The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE
1401 H Street, NW, Washington, DC 20005 USA

October 7, 2024

Filed Electronically

Internal Revenue Service
CC:PA:01:PR (Notice 2024-55)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice 2024-55 – Certain Exceptions to the 10 Percent Additional Tax Under Code Section 72(t)

To Whom It May Concern:

The Investment Company Institute[1] appreciates the opportunity to provide our views to the Treasury Department ("Treasury") and Internal Revenue Service (IRS) on Notice 2024-55 (Notice).[2] The Notice provides guidance on the application of the exceptions to the 10 percent additional tax under Internal Revenue Code (Code) section 72(t) for emergency personal expense distributions and domestic abuse victim distributions, pursuant to sections 115 and 314 of the SECURE 2.0 Act of 2022 (Act).

Background

Emergency personal expense distributions (EPEDs) (§115). The Act provides a new exception from the 10 percent early withdrawal penalty for certain distributions from defined contribution (DC) plans and IRAs for specified emergency expenses (these are unforeseeable or immediate

[1] The Investment Company Institute (ICI) is the leading association representing the asset management industry in service of individual investors. 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 $37.1 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $8.7 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London.

[2] Notice 2024-55, 2024-28 I.R.B. 31, *available at* https://www.irs.gov/pub/irs-drop/n-24-55.pdf.

financial needs relating to personal or family emergency expenses). Plans generally may rely on an individual's certification that a distribution meets the criteria for an EPED, and can permit the distributions as in-service withdrawals. Individuals are limited to one distribution per calendar year of up to $1,000, with the option to repay the distribution within three years. No additional emergency expense distributions are permitted from the plan during the immediately following three calendar years unless the amount of the previous distribution is recontributed to such plan.

Domestic abuse victim distributions (DAVDs) (§314). The Act provides for a new type of penalty-free in-service withdrawal from DC plans and IRAs for victims of domestic abuse meeting certain eligibility criteria (e.g., if made to an individual during the 1-year period beginning on any date on which the individual is a victim of domestic abuse by a spouse or domestic partner). The term "domestic abuse" means physical, psychological, sexual, emotional, or economic abuse, including efforts to control, isolate, humiliate, or intimidate the victim, or to undermine the victim's ability to reason independently, including by means of abuse of the victim's child or another family member living in the household. Plans adopting DAVDs may rely on a participant's self-certification of eligibility. Section 314 limits DAVDs to an individual to the lesser of $10,000 (to be adjusted for inflation, in amounts rounded to the nearest multiple of $100) or 50 percent of their account balance. Participants generally are permitted to repay such distributions into an eligible retirement plan within three years.

Executive Summary

Our comments and recommendations include the following:

- There Should Not Be Exceptions to Self-Certification of EPEDs or DAVDs. The Act provides that plan administrators may rely on individual self-certification that an EPED or DAVD meets the applicable requirements for such a distribution. However, in the case of EPEDs the Notice also invites comments as to whether Treasury should provide exceptions to self-certification and procedures to address cases of employee misrepresentation. Any such exceptions would severely undercut the benefits to self-certification of distributions, and as such should not be included in future guidance.

- Permit Self-Certification for EPED and DAVD Repayments. Future guidance should provide that individual self-certification also is available for repayments of EPEDs and DAVDs. Self-certification of repayments would significantly ease the burdens to plans and their administrators of offering EPEDs and DAVDs and accepting repayments.

- Confirm That a Plan Can Eliminate EPED and DAVD Features. Treasury and IRS should formally confirm that EPED and DAVD features are not protected benefits under the anti-cutback rule. As the Act is silent as to whether these features are protected benefits, absent an affirmative statement plan sponsors may be hesitant to offer these features for

fear that they would be limited in their ability to later eliminate them (e.g., if they are determined to be too costly to administer or otherwise not desired for a plan).

- Confirm that Repayments Are Permitted to a Different Plan. We are concerned that the applicable guidance is not clear that EPEDs, DAVDs, and QBADs can be repaid to plans other than the distributing plan or an IRA. Repayment to a different plan should be permitted, to facilitate the administration of these features and the preservation of retirement savings. We also request confirmation that a plan that does not accept rollover contributions would not have to be amended to permit rollover contributions in order to offer EPEDs, DAVDs, or QBADs.

- Permit Self-Certification for Both Distributions and Repayments in Cases of Terminal Illness. Treasury and IRS should provide that both eligibility for and repayments of terminal illness distributions may be self-certified, consistent with their discretion under Section 326 of the Act. Self-certification would address many practical challenges to vesting discretion to evaluate these distributions and repayments with plan sponsors and administrators.

1. There Should Not Be Exceptions to Self-Certification of EPEDs or DAVDs

Sections 115 and 314 helpfully provide that an administrator may rely on an individual's certification that requested EPEDs and DAVDs meet the applicable requirements for a permissible distribution. The Notice, however, invites comments as to whether Treasury and IRS should provide for exceptions to self-certification for EPEDs and procedures to address cases of employee misrepresentation. We urge Treasury and IRS to not provide for any such exceptions, whether for EPEDs, DAVDs, or other early distribution options with self-certification. While section 115 authorizes Treasury to provide exceptions in cases where the plan administrator has actual knowledge contrary to the participant's certification, we believe further regulation of or limitations on the self-certification standard is unnecessary. It is unlikely that a plan administrator would have the definitive and comprehensive knowledge of an individual's financial situation that would be necessary to negate the individual's self-certification of eligibility for an EPED. Adding exceptions would defeat the entire purpose of self-certification, and moreover would seem to require plan administrators to collect sensitive information and/or to make judgment calls over deeply personal and confidential matters of an employee. Moreover, we are not aware of evidence suggesting that employee misrepresentations in self-certifications are a pervasive issue warranting further regulation. A primary goal of both the SECURE Act and the Act was to reduce administrative burdens associated with offering employer-sponsored retirement plans. To that end, the self-certification standard as articulated in Q&A A-2, A-9, and B-9 of Notice 2024-55 is a reasonable and workable standard that should stand on its own.

2. Permit Self-Certification for EPED and DAVD Repayments

Sections 115 and 314 both provide for repayment of distributions pursuant to rules that are similar to those under Code section 72(t)(2)(H)(v), which provides for repayment of qualified birth or adoption distributions (QBADs). Under these repayment rules, an individual generally may—at any time during the 3-year period beginning on the day after the date on which the distribution was received—repay the distribution (not to exceed the aggregate amount of the distribution) to an applicable eligible retirement plan in which the individual is a beneficiary and to which a rollover can be made. Although the applicable statutory language permits self-certification of eligibility for EPEDs and DAVDs, neither the statutory language nor any applicable regulatory guidance address whether self-certification is available for repayments of QBADs, EPEDs, or DAVDs.

Notice 2024-55 requests comments on whether it would be helpful if the anticipated proposed regulations permit an administrator to rely on an individual's certification that a proposed repayment meets the requirements under Code section 72(t)(2), is made within the applicable 3-year time period, and does not exceed the amount of the distribution with respect to which a repayment is being made. We urge Treasury and IRS to expressly permit individuals to self-certify that amounts being repaid meet these conditions for repayment. Self-certification of repayments is necessary and appropriate for the same reasons it is needed for distribution eligibility, and particularly because plans often are required to accept repayments of special distributions if the plan permits such distributions.

3. Confirm That a Plan Can Eliminate EPED and DAVD Features

As you know, Code section 411(d)(6) generally protects certain benefits (including optional forms of benefit) from reduction or elimination by plan amendment, with exceptions in some cases provided by statute or regulation. We urge Treasury and IRS to formally confirm that EPED and DAVD features are not protected benefits under the anti-cutback rule. A failure to provide explicit anti-cutback relief would create significant burdens and complexities for plans and their administrators, and in our view also would discourage the adoption of EPED and DAVD features—as well as the other optional in-service distribution options created by the SECURE Act and the Act. A plan sponsor may decide, after some experience with a given in-service distribution option, that it no longer wants to offer the option because it is difficult to administer and/or not benefitting participants. If it is not clear that these distribution options are not protected benefits, plan sponsors would be less likely to add them. We ask that Treasury and IRS exercise their established discretion to confirm in the applicable guidance that EPEDs and DAVDs, as well as the other optional in-service distributions created by the SECURE Act and the Act, are not protected benefits and as such can be eliminated at the plan sponsor's discretion.

As a related point, we also recommend future guidance confirm that a plan is not required to accept the repayment of a distribution where the plan has terminated the distribution option (be it an EPED, DAVD, or other optional in-service distribution). Q&A A-12 and B-11 of the Notice provide that a plan must permit repayment of an EPED or DAVD distribution where, among other criteria, the plan permits such distribution. Future guidance should confirm that this

determination is made at the time a repayment is made or attempted to be made. Any other result would have the practical effect to imposing a 3-year waiting period on the termination of service provider arrangements associated with the distribution option, as many plans would need a service provider's assistance to process repayments.

4. Confirm that Repayments Are Permitted to a Different Plan

We ask that Treasury and IRS confirm that repayments of EPEDs, DAVDs, and QBADs can be made to a different plan than the plan from which the distribution was made. Sections 115 and 314 (EPEDs and DAVDs), as well as section 326 of the Act, which provides an exception from the early distribution penalty for terminal illness distributions (TIDs), provide that distributions may be repaid pursuant to rules similar to those for the repayment of QBADs. Notice 2020-68 provides that repayments of QBADs can be made "to an applicable eligible retirement plan in which the individual is a beneficiary and to which a rollover can be made."[3] This guidance does not specifically restrict the ability to make a repayment to a different employer sponsored plan than the plan from which the distribution came. Notice 2024-55 (relating to EPEDs and DAVDs) uses the same quoted language as Notice 2020-68, implying that repayment can be made to a different employer sponsored plan (or to an IRA). Certainty on this point would be helpful.

Practical considerations support permitting individuals to make repayments of these special early distributions to a different plan (in addition to an IRA) where the plan does not otherwise prohibit such repayments. The distributing plan may have been terminated, an individual may no longer be a participant in the plan from which a distribution was made, or the plan may have eliminated the applicable distribution option. Under these circumstances, an individual who does not have an IRA (and does not want to open an IRA and incur any attendant costs) would be well-served by the ability to make a repayment to a different plan in which they participate.

In a similar vein, we request that Treasury and IRS clarify the circumstances under which a plan is required to accept repayments. More specifically, our members have indicated that they interpret the applicable guidance for QBAD repayments (Notice 2020-68, Q&A D-13) as not requiring plans to accept rollovers in order to offer QBADs. Under Q&A D-13, the only circumstances under which a plan would be required to accept a repayment is where (a) the plan permits QBADs, (b) the individual received a QBAD from that plan, and (c) the individual *is eligible* to make a rollover contribution to that plan at the time the individual wishes to repay the QBAD. (Notice 2024-55, Q&A A-12 and B-11 use similar language for EPED and DAVD

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[3] Notice 2020-68, 2020-38 I.R.B. 567, *available at* https://www.irs.gov/pub/irs-drop/n-20-68.pdf. See also Q&A A-7 and B-6 of Notice 2024-55. We note, however, that Code section 72(t)((2)(H)(v)(II) (relating to QBADs) provides that the "aggregate amount of contributions made by an individual under [the provision permitting repayments] to any applicable eligible retirement plan which is not an individual retirement plan shall not exceed the aggregate amount of qualified birth or adoption distributions which are made from such plan to such individual." This could be interpreted as limiting repayments to either the same plan from which the distribution came or to an IRA. It therefore would be helpful for Treasury and IRS to expressly confirm the view that participants may make repayments to a different plan (to the extent the plan allows).

repayments.) We interpret this to mean that a plan that does not generally permit participants to make rollover contributions into the plan could still offer QBADs, EPEDs, or DAVDs without also accepting repayments of such distributions. Treasury and IRS should confirm this interpretation.

5. Permit Self-Certification for Both Distributions and Repayments in Cases of Terminal Illness (Act section 326)

Notice 2024-55 also solicits comments on aspects of section 72(t) not covered by the Notice. In an earlier letter, the Institute requested guidance for terminal illness distributions (TIDs).[4] We reiterate these requests here, as relevant. Section 326 of the Act provides a new exemption from the 10 percent early distribution penalty in the case of a distribution from a plan or IRA to a terminally ill individual,[5] effective for distributions made after the date of enactment. A terminally ill individual must furnish "sufficient evidence" to the plan administrator "in such form and manner as the Secretary may require."

We request that the updated regulations under Code section 72(t) provide that plan administrators and IRA providers may rely on self-certification from the individual as "sufficient evidence" of a terminal illness. Otherwise, a plan or IRA provider could be forced to make difficult (and potentially improper) inquiries into an individual's sensitive personal health information that is a part of a physician's certification. Furthermore, financial institutions are not appropriately positioned to make determinations as to either health status or the accuracy or completeness of health-related information, or to maintain private health information. Similarly, a plan administrator or IRA provider should not be required to assess the veracity of any evidence of a terminal illness provided by an individual. While interim guidance under section 326 of the Act contained in Notice 2024-02 provides that a plan administrator may rely on a physician's certification of terminal illness provided to the administrator, the certification still contains private health information.[6] Moreover, absent a clear statement to the contrary in formal regulations, many administrators may determine that they are required in the exercise of their duties to review physician certifications to confirm that they meet the applicable requirements.[7]

While interim guidance under section 326 of the Act does not permit self-certification for a TID, the text of section 326 does not preclude self-certification at Treasury and IRS' discretion.

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[4] Letter from Elena Chism, Deputy General Counsel, Retirement Policy, and Shannon Salinas, Associate General Counsel, Retirement Policy, to Carol Weiser, Benefits Tax Counsel, US Department of Treasury, and Rachel Levy, Associate Chief Counsel, IRS, dated March 23, 2023, p.9, *available at* https://www.ici.org/system/files/2023-04/23-cl-secure20-priorities.pdf.

[5] A terminally ill individual means an individual who has been certified by a physician as having an illness or physical condition that can reasonably be expected to result in death in 84 months or less after the date of the certification.

[6] Notice 2024-02, 2024-2 I.R.B. 316, *available at* https://www.irs.gov/irb/2024-02_IRB.

[7] See Notice 2024-02, A. F-6.

Additionally, Notice 2024-02 already requires that individuals retain a copy of the physician's certification and the underlying documentation for their own tax records. Future guidance could address the above concerns with the administrator receiving the physician's certification by requiring instead that an individual self-certify that they have obtained an appropriate physician certification, and that they continue to retain it for their tax records.

Conclusion

ICI and its members appreciate the opportunity to comment on the Notice and on Code section 72(t) generally. If you have any questions, please contact Elena Chism at 202/326-5821 (elena.chism@ici.org) or David Cohen at 202/326-5361 (david.cohen@ici.org).

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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