INVESTMENT COMPANY INSTITUTE®

1401 H STREET, NW, WASHINGTON, DC 20005, USA • WWW.ICI.ORG

October 24, 2023

Filed Electronically

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2023-62), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: *Comments re. IRS Notice 2023-62*

To Whom It May Concern:

The Investment Company Institute (ICI or the "Institute")[1] is pleased to submit comments on IRS Notice 2023-62 and section 603 of the SECURE 2.0 Act (the "Act"). Section 603 of the Act places new restrictions on age 50 catch-up contributions under Internal Revenue Code (the "Code") section 414(v). Effective for taxable years beginning after December 31, 2023, the Act requires all future age 50 catch-up contributions to a 401(k), 403(b), or governmental 457(b) plan to be made as Roth contributions, unless the employee earned $145,000 (indexed) or less in FICA wages in the prior year from the employer sponsoring the plan. Notice 2023-62 provides a two-year administrative transition period for parties to meet the requirements of section 603, and requests comments on other aspects of compliance with the Roth catch-up requirement.

ICI strongly supports efforts to promote retirement security for US workers. As a trade association representing the asset management industry, ICI is especially attuned to the needs of retirement savers because our members play a significant role in US retirement saving by making available the investment products through which pension plans, defined contribution (DC) plans,

[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. ICI's 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 other jurisdictions. Its members manage $31.5 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $8.8 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through ICI Global.

and individual retirement accounts (IRAs) invest. Total US retirement assets were $36.7 trillion as of June 30, 2023,[2] with our members managing a large portion of those assets through regulated funds, collective investment trusts, and separate accounts. To this end, the Institute supported the Act because it provides more tools for American families to save for and achieve a financially secure retirement.

Due to its breadth, implementing the Act will require significant rulemaking and guidance from the Department of the Treasury ("Treasury"), Internal Revenue Service (IRS or the "Service"), and the Department of Labor. Our members, many of which provide plan administration services to retirement plans and offer IRAs, already are working to make the necessary systems changes to operate in compliance with the Act's provisions. Through this process, member firms have identified several areas needing guidance.

We appreciate IRS and Treasury providing a two-year administrative transition period for compliance with section 603. Notwithstanding this extended period for compliance, we and our members continue to have significant questions relating to implementation. Guidance is needed as soon as possible to allow for systems and other development. In March 2023, we submitted initial comments on section 603 as part of a broader request for priority guidance under the Act.[3] We reiterate these comments here, to the extent they remain applicable. We also set forth additional questions and recommendations, based both on the statutory language and on Notice 2023-62.

Executive Summary

Our comments focus on two broad themes: the importance of according plans and plan sponsors flexibility in plan designs that satisfy the requirements of section 603; and providing flexibility to recharacterize contributions as necessary to comply with section 603. Our letter makes the following recommendations.

- IRS and Treasury should adopt a flexible approach to permitting corrections and recharacterizations, including by allowing recharacterization of catch-up contributions made on a pre-tax basis where the participant is subject to Code section 414(v)(7)(A), through an in-plan Roth rollover for the relevant contribution amount. This approach should include a de minimis exception, whereby catch-up contributions under a given threshold need not later be recharacterized as Roth contributions.

[2] See Investment Company Institute, "Quarterly Retirement Market Data, Second Quarter 2023," available at https://www.ici.org/research/stats/retirement.

[3] Letter to Treasury and IRS from Elena Chism and Shannon Salinas, dated March 23, 2023, available at https://www.ici.org/system/files/2023-03/35218a.pdf.

- For individuals with wages above the $145,000 threshold who elected to make catch-up contributions on a pre-tax basis, guidance should confirm that a plan can carry out their catch-up election on a Roth basis by utilizing negative consent.

- Future guidance should confirm that if a participant who is subject to the Roth catch-up requirement makes designated Roth contributions prior to reaching the Code section 402(g) limit, some or all of those Roth contributions ultimately could be characterized as catch-up contributions, thereby allowing the participant to made additional pre-tax deferrals until reaching an applicable limit.

- IRS and Treasury should permit alternative plan design structures for complying with section 603, including plan designs that allow catch-up contributions only for those employees under the Code section 414(v)(7)(A) limit or that require all catch-up contributions to be made on a Roth basis.

- Future guidance should confirm that section 603 does not apply to the special catch-up contributions permitted under Code sections 457(b)(3) or 402(g)(7).

- IRS and Treasury should consider providing additional administrative transition relief to governmental and multiemployer plans under certain circumstances.

1. IRS and Treasury Should Take a Permissive Approach to Corrections Related to Section 603

We are concerned that, irrespective of how carefully crafted and robust the system changes to implement section 603 are, there still will be situations requiring correction or recharacterization. For example, recharacterization may be necessary if an employee's wages for a prior year are determined (or adjusted) after the close of the contribution year to exceed $145,000. In addition, instances where a payroll system simply fails to timely stop an impacted participant's pre-tax deferral (and switch to Roth) are inevitable. These situations may be discovered in the year of contribution or in a subsequent year—including after tax reporting for the contribution year (such as W-2s) has been finalized. To facilitate the implementation of section 603, it is critical that any guidance include a flexible regime for correction.

1.1 IRS and Treasury should permit correction by in-plan Roth rollover

Within the bounds of current correction procedures for operational errors under IRS's Employee Plans Compliance Resolution System (EPCRS) (including new rules for correcting inadvertent failures under the Act), we urge the IRS to permit correction of catch-up contributions made on a pre-tax basis where the participant is subject to Code section 414(v)(7)(A) by executing an in-plan Roth rollover for the relevant contribution amount. This correction method should be available regardless of whether the correction is made in the year of contribution or in a subsequent year. Under this simple approach—effectively a transfer to a designated Roth account—the plan would follow many of the established rules for in-plan Roth rollovers, which include that the amounts transferred are:

- subject to income tax in the year that the contributions are treated/recharacterized as Roth contributions (which may be different than the year in which they were deposited in the plan);
- excluded from income tax withholding;
- excluded from wages for other purposes; and
- subject to reporting on Form 1099-R.

We also recommend IRS and Treasury clarify that the transfer would not be subject to earnings calculations (*i.e.*, only the amount of the original contribution would be transferred to the designated Roth account). This approach would minimize the impact on participants.

In establishing this proposed correction method, IRS and Treasury also should clarify that a plan that does not currently permit voluntary in-plan Roth rollovers by participants need not be amended to provide for such rollovers in order to use the correction method.

1.2 IRS and Treasury should establish a standing de minimis exception for correction of pre-tax contributions under section 603

We recommend, as part of a permissive approach to corrections, that IRS and Treasury establish a standing de minimis exception whereby catch-up contributions under a given threshold need not later be recharacterized as Roth contributions. We suggest a de minimis amount of $250, consistent with the EPCRS de minimis exception for excess amounts. This de minimis exception would both facilitate compliance and help minimize the risk of participant confusion.

1.3 IRS and Treasury should provide a similar safe harbor for recharacterization of contributions to correct failed ADP testing

In our March 23 letter, we recommended specific guidance relating to correction of failed actual deferral percentage (ADP) testing pursuant to Code section 401(k)(8). Under current rules, if a plan fails the ADP test, any excess contributions attributable to a highly compensated employee who is eligible to make age 50 catch-up contributions are reclassified as catch-up contributions as of the last day of the plan year, to the extent the individual's catch-up limit is not exceeded.[4] In light of the new Roth catch-up rule, to use this method of correction with respect to an employee with wages over $145,000, the plan would need to recharacterize the deemed catch-up contributions as Roth contributions. We reiterate our earlier recommendation that IRS and

---

[4] Treas. Reg. §1.414(v)-1(c)(3) and §1.414(v)-1(d)(2)(iii).

Treasury provide guidance clarifying that such a later Roth recharacterization would be permissible.

Assuming that such a recharacterization is permissible, a number of key issues remain unclear, including:

- in which year the contributions should be included in the employee's taxable income (for example, if the contribution is determined to be Roth catch-up in the year following the year in which it was deposited in the plan);
- whether the contributions should be excluded from wages for purposes of income tax withholding;
- whether the contributions should be excluded from wages for other purposes, such as applying various wages thresholds and compliance testing;
- how to report the contributions as income; and
- how to determine wages in connection with employer mergers or spin-offs in the prior year.

We request that Treasury and the Service clarify that pre-tax contributions that are later treated or recharacterized as Roth catch-up contributions should be:

- subject to income tax in the year that the contributions are treated/recharacterized as Roth contributions (which may be different than the year in which they were deposited in the plan);
- excluded from income tax withholding;
- excluded from wages for other purposes;
- not subject to earnings calculations (*i.e.*, the recharacterized amount would only be the amount of the contribution); and
- subject to reporting on Form 1099-R (though a de minimis reporting threshold exception should be established for amounts of $250 or less, based on the EPCRS de minimis correction exception for excess amounts).

The foregoing requested guidance would result in these amounts being treated similar to in-plan Roth rollover contributions. The subsequent treatment of a pre-tax contribution as a Roth catch-up contribution is effectively a transfer to a designated Roth account (as set forth in Code section 402A(c)(4)(E)) that an affected participant should be deemed to have elected by virtue of making their initial deferral election in an amount that exceeded the applicable limit on pre-tax elective deferrals.

2. Guidance Should Permit Use of Negative Consent to Change Form of Catch-up Election

In our March 2023 letter, we requested that the IRS clarify whether, for individuals above the wage limit who elected to make catch-up contributions on a pre-tax basis, a plan can carry out their catch-up election on a Roth basis by utilizing negative consent. We were gratified to see that, as stated in Notice 2023-62, the IRS plans to issue guidance permitting use of negative consent in this situation. We urge the IRS to confirm that the negative consent approach is permissible regardless of whether the plan uses a spillover election for catch-up contributions or requires separate elections for catch-up contributions.

3. Guidance Should Address Situations Where a Participant Makes Roth Contributions Prior to Exceeding the Section 402(g) Limit

IRS and Treasury should confirm that when a participant is subject to Code section 414(v)(7)(A), the sequence of Roth and pre-tax contributions made before and after reaching the Code section 402(g) limit does not matter so long as the participant's contributions ultimately satisfy all applicable limits. For example, a catch-up eligible participant may direct that part of each salary deferral is made on a pre-tax basis and part on a Roth basis. Once the participant reaches the Code section 402(g) contribution limit with a combination of Roth and pre-tax contributions, the participant may want to make additional pre-tax contributions. The plan should be able to characterize contributions as catch-up or non-catchup in a manner that satisfies the Code section 414(v)(7)(A) limitation on pre-tax catch-up contributions. In other words, there should be no need to cut off pre-tax contributions until the Code section 402(g) limit is reached with pre-tax contributions, or, if earlier, another applicable limit is reached (e.g., the total combined 402(g) and 414(v) limits or the 415(c) limit).[5]

4. IRS and Treasury Should Permit Alternative Plan Design Structures That Would Comply with Section 603

As IRS and Treasury consider further guidance pursuant to section 603 of the Act, they should consider preserving plan design flexibility. As discussed elsewhere herein, and as numerous parties have noted in earlier requests for guidance under the Act, plans and their service providers face a range of challenges to implementing section 603. To the extent IRS and Treasury can exercise their discretion to allow alternative plan designs that they would view as in compliance with section 603, we expect that more parties would be positioned to implement section 603—whether now or as of the end of the administrative transition period.

---

[5] On a related note, if amounts that were automatically designated as Roth catch-up contributions (e.g., by negative consent) are later determined to be regular deferrals (not catch-up contributions), the plan should not be required to recharacterize such contributions as pre-tax deferrals.

4.1 IRS and Treasury should permit a plan to allow catch-up contributions *only* for those participants not subject to Code section 414(v)(7)(A)

Section VI of Notice 2023-62 proposes an important alternative means for plans to comply with section 603. By limiting catch-up contributions to participants who do not exceed the Code section 414(v)(7)(A) limit, the proposed plan design removes two significant challenges that many plans face in complying with section 603. One, as discussed above, plans (in particular government and multiemployer plans) may face practical limitations to their ability to implement needed changes in the given timeframe. These process barriers to implementing a Roth option (be they legislative or collective bargaining in nature) should not preclude such plans from offering *any* catch-up contributions. Two, we understand from our members that some plan sponsors may not wish to include a Roth feature as part of their plan design. This suggested plan design preserves these sponsors' preferences.

In providing for such a plan design, IRS and Treasury also should confirm that it would not be precluded under the universal availability requirement of Code section 414(v)(4), which is intended to protect non-highly compensated employees. We note that this proposed alternative means of complying with section 603 would impact more highly compensated participants, while allowing most lower-paid participants to still make catch-up contributions.[6] As part of this guidance, and in the interest of fairness, the IRS and Treasury could include a requirement that the plan must limit catch-up contributions for all highly compensated employees, even those who do not have FICA wages (such as owner-employees).

4.2 IRS and Treasury should permit plans to require that all catch-contributions be designated as Roth contributions

The proposed plan design noted in Section VI of Notice 2023-62 would address a number of significant concerns for many plans and their service providers, as they would not be required to implement a Roth feature. But it has disadvantages, including that participants with FICA wages in excess of the Code section 414(v)(7)(A) limit no longer would be able to make catch-up contributions. In addition, that approach would still require integration with payroll providers to ensure that participants are tracked as to the Code section 414(v)(7)(A) limit. In light of the significant challenges this will entail for many plans, and to facilitate an alternative plan design that permits all otherwise eligible participants to make catch-up contributions, we urge IRS and Treasury to also permit a plan design whereby all catch-up contributions must be designated as Roth contributions. Such a plan design would obviate the need for plans and their service providers to integrate systems with their payroll providers. Especially for smaller plans that may

[6] We acknowledge that there may be some non-highly compensated employees (i.e., those under the Code section 414(q)(1)(B) limit, currently $150,000) who have FICA wages over the $145,000 threshold.

face relatively higher costs to implement such connections, we believe this plan design would lead to broader continued availability of catch-up contributions.

5. Guidance Should Confirm That Section 603 Does Not Apply to Special Catch-up Contributions

As described in our March 2023 letter, we also request confirmation that the Roth catch-up contribution requirement of section 603 does not apply to the special catch-up contributions permitted under Code section 457(b)(3) for participants within three years of normal retirement age or to the special 15-year catch-up contributions permitted under Code section 402(g)(7) for 403(b) plans. The Roth requirement should not apply with respect to these special catch-up contributions because they are not governed by Code section 414(v)—the provision that section 603 amends—and section 603 does not reference them.

6. IRS and Treasury Should Consider Additional Transition Relief for Governmental and Multiemployer Plans

While the two-year administrative transition period provides much-needed time for plans and their service providers to come into compliance with section 603, certain plans may require more than two years. In particular, governmental and multiemployer plans face unique challenges in complying with section 603. Governmental plans (both 403(b) and 457(b) plans) are less likely than private-sector 401(k) plans to offer Roth features. Moreover, implementing a Roth feature can be significantly more complex than for a private-sector 401(k) plan. In addition to potentially requiring legislative changes, after any such legislative changes are implemented, many governmental plans also will require revisions to applicable collective bargaining agreements. These changes are outside of the control of plans and plan sponsors. As such, these plans may require more than two years to implement those changes needed to comply with section 603. Aside from the time required to implement needed changes, governmental plans also may face difficulties in applying the $145,000 wage threshold. While FICA wages may be a clear term for private employers, this is not always the case for states. States take widely varied approaches in how they determine FICA wages. Moreover, employees of different sponsoring governmental entities may or may not have FICA wages—requiring more customization to build the systems to facilitate section 603 compliance. In light of these challenges, we recommend that governmental plans be accorded an administrative transition period that extends through the end of the calendar year in which the legislative session (if any) in effect as of December 31, 2025 concludes.

Multiemployer plans similarly will face numerous challenges that warrant flexibility beyond a two-year transition period. Most significantly, for multiemployer plans the features of the plan (including Roth and catch-up features) often are reflected in collective bargaining agreements. These typically are multiyear agreements among multiple employers and a union, and may not easily be modified mid-contract to reflect changes in previously agreed to plan features. Additionally, multiemployer plans by definition involve numerous different employers and likely different payroll providers. As such, implementing the systems and processes needed to comply with section 603 are even more challenging than for single-employer plans. We recommend that multiemployer plans be accorded an administrative transition period that extends through the later of the current end date or the end of the calendar year in which an applicable collective bargaining agreement in effect as of December 31, 2023 is renegotiated/renewed.

* * * * *

If we can provide you with any additional information regarding these requests, 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

Elena Barone Chism
Deputy General Counsel
Retirement Policy

/s/ David A. Cohen

David A. Cohen
Associate General Counsel
Retirement Policy

cc: Carol Weiser
Benefits Tax Counsel, U.S. Department of the Treasury

Rachel Levy
Associate Chief Counsel, Internal Revenue Service

Kara M. Soderstrom
Senior Technician Reviewer, Office of the Associate Chief Counsel, Internal Revenue Service