INVESTMENT COMPANY INSTITUTE

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June 9, 2023

Filed Electronically

Lily Batchelder
Assistant Secretary for Tax Policy
US Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

William M. Paul
Principal Deputy Chief Counsel
Deputy Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Priority Guidance Plan Recommendations on Retirement Security Issues

Dear Ms. Batchelder and Mr. Paul:

The Investment Company Institute (ICI)[1] is pleased to submit recommendations regarding retirement security issues for projects to be included on the 2023-2024 Priority Guidance Plan. A separate ICI submission describes our recommendations regarding regulated investment companies.

ICI previously submitted a comment to the IRS and Treasury requesting guidance regarding selected provisions of the SECURE 2.0 Act of 2022 (SECURE 2.0 Act).[2] Rather than restate the points made in that letter, we have attached it for your reference. In addition, this letter makes recommendations for guidance on the following topics:

- The unified plan rule for multiple employer plans;
- Permanent remote notarization relief;
- The notice requirement under Internal Revenue Code section 411(a)(11); and
- Application of the one-per-year limit on IRA rollovers.

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of $30.2 trillion in the United States, serving more than 100 million investors, and an additional $8.6 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

[2] Letter to Treasury and IRS from Elena Chism and Shannon Salinas, dated March 23, 2023, available at https://www.ici.org/system/files/2023-04/23-cl-secure20-priorities.pdf.

1. Multiple employer plans; pooled employer plans (section 101 of the SECURE Act)

We request that IRS and Treasury finalize, with certain modifications, the proposed regulations published on March 28, 2022, relating to the "unified plan rule" for multiple employer plans (MEPs). The unified plan rule provides that the failure by one employer maintaining a MEP, or by the plan itself, to satisfy an applicable tax-qualification requirement will result in the disqualification of the MEP for all participating employers.[3] In connection with the creation of pooled employer plans (PEPs), a new type of MEP available to otherwise unrelated employers, section 101 of the SECURE Act amends Code section 413 to allow PEPs (and MEPs adopted by groups of related employers) to continue to be treated as satisfying the tax qualification requirements despite the violation of certain requirements with respect to one or more participating employers. In the case of a violation of the tax qualification requirements by a participating employer, the SECURE Act allows the plan to spin off the portion of the plan's assets attributable to that participating employer into a separate plan maintained by that employer. The March 2022 proposed regulations would implement the SECURE Act changes to the unified plan rule.

We reiterate our comments on the proposal, submitted in a letter dated May 27, 2022.[4] Our comment letter expresses general support for the proposed regulations and makes recommendations on the following issues.

- *Inclusion of Procedures in Plan Terms*. The letter recommends eliminating the proposed requirement for the plan document to include detailed procedures for addressing a participating employer failure.
- *Time Limit for Completing Spinoff*. The letter recommends clarification that the 180-day safe harbor period for completing a spinoff would not include periods during which the plan administrator waits for information or action from the unresponsive participating employer.
- *Option for Spinoff Initiated by Plan Administrator*. The letter recommends providing an option for the plan administrator to voluntarily initiate a spinoff of the assets attributable to the employees of the unresponsive participating employer to a separate single-employer plan, followed by a termination and distribution of the assets of such plan.
- *Model Plan Language*. The letter recommends providing model plan language as soon as possible to allow plans adequate time to incorporate the model language.
- *Crediting Service for Employment with Other Participating Employers*. The letter recommends reconsidering, in a separate rulemaking, the preamble's presumption that

[3] Code section 413(c) contains the unified plan rule for MEPs.

[4] See Letter to IRS from Elena Barone Chism, dated May 27, 2022, available at https://www.ici.org/system/files/2022-05/34164a.pdf.

employers participating in a PEP would be required to credit an employee with service for periods the employee was employed by another employer participating in the PEP, for purposes of plan eligibility and vesting.

These recommendations, detailed in our May 27, 2022 comment letter, will enhance the ability of MEP and PEP administrators to address compliance issues more effectively.

2. Permanence of Remote Notarization Relief

We reiterate our prior comments, submitted in a joint letter (dated September 30, 2021) responding to Notice 2021-40,[5] requesting that IRS and Treasury make permanent the temporary relief from the physical presence requirement for notarization of spousal consent (and other participant elections); as well as our comments in a joint letter (dated March 10, 2023) regarding the proposed regulation from December 2022 that would make this temporary relief permanent.[6] The temporary relief, originally announced in Notice 2020-42[7] and extended by Notices 2021-03, 2021-40 and 2022-27, expired on December 31, 2022, though the IRS indicated that it will permit reliance on the proposed regulation prior to issuance of the final regulation.

As described in the above referenced joint letters, remote witnessing worked well during the pandemic and allowed retirement plan participants to access their benefits without unnecessarily jeopardizing their health by physically meeting with a notary public or plan representative. In addition, the joint letters explain that remote witnessing under the protective conditions described in Notice 2020-42 has proven to be more secure and more convenient than physical witnessing. Moreover, as noted in the joint comments, the undersigned have seen no indication, either from plan sponsors or service providers, of fraud, spousal coercion, or other abuse. We urge the IRS to take swift action to finalize the proposed rule to permit continued remote notarization and witnessing.

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[5] Letter to IRS re: Permanent Relief for Remote Witnessing Procedures, dated September 30, 2021, from ICI and 15 other trade organizations, available at https://www.ici.org/system/files/2021-10/33806a.pdf

[6] Letter to IRS re: Use of an Electronic Medium to Make Participant Elections and Spousal Consents (RIN 1545-BQ50, dated March 10, 2023, from ICI and 18 other organizations, available at https://www.ici.org/system/files/2023-03/35205a.pdf.

[7] Notice 2020-42 provided temporary relief from the physical presence requirement in Treasury Regulation § 1.401(a)-21(d)(6) for participant elections required to be witnessed by a plan representative or a notary public, including a spousal consent. Section 1.401(a)-21(d)(6)(i) provides that, in the case of a participant election that is required to be witnessed by a plan representative or a notary public (such as a spousal consent required under § 417), the signature of the individual making the participant election must be witnessed in the physical presence of a plan representative or a notary public. Section 1.401(a)-21(d)(6)(iii) provides that the Commissioner may provide in guidance that the use of procedures under an electronic system is deemed to satisfy the physical presence requirement, but only if those procedures with respect to the electronic system provide the same safeguards for participant elections as are provided through the physical presence requirement.

3. Regulations under Code section 411(a)(11)

We request that IRS and Treasury finalize the proposed regulations implementing section 1102 of the Pension Protection Act, which instructed Treasury to modify the regulations under Code section 411(a)(11) to require disclosure of the consequences of failing to defer receipt of a distribution from a DC plan.[8] We strongly recommend that you finalize the requirements as proposed. As we stated in our comment letter,[9] the proposal strikes the right balance by alerting the participant that the plan may have investments, or fee structures, different from those obtainable in an IRA, and alerting the participant that more information is available. This approach will not overwhelm the participant with information that obscures the key information while also assuring the participant has access to information consequential to the decision whether to take or defer a distribution from the plan.

4. Additional guidance clarifying the application of the one-per-year limit on IRA rollovers

Pursuant to an item on the second quarter update to the 2014-2015 Priority Guidance Plan, the IRS issued Announcement 2014-32 which clarifies the impact a 2014 IRA rollover has on the one-rollover-per-year limitation contained in Code section 408(d)(3)(B). Announcement 2014-32 and previously issued Announcement 2014-15 were issued in response to *Bobrow v. Commissioner*,[10] a January 2014 Tax Court opinion which held that the one-rollover-per-year limitation applies on an aggregated basis to all of a taxpayer's IRAs and not to each IRA separately. While Announcement 2014-32 addressed certain issues relating to the section 408(d)(3)(B) one-per-year-limitation on IRA rollovers, as is further discussed below, we request additional guidance permitting waivers of inadvertent violations of the one-per-year-limit on IRA rollovers in circumstances where the inadvertent violations are beyond the control of the IRA holder. For example, as discussed below, such inadvertent violations may arise as a result of trailing dividends or in circumstances where the IRA holder has not taken an affirmative action to initiate a distribution. We ask that you consider these issues as you work on regulations and guidance pertaining to IRAs, as indicated on the current Priority Guidance Plan.

With respect to trailing dividends, in circumstances where an IRA holder initiates an indirect rollover after the dividend record date, but prior to the dividend payment date, the dividend payment will likely be issued directly to the IRA holder as a subsequent payment. In a circumstance where the IRA holder effectuates a rollover to another IRA within the 60-day period required by section 408(d)(3)(a)(i), an attempt to roll the trailing dividend payment into the new IRA may be seen as violating section 408(d)(3)(B)'s one-per-year-limitation on IRA rollovers.

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[8] 73 Fed. Reg. 59575 (Oct. 9, 2008).

[9] *See* ICI letter to Internal Revenue Service re: proposed regulation (REG-107318-08), dated January 7, 2009.

[10] T.C. Memo. 2014-21 (January 28, 2014).

Another example involves circumstances where the decision to initiate a distribution is due to circumstances beyond the control of the IRA holder. Such a situation may occur, for example, where an investment product undergoes a structural change (such as a reorganization, merger, or closure) and as a result of the structural change, the IRA holder's investment in the investment product is liquidated and payment issued directly to the IRA holder. In the event that payment is issued to the IRA holder during a 12-month period in which he or she has previously made an indirect rollover, he or she will be precluded from making another indirect rollover with the funds received as a result of the investment product structural change.

Similarly, a distribution to the IRA holder may be reported under the circumstances described in Revenue Ruling 2018-17,[11] where assets in a traditional IRA are paid to a state unclaimed property fund. If such assets are later recovered by the IRA owner, the one-rollover-per-year limitation could prevent the individual from returning the funds to an IRA.

In light of these possible situations, it may be appropriate for the IRS to have a process for waiving inadvertent violations of the one-per-year limit on IRA rollovers, similar to the waiver process contained in Code section 408(d)(3)(I) for violations of the 60-day rule for indirect rollovers.

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If we can provide you with any additional information regarding these issues, please do not hesitate to contact Elena Chism at 202/326-5821 (elena.chism@ici.org) or David Cohen at 202/326-5361 (david.cohen@ici.org).

Sincerely,

/s/ Elena Barone Chism	/s/ David A. Cohen
Elena Barone Chism Deputy General Counsel Retirement Policy	David A. Cohen Associate General Counsel Retirement Policy

Attachment

cc: Carol Weiser, Benefits Tax Counsel

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[11] Revenue Ruling 2018-17 provides that, under the facts and circumstances described, an IRA trustee who pays amounts from a traditional IRA to a state unclaimed property fund must report the payment on Form 1099-R and withhold federal income tax (unless the taxpayer made a withholding election).