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February 20, 2024

*Filed Electronically*

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2024-2)
Room 5203,
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2024-2—Miscellaneous Changes Under the SECURE 2.0 Act of 2022

To Whom it May Concern:

The Investment Company Institute[1] appreciates the opportunity to comment on Notice 2024-2 (the "Notice"), the recent guidance issued by the Internal Revenue Service (the "Service") relating to certain changes to the Internal Revenue Code ("Code") enacted under the Consolidated Appropriations Act, 2023 (CAA). As you know, the CAA (signed by the President on December 29, 2022) includes the SECURE 2.0 Act of 2022 ("SECURE 2.0 Act" or "Act"), which is a collection of provisions intended to improve the private-sector retirement system.

Due to its breadth, implementing the SECURE 2.0 Act requires significant rulemaking and guidance from the Department of the Treasury ("Treasury"), the Service, and the Department of Labor. In March 2023, ICI submitted a letter[2] to the Service and Treasury requesting guidance in several areas where immediate clarification—or, in some cases, short-term compliance relief—is

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[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 $33.2 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $8.5 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.

[2] See letter from Elena Barone Chism and Shannon Salinas, ICI, to Carol Weiser, Benefits Tax Counsel, US Department of the Treasury and Rachel Levy, Associate Chief Counsel, Internal Revenue Service (March 23, 2023), available at https://www.ici.org/system/files/2023-04/23-cl-secure20-priorities.pdf (the "March Letter").

crucial. ICI appreciates that the Service has issued Notice 2024-2, which answers several important questions related to twelve separate sections of the SECURE 2.0 Act. Several of the answers provided relate to questions we asked in our March Letter and will be very helpful to our members as they work to implement the various provisions of the Act.

We appreciate the Service's invitation to submit comments and suggestions regarding the matters discussed in the Notice. We describe below the additional guidance and transition relief that would be helpful to implement the provisions of the SECURE 2.0 Act that are covered by the Notice.

## 1. Automatic Enrollment Required for New Plans (§101) (Section A of Notice)

Section 101 of the SECURE 2.0 Act will require newly established 401(k) and 403(b) plans to automatically enroll participants, effective for plan years beginning after December 31, 2024. Plans established prior to December 29, 2022 ("pre-enactment plans") are excluded from the automatic enrollment requirement, as are plans adopted by businesses in existence for less than three years and plans adopted by businesses that employ ten or fewer employees.

We appreciate the guidance in the Notice regarding this provision, which addressed several questions regarding the impact of mergers and spin-offs on the grandfather treatment offered to pre-enactment plans and the timing of plan "establishment" for purposes of determining eligibility for this grandfather treatment. As explained below, we request further clarification on the application of the grandfather exception for pre-enactment plans in contexts involving multiple employer plans (MEPs), including pooled employer plans (PEPs). We also reiterate below a question raised in our March Letter regarding identification of employees subject to the automatic enrollment requirement.

### 1.1 Treatment of Employers Joining Post-Enactment MEPs

The statute provides that "[the grandfather exception] shall not apply in the case of an employer adopting after such date of enactment a plan maintained by more than one employer, and [the requirement to automatically enroll] shall apply with respect to such employer as if such plan were a single plan."[3] We interpret this to mean that an employer without a pre-enactment plan cannot obtain eligibility for grandfather treatment simply by joining a MEP that was established pre-enactment. Rather, the Act provides that in the case of a MEP, each participating employer's grandfather status should be determined separately, without regard to the pre-enactment status of the MEP itself. Q&A A-3 of the Notice confirms this interpretation, providing that if a post-enactment single employer plan is merged into a MEP that includes pre-enactment plans, the ongoing plan would not be treated as a pre-enactment plan as to that employer. The Notice further specifies that the merger of such post-enactment plan into the MEP would not affect the pre-enactment status of other employers participating in the MEP.

[3] New Code section 414(c)(2)(B).

The Notice raises a question, however, in the case of a pre-enactment plan joining a MEP that is first established after December 29, 2022. It is unclear under the Notice whether the Service would view the pre-enactment plan as losing its pre-enactment grandfather status by adopting the post-enactment MEP. We read Code section 414(c)(2)(B) as reflecting Congress' intent for the grandfather exception to apply separately with respect to each participating employer—i.e., depending on whether the individual employer maintained a plan prior to December 29, 2022 rather than depending on when the MEP itself was established.

Q&A A-3 of the Notice could be read as suggesting that a pre-enactment plan joining a MEP established after enactment would no longer be eligible for the grandfather exception.[4] We do not believe this result is intended or is supportable by sound policy rationale. We urge the Service to expressly confirm that the application of the grandfather rule to a MEP with respect to each participating employer plan depends on the date the employer first adopted the plan, regardless of when the MEP itself was first established. Not only is this the better reading of the statute,[5] but it also is preferable for policy reasons. It is clear that Congress' intention with the SECURE 2.0 Act is to expand the availability and use of PEPs.[6] Treating PEPs that were established after December 29, 2022 differently than those established before that date would put newer PEPs at a significant disadvantage in the marketplace, discouraging the adoption of newer PEPs. While with section 101, Congress intends to increase future use of automatic enrollment, the first step to getting employees into a plan is to ensure that their employer offers a retirement plan, and encouraging the expansion of PEPs is one way Congress attempts to address this first step.

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[4] Q&A A-3 (answering "Generally, no" to the question of whether a non-grandfather plan merged into a grandfather plan will receive grandfather treatment post-merger) does not provide clarity on the Service's position regarding the relevance of the date when a MEP is adopted.

[5] The statutory definition of PEP provides a further argument for why the timing of the establishment of a PEP should not be relevant to the analysis. In ERISA section 3(43), defining a PEP, subsection (D) provides as follows:

> Treatment of employers as plan sponsors. — Except with respect to the administrative duties of the pooled plan provider described in paragraph (44)(A)(i), *each employer in a pooled employer plan shall be treated as the plan sponsor with respect to the portion of the plan attributable to employees of such employer* (or beneficiaries of such employees). (emphasis added)

Establishment of a CODA is a settlor decision and, as such, would not rest with the pooled plan provider (PPP) but rather with each individual participating employer as plan sponsor. Hence the analysis should be based solely on when each participating employer established the CODA, allowing the timing of the establishment of the PEP to be disregarded.

[6] Note that in section 106 of the SECURE 2.0 Act, Congress expanded the use of PEPs by allowing 403(b) plans to participate in MEPs (including PEPs). In section 111 of the Act, Congress address the credit for small employer pension plan startup costs to make sure that employers which join an existing MEP (including a PEP) can receive the credit. Section 105 of the Act modifies the requirements applicable to a PEP to require that the plan designate a named fiduciary (other than an employer in the plan) to be responsible for collecting contributions to the plan and that such fiduciary implement written contribution collection procedures that are reasonable, diligent and systematic. Finally, section 344 of the SECURE 2.0 Act requires DOL to conduct a study on PEPs, including their impact on coverage, and provide a report to Congress, including recommendations on how PEPs can be improved to serve and protect participants.

### 1.2 Identification of Employees to Automatically Enroll

The Notice did not address one question we asked in our March Letter regarding the identification of employees subject to the automatic enrollment requirement. For plans established after December 29, 2022, but prior to 2025, ICI's March Letter requested guidance on the issue of which employees are subject to the automatic enrollment requirement beginning in the 2025 plan year. It is unclear whether this requirement will apply only to employees becoming eligible for the plan in 2025 and later, or to all eligible employees (even those who became eligible prior to the automatic enrollment effective date). It would be helpful if future guidance addressed this issue.

## 2. Contribution Limit to SIMPLE Plans (§ 117) (Section E of Notice)

Effective for taxable years beginning after December 31, 2023, the SECURE 2.0 Act increases the annual deferral limit to SIMPLE plans, and the catch-up contribution limit that applies at age 50 for SIMPLE plans, to 110 percent of the otherwise applicable limits in 2024 (and indexed thereafter). These increased deferral limits are available with respect to employers with no more than 25 employees, and, for employers with more than 25 employees and not more than 100 employees, the increased limits are available only with respect to those employers who make enhanced employer contributions on behalf of employees (either a four percent matching contribution or a three percent non-elective contribution).The Notice's guidance regarding this provision was helpful, but also raised additional questions for our members.

### 2.1 Transition Relief for 2024

The Notice provides that for employers with 25 or fewer employees, the increased contribution limits apply automatically,[7] and the employer must notify employees of the increased limits—the notice being included in the annual employer notification that informs employees of the opportunity to enter into a salary reduction agreement or to modify a prior agreement.[8] Given that the Service issued the Notice on December 20, 2023, well after the annual employer notification was required to be provided for the 2024 plan year,[9] we request the Service provide relief for employers who did not include this information in the notification provided in 2023 for the 2024 plan year.

In support of our request for relief, we would note that while the onus is on the employer to provide the notification to employees, in practice, small employers (especially those with 25 or fewer employees) rely heavily on the SIMPLE IRA provider for assistance with plan

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[7] The increased limits apply automatically in the case of an eligible employer described in Code section 408(p)(2)(E)(iv) that has no more than 25 employees who received at least $5,000 of compensation for the preceding calendar year.

[8] The Notice provides that whether the contributions apply automatically or must be elected the employer must maintain documentation to reflect the changes and notify employees eligible to participate as part of the required annual disclosures under Notice 98-4 which were due by November 2, 2023.

[9] Notification requirements are provided in Q&A G-1 of Notice 98-4.

administration requirements. However, SIMPLE IRA providers are not necessarily in a position to know the number of eligible employees that the small employer has. This has made the transition in applying these new rules particularly difficult.

Similarly, SIMPLE IRA plan sponsors with more than 25 employees who want to adopt the increased limits for 2024 (by making the election and providing the higher matching or nonelective contributions required in order to make the higher limits available),[10] presumably would have had to make the election and notify employees of the increased limits in the annual notification that was due November 2, 2023. The Notice was issued on December 20, 2023, well after the due date for the 2023 notification to employees. Because of this timing lag, we request that the Service provide flexibility for employers to adopt this change mid-year for 2024, rather than requiring that employers must wait until the 2025 plan year to make this change effective. The Service should provide that such employers may adopt the limits,[11] notify participants, and allow those eligible employees to modify their contribution elections, all mid-year, for 2024. Otherwise, employers with existing SIMPLE IRA plans will have to delay adoption of the increased limits until 2025.

### 2.2 Voluntary Adoption of Higher Employer Contributions

The Notice describes how an employer with more than 25 employees can make an election to provide the higher matching or nonelective contributions and explains that smaller employers (25 or fewer employees) *are not required* to provide these higher employer contributions. However, both the statute and the Notice are silent regarding whether employers with 25 or fewer employees can voluntarily elect to provide these higher employer contributions (either matching contributions of four percent or non-elective contributions of three percent). While the statute is not clear, we believe that allowing smaller employers to make such a voluntary election is consistent with Congressional intent and we request that the Service confirm this option.

### 2.3 Updates to Model Forms

Finally, as described in more detail in section 4.4 of this letter, we request that the Service prioritize updating the model forms used for offering SIMPLE IRAs.

## 3. Terminal Illness Distributions (§326) (Section F of Notice)

Section 326 of the Act provides a new exception from the 10 percent early distribution penalty in the case of a distribution from a plan or IRA to a terminally ill individual, effective for distributions made after December 29, 2022. A terminally ill individual must furnish “sufficient evidence” to the plan administrator “in such form and manner as the Secretary may require.”

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[10] An employer that has more than 25 eligible employees must make an election for the increased limits to apply and must also make additional employer contributions (either matching contributions of four percent or non-elective contributions of three percent).

[11] According to Q&A E-4 of the Notice, an employer making the election “must take formal written action to make an election to reflect the increased limits and should maintain documentation of the election in the plan’s records.”

ICI's March Letter recommended that the Service allow plan administrators and IRA providers to rely on self-certification from the individual as "sufficient evidence" of a terminal illness. Contrary to our recommendation, in Q&A F-5 of the Notice, the Service provides that a certification of terminal illness from a physician is required, and must include several items, including "a narrative description of the evidence that was used to support the statement of illness or physical condition (as described in this F-6(1))." We urge the Service to reconsider this decision to require that a physician's certification be provided. While Code section 72(t)(2)(L)(i) requires that to qualify as a terminally ill individual, an employee must have been certified by a physician as having a terminal illness, section 72(t)(2)(L)(iii) does not require that the physician's certification must be provided to the plan. Rather, it says that the employee must furnish "sufficient evidence to the plan administrator in such form and manner as the Secretary may require." Therefore, we believe the Service has the authority to allow the plan to rely on self-certification.

In the event that the Service does not change its position, we suggest that, at a minimum, the Service should remove the requirement to include a physician's narrative description (item (2).[12] The information that would be included in the physician's narrative description would likely include the individual's sensitive personal health information—information that the plan administrator and IRA providers do not need to receive, and the individual may be reluctant to provide.

**4. Roth SIMPLEs/SEPs Permitted (§601) (Section K of Notice)**

Previously, simple retirement accounts (SIMPLE IRAs), described in Code section 408(p), and simplified employee pensions (SEP IRAs), described in Code section 408(k), were not permitted to be designated as Roth IRAs. Section 601 of the Act permits employers to offer employees the opportunity to have SIMPLE and SEP IRA contributions made as Roth contributions, effective for taxable years beginning after December 31, 2022.

The Notice provides several helpful answers to questions on which guidance was needed to begin implementation of section 601. However, ICI members have raised various new questions resulting from this guidance.

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[12] The five items required under A.F-6 are:

1) A statement that the individual's illness or physical condition can be reasonably expected to result in death in 84 months or less after the date of certification;
2) A narrative description of the evidence that was used to support the statement of illness or physical condition (as described in this F-6 (1));
3) The name and contact information of the physician making the statement;
4) The date the physician examined the individual or reviewed the evidence provided by the individual, and the date that the certification is signed by the physician; and
5) The signature of the physician making the statement, and an attestation from the physician that, by signing the form, the physician confirms that the physician composed the narrative description based on the physician's examination of the individual or the physician's review of the evidence provided by the individual.

**4.1 Transition Relief for 2024**

Q&A K-2 provides that if an employer offers the ability to make Roth contributions, the employer must offer employees the same effective opportunity to make a Roth contribution election as the employees have to enter into a salary reduction agreement under the plan (the minimum requirements of which are provided in Code section 408(p)(5), as described in Notice 98-4). As a result, to make Roth contributions available for 2024, employers would have had to notify employees by November 2, 2023. Our members who offer SIMPLE plans reported that they received several inquiries from clients with interest in making Roth contributions available. However, because of the many open questions regarding implementation, many providers determined to wait until guidance was issued before offering the feature to employers. At this point, because the Notice was issued in December 2023, it seems that absent additional guidance, employers with existing SIMPLE plans will have to wait until the 2025 plan year to make the Roth feature available. To allow earlier adoption, we request that the Service allow for mid-year changes to make Roth contributions available during the 2024 plan year, including relief with respect to the employee notice requirement.

**4.2 Ability to Limit Roth Elections to Employee Contributions**

When implementing a Roth feature for SIMPLE IRA plans, allowing the employee to elect to have employer contributions made on a Roth basis adds a layer of complexity that may be undesirable for employers and/or SIMPLE IRA providers. The ability to design the plan to allow employees to designate a Roth IRA for the employee contributions only, and not the employer contributions, would simplify administration.

In section L of the Notice, with respect to the optional treatment of employer contributions as Roth contributions in a 401(k), 403(b), or governmental 457(b), the Service makes clear that an employee generally may be permitted to designate an elective contribution as a Roth contribution without being permitted to designate a matching contribution or nonelective contribution as a Roth contribution. In other words, plans are not required to permit Roth employer contributions merely because they permit Roth elective contributions. We assume that this flexibility would also be extended to Roth programs in SIMPLE plans, though we would appreciate confirmation that this bifurcation is permitted. Nothing in the statute appears to prevent this approach. Further, the Service should confirm that it would not make any difference if this design choice (to not permit Roth employer contributions) was dictated by the provider or elected by the sponsoring employer (i.e., either way should be permissible).

**4.3 Clarification of Reporting Obligations**

For SIMPLE IRA sponsors who decide to permit employees to elect to receive an employer contribution as a Roth IRA contribution, Q&A K-5 provides that the employer must report the employer contribution on Form 1099-R (rather than treat these contributions as wages reported on IRS Form W-2). We agree that this Form 1099-R reporting is the responsibility of the employer as plan sponsor. Despite the fact that the onus to provide the Form 1099-R is on the employer, some of our members expect to offer assistance with this task. Typically, Forms 1099-

R are issued by the custodian of a SIMPLE IRA, and some of our members report that, realistically, some small employers sponsoring these plans may expect the custodian or SIMPLE IRA service provider to issue the Form 1099-R in this case as well. For a SIMPLE IRA provider that voluntarily provides this service to its clients, we request clarification regarding whether the custodian or service provider is permitted to issue the Form 1099-R as they normally do (with the custodian or service provider listed as payer) or whether the Form 1099-R must be issued on behalf of the employer (with the employer listed as the payer). We believe that, although the Notice states that the "employer" must report the contributions on the Form 1099-R, this does not mean that the employer, rather than the provider, must be listed as the payer. Allowing this flexibility would simplify administration, by minimizing any customization of the Form 1099-R reporting.

**4.4 Updates to Model Forms and Prototype Language**

We appreciate that in Q&A K-7 of the Notice, the Service provided that an employer using the Form 5304-SIMPLE, Form 5305-SIMPLE, Form 5305-SEP, Form 5305A-SEP, or a prototype document approved by the Service, may continue to use the form or document without amendment until the Service issues new forms or provides new guidance on prototype plan documents. This flexibility is extremely helpful. As many of our member firms rely on these model forms (or model language for prototype documents), however, we urge the Service to prioritize updating the model forms and language as soon as possible. The absence of updates complicates the implementation of such significant changes to plan features. In the meantime, the Service should provide guidance on what language an employer may use to document their election to modify the plan and to notify employees. The Notice instructs plans to follow the notification guidelines under Notice 98-4, which do not allow Roth contributions under a SIMPLE IRA plan.

While a Roth IRA must be separate from a traditional (pre-tax) IRA, our members have discussed offering both types as part of a single SIMPLE plan document, to simplify administration. Otherwise, maintaining them as separate plans may require separate beneficiary records, separate withholding elections, etc. The Service should consider offering the model forms as single plans that offer a variety of options within the same form (e.g., pre-tax only, allowing both Roth and pre-tax employee elective contributions but only pre-tax employer contributions, and offering pre-tax and Roth for all contributions under the plan). This would maximize both flexibility and simplicity. Underlying the form, the custodial agreement would support both the Roth and traditional IRAs.

**5. Roth Employer Contributions Permitted (§604) (Section L of Notice)**

Previously, plans could provide employer contributions only on a pre-tax basis. Effective as of December 29, 2022, the SECURE 2.0 Act allows sponsors of 401(k), 403(b), and governmental 457(b) plans to offer vested employer matching contributions and nonelective contributions on a Roth basis, at the election of the employee.

In the Notice, the Service addressed several guidance requests from ICI's March Letter on various tax implications such as income tax withholding rules, as well as guidance on whether partially vested employees may elect Roth treatment. This guidance will be very helpful in allowing our members to assist plans in adopting this feature.

The Notice did not address one question we asked regarding the application of the five-year holding period rule for Roth accounts—whether the five-year clock for determining qualified distributions from designated Roth accounts is applied separately for Roth employer contributions and employee designated Roth contributions. ICI's March Letter asked for confirmation that time counted towards meeting the five-year period with respect to earlier employee designated Roth contributions should be counted for purposes of Roth employer contributions, and vice versa. In other words, there should be no distinction between employer and employee Roth contributions for purposes of the holding period.

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We look forward to working with the Service to implement the many positive changes for savers included in the SECURE 2.0 Act. We would appreciate the opportunity to discuss with you several of our comments described in this letter, particularly the issues associated with the Act's changes to SIMPLE IRAs. To that end, and if we can provide you with any additional information regarding the issues described herein, please do not hesitate to contact Elena Chism at 202/326-5821 (elena.chism@ici.org) or Shannon Salinas at 202/326-5809 (shannon.salinas@ici.org).

Sincerely,

/s/ Elena Barone Chism

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