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Dear Carol and Rachel:

On December 29, 2022, Congress passed SECURE 2.0, which contained over 90 distinct retirement plan provisions with effective dates ranging from the date of enactment, 2023, 2024, 2025 and beyond. Congress directed the Department of the Treasury to act on many of the provisions, and many other provisions need implementation guidance from the Treasury and the Internal Revenue Service (collectively, Treasury).

We appreciate the amount of work needed to implement SECURE 2.0 and to continue implementing the Secure Act of 2019, and we look forward to working with you on this. Below is a non-exhaustive list of priorities, which we hope will assist in implementation. All section references below are to SECURE 2.0.

Immediate and Near-Term Issues

A number of the SECURE 2.0 provisions are effective immediately, in 2023 or 2024. We view these as immediate and near-term issues that need guidance sooner than other provisions. Although it may seem that items that are not effective until 2024 may not need immediate guidance, updating systems for these changes will take time, which means that guidance will be needed well before 2024.

Catch-up Contributions

Under Section 603, individuals with Code Section 3121(a) wages of more than $145,000 in the preceding year from the plan sponsor may only make catch-up contributions on a Roth basis. If Roth catch-up contributions are made on behalf of such an individual, the plan must provide that any other individual may make Roth catch-up contributions. In addition to technical issues that we believe the IRS can address, numerous other implementation questions have arisen. Although this provision is not effective until taxable years starting on and after December 31, 2023, plan sponsors and service providers need clarification much sooner than 2024 to be able to update systems, communicate with participants and allow for changes in elections before the effective date. Some of the issues to be addressed include, but are not limited to:

- The statute does not require plan sponsors to provide notice of these requirements to participants. However, given the importance of these changes, Treasury could provide a model notice to include with other required notices.
- Is a plan sponsor allowed to limit all participants to making catch-up contributions as Roth, with an option for individuals with compensation under $145,000 an opportunity to opt out?
- An individual with compensation less than $145,000 may elect to make catch-up contributions either on a Roth or pre-tax basis. Is a plan sponsor allowed to limit the election frequencies for such individuals?
- What is the procedure for correcting contributions for individuals whose compensation is later determined to be above the threshold or would such amounts be recharacterized as Roth catch-up contributions? If recharacterized as Roth catch-up contributions:
    - In which year should the contributions be included in the employee's taxable income? For example, are the contributions determined to be Roth catch-up in the year following the year in which they are deposited in the plan?
    - Should the contributions be excluded from wages for purposes of income tax withholding?
    - Should the contributions be excluded from wages for other purposes, such as applying various wage thresholds and compliance testing?
    - How should the contributions be reported as income?
- What is the compensation for individuals with part-year employment in the prior year or new hires or should such individuals be deemed to be under $145,000? For example, an employee's annual compensation is $200,000, and the person is hired in August. Therefore, in year one, the person had no wages from the employer in the prior year, so they are below $145,000. In year two, the actual prior year's wages were below $145,00. It would only be until year three that the prior year's wages were above $145,000 so in that year, the person would be limited to Roth only in year three.
- Will individuals without wages under Code Section 3121(a) be considered to have wages ?

Given the number of outstanding issues, and the major systems overhaul for payroll providers, recordkeepers and plans sponsors that cannot be started until guidance is received, we also request that Treasury extend the applicability date by 12 to 24 months or at least provide for good faith compliance during that period.

Contributions to SIMPLE Plans

> SECURE paragraph 601(a) deleted Code section 408A(f), which provided that:
>
> (1) a simplified employee pension or a simple retirement account may not be designated as a Roth IRA; and
>
> (2) contributions to any such pension or account shall not be taken into account for purposes of subsection (c)(2)(B).

As explained by the Senate Finance Committee summary, "Generally, all plans that allow pre-tax employee contributions are permitted to accept Roth contributions with one exception – SIMPLE IRAs. 401(k), 403(b), and governmental 457(b) plans are allowed to accept Roth employee contributions. Section 601 allows SIMPLE IRAs to accept Roth contributions."[1]

Unfortunately, by deleting all of paragraph (f) instead of only deleting clause (1), SIMPLE and SEP contributions are now taken into account in determining the amount of separate Roth IRA contributions, which will limit the amount allowed in a separate Roth IRA. Under prior law, an individual could contribute the full amount to a SIMPLE IRA and the full amount to a Roth IRA. We believe this is an inadvertent drafting error, and the intent of Section 601 was merely to allow for Roth contributions in SIMPLE IRAs and SEP plans. We request that Treasury clarify that maximum contributions to both are still permitted.

New Distributions and Penalty Waivers

SECURE 2.0 contains new provisions that disregard the 10 percent early withdrawal penalty for numerous distributions, and, in many cases, includes a new distributable event. Treasury should clarify that these provisions are discretionary. In addition, for each new penalty exception for which SECURE 2.0 does not clearly address whether such exception creates a distributable event (e.g., terminal illness under Section 326), clarification is requested. Treasury also should clarify whether the distributable events apply to both elective deferrals and employer contributions. These likely could be accomplished through subregulatory guidance.

Guidance on the specific distribution and penalty waivers would be helpful. For example, for distributions on account of terminal illness, guidance on the form and manner of providing proof of terminal illness would be helpful. We suggest that a participant's self-certification of terminal illness should constitute "sufficient evidence" of such illness. Plan administrators should not be required to obtain additional documentation, which may contain sensitive personal health information and which a plan administrator would be ill-equipped to assess in any event. There also are a number of outstanding questions with respect to distributions for long-term care insurance, such as:

- For which family members may an employee purchase long-term care insurance?
- What is meaningful financial assistance?
- What consumer protections are required?
- What other information will be required on the long-term premium statement?
- What other information will be required for the disclosure from the issuer to the Secretary?
- What forms are required for statements relating to long-term care premiums?

[1] See the Senate Finance Summary of SECURE 2.0, available at https://www.finance.senate.gov/imo/media/doc/Secure%202.0_Section%20by%20Section%20Summary%2012-19-22%20FINAL.pdf.

However, given that this provision is not effective until 2025, this guidance is not as much of a priority as those provisions that become effective in 2024 or earlier.

Emergency Withdrawals

Section 115 amended Code Section 72(t) to allow for one annual penalty free withdrawal (from all plans maintained by the employer) for "emergency personal expenses," not to exceed the lesser of $1,000 or an individual's total nonforfeitable benefit. An "emergency personal expense" is a distribution to meet unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses," and the plan administrator may rely on the participant's representation that the withdraw is for an emergency personal expense. A participant may repay the amount distributed for emergency personal expenses.

For plans to be able to allow for emergency personal expense distributions, record keeping systems will need to be updated during 2023 to be ready for 2024 distributions. However, there are a number of open issues such as:

- The definition of "emergency personal expense". Given the personal nature of this, it should be based on facts and circumstances, with the burden of establishing this on the participant.
- What are the plan sponsor's responsibility if they actually know a distribution is not for an emergency personal expense?
- Whether the annual withdrawal limit is based on each individual's withdrawal date or the plan year.
- Whether there are any difference in repayment of these amounts as compared to birth and adoption distributions.

Pension-Linked Emergency Savings Account

Section 127 amended both the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code) to allow plan sponsors to established pension-linked emergency savings accounts, but individuals who are highly-compensated employees (HCE) as defined under Code Section 414(q) are not allowed to contribute to these accounts. If an individual becomes an HCE, the individual may no longer make contributions. Treasury should verify that an employer determines HCE status for a pension-linked emergency savings account the same as under the Code, namely for the compensation test looking at the preceding year (with the options to include the top 20 percent). Also, Treasury should clarify whether an employer with a pension-linked emergency savings account must determine HCE status the same way it does for other purposes with respect to the plan. Finally, Treasury should define what these contributions are for tax purposes (as they appear to be elective deferrals), and whether these contributions are including for purposes of non-discrimination testing, e.g. under Code sections 402(g), ADP testing, and 415 testing.

Both the ERISA and Code provisions provide that the Secretary may provide for reasonable restrictions. Plan sponsors will be reluctant to set up accounts until Treasury and Department of Labor (DOL) determine what, if any, restrictions will apply.

Both the ERISA and Code provisions require the administrator to provide notices to individuals in the pension-linked emergency savings accounts. The Secretaries must prescribe regulations necessary to address reporting and disclosure requirements, but the regulation should seek to prevent unnecessary reporting and disclosure. In addition, a model notice would be welcome.

Guidance on what is a reasonable time for making the contribution to the accounts and when must distributions be made after termination also would be welcome. This guidance should provide that contributions must be made under rules applicable to elective deferrals. With respect to distributions after termination, any guidance should provide that the distribution must be made within a reasonable time.

Student Loans

For plan years starting after December 31, 2023, an employer may make matching contributions based on qualified student loan payments. The statute allows an employer to rely on an employee's annual certification that payments were made. For many of our members that currently have student loan repayment programs, they require service providers to track and verify the payments, and an employee certification alone is not enough. Employers may wish to apply a similar requirement to student loan repayments rather than the employer allowing for self-certification.

This section also requires that Treasury issue guidance "permitting employers to establish reasonable procedures to claim matching contributions for such qualified student loan payments under the plan, including an annual deadline (not earlier than 3 months after the close of each plan year) by which a claim must be made."

Many of our members are eager to implement this provision, however, there are a number of areas where guidance would be useful such as:

- It is unclear whether an employer must adopt such procedures, what constitutes reasonable procedures to claim matching contributions, and if any procedures that are adopted must incorporate the annual deadline set forth in Treasury/IRS guidance. The use of the word "permitting" indicates that employers are not required to establish procedures to claim matching contributions after the end of the year, but this should be confirmed.
- Any guidance on these procedures also should allow a requirement to register eligible loans with the employer or plan sponsors so the payments made throughout the year may be tracked, provided the participant is given an opportunity to review and correct payment information collected.
- The term "qualified student loan payment" means a payment made by an employee in repayment of a qualified education … but only … (ii) if the employee certifies annually to the employer making the matching contribution under this paragraph that such payment has been made on such loan." Treasury should clarify that this certification requirement is deemed satisfied if the employer tracks the payments.

- If the plan sponsor does not track the payments, and, instead relies on a certification:
    - May the certification be required more often than annually?
    - What is the method of certification?
- Treasury should confirm that student loan repayments may be on behalf of someone else are qualified student loan repayments if the loan is in the employee's name.
- As noted above, Section 110(g)(2) specifies that a plan may impose an annual deadline to claim student loan matching contributions as late as 3 months after the close of each plan year. However, Code Section 4979 imposes a 10% excess tax on, among other things, excess contributions over the maximum permitted under ADP and ACP testing, unless those excess amounts are distributed within 2 ½ months after the end of the plan year. To the extent plans are required to allow plan participants at least 3 months after the end of the plan year to provide certifications, those certifications could change applicable nondiscrimination testing results which in turn could give rise to corrective distributions that could not be made within the 2 ½ month time frame to avoid an employer excise tax. Treasury could harmonize this by specifying that the six-month period currently provided to certain EACAs under the statute will also be provided to plans that allow for student loan matching.
- The 3-month period to claim a student loan match means that this match could be after other matching contributions have been made and will cause administrative issues with current rules. Treasury should clarify the reasoning behind the 3-month period, how the late date will impact deductibility, 415 testing and other nondiscrimination testing, and that (as noted above) it is optional, not required.
- Treasury should clarify that matching contributions for student loan payments that are later refunded or returned (before the plan's certification deadline) are not required to be forfeited. A match made on the basis of a payment actually made in good faith should be permitted to remain in the plan.

Section 110 allows the Secretary to issue guidance on the following, and we encourage Treasury to do so as soon as possible:

- Allowing qualified student loan matching contributions at a different frequency than other matching contributions;
- Reasonable procedures for claiming matching contribution, including an annual deadline; and
- Model amendments to implement matching contributions on such qualified student loan payments.

Recovery of Plan Overpayments

Section 301 amended both ERISA and the Code to allow plans to either seek or not seek inadvertent benefit overpayments. Under the ERISA provisions, a fiduciary does not breach its fiduciary duty if it does not seek recoupment from a participant or beneficiary. It also does not breach its fiduciary duty if it does not seek recoupment from a plan sponsor or contributing employer if the fiduciary determines that unless the failure to recover all or part of the overpayment faster than required under the funding rules would materially affect the plan's

ability to pay benefits due to other participants and beneficiaries. The Code provisions do not contain this limitation on seeking recoupment from plan sponsors or contributing employers and instead merely provide that a plan will not be disqualified if:

- The plan does not obtain payment from any participant, beneficiary, employer, plan sponsor, fiduciary, or other party on account of any inadvertent benefit overpayment made by the plan, or
- The plan sponsor amends the plan to increase past, or decrease future, benefit payments to affected participants and beneficiaries to adjust for inadvertent benefit overpayments.

However, nothing in the overpayment provisions relieves the plan of its funding obligations under Code Sections 412 and 430.

Given the similar provisions in both the Code and ERISA, both the DOL and Treasury will need to work together on guidance, including reconciling Rev. Proc. 2021-31 with SECURE 2.0. In addition, Section 301 gives the Secretary broad authority to "issue regulations or other guidance of general applicability specifying how benefit overpayments and their recoupment or non-recoupment from a participant or beneficiary shall be taken into account for purposes of satisfying any requirement applicable to a plan to which paragraph (1) applies.'' However, this broad authority also must be reconciled with any ERISA obligations.

Election to Make Matching and Nonelective Contributions Roth

Section 604 provides that plan sponsors may allow employees to designate matching and nonelective contributions as Roth contributions. Although this section was effective on the date of enactment, because of the numerous outstanding questions, most plan sponsors will likely not implement it without Treasury guidance. These questions include, but are not limited to:

- Is the election on behalf of each employee and each employee may make a different election?
- Are there any restrictions on how and when employees may make such elections?
- May an employer default all matching or nonelective contributions as Roth, subject to an employee opting for pre-tax?
- May an employer apply a vesting schedule to pre-tax amounts for those participants who elect pre-tax contributions, even though Roth amounts must be immediately nonforfeitable?
- What is the income and payroll tax reporting for such amounts?

Required Minimum Distribution Age

It appears that the intent of Section 107 was that for all individuals, between 2023 and 2033 the Required Minimum Distribution age is 73, and age 75 starting January 1, 2033.[2] However, as drafted, for individuals born in 1959, they would have two RMD dates, age 73 and

[2] Id.

age 75. Although a formal, technical correction from Congress is ideal, guidance from the Treasury that the intent was for anyone born in 1959 to have an RMD age of 75 would be welcome.

Immediate Financial Incentives

Section 113 allows employers to provide "de minimis financial incentives (not paid for with plan assets)" to employees who elect to make contributions to the plan. In addition, both the Code and ERISA were amended to provide that this is not a prohibited transaction.

The legislation does not define "de minimis", and it does not make an exception to the taxability of a financial incentive if it is provided in cash or a cash equivalent. In other employee benefits context, de minims fringe benefits are benefits that are so small as to make accounting for it unreasonable or administratively burdensome. 26 CFR § 1.132-6(a). However, the provision of cash (including a gift certificate or gift card) is not considered a de minimis fringe benefit. 26 CFR § 1.132-6(a). Before implementing this provision, employers need guidance on issues, such as:

- What is "de minimis"?
- Confirmation that the provision of cash, including gift certificates or gift cards would be taxable, similar to 26 CFR § 1.132-6(a).
- Must the incentive be offered to all participants? For example, may highly compensated employees be excluded?
- May an entity other than the employer provide the incentive?
- Are there any limits on the form of the incentive?

Other Issues

The following items are important to our members, however, given their effective dates, we feel that guidance may be provided after the issues listed above.

Automatic Enrollment

Under Section 101, for plan years starting on and after December 31, 2024, to be qualified under the Code, a 401(k) or 403(b) plan must:

- Be an eligible automatic contribution plan under Code section 414(w)(3);
- Require an automatic contribution percentage in the first year of participation of no less than 3 and not more than 10 percent of compensation (unless otherwise elected by the participant);
- Increase the contribution annually by one percent after the first year of participation to at least 10 percent but not more than 15 percent; and
- Invest all contributions in accordance with 29 CFR Section 2550.404c-5.

This provision applies to any 401(k) or 403(b) plan established on or after December 29, 2022, except for:

- SIMPLE plans under Code Section 401(k)(11);

- Governmental or church plans;
- Plans in existence for less than three years; and
- Employers with 10 or fewer employees.

The exception to plans established before December 29, 2022 does not apply to an employer that adopts a MEP/PEP after enactment; however, each employer in a multiple employer plan is looked at separately to determine whether it is a small or new business.

Although this provision is not effective in the near term, there are many questions that need to be resolved before its effective date. However, the questions relating to grandfather status and mergers and acquisitions may need to be addressed earlier. Automatic enrollment questions include:

- The effective date is for plan years beginning after December 31, 2024, however, plans that were in existence before December 29, 2022 are exempt. Treasury should clarify that the provision of Section 101 will apply to any plan established on or after December 29, 2022, but not until plan years beginning after December 2024 and should clarify that the provision does not apply to new 401(k) CODAs added to existing defined contribution plans.
- With respect to plans in existence less than three years, will the eligible automatic enrollment provisions apply for plan years starting after year three?
- What is the definition of employee for purposes of determining whether this provision applies, e.g., are part-time employees, seasonal, collectively bargained employees excluded?
- How do you determine whether the employer "normally" employees more than 10 employees for a taxable year?
- How does this impact mergers and acquisitions, e.g. is a spinoff a new plan?
- Are current employers in a MEP/PEP established before enactment grandfathered?
- What about merging an existing plan into a MEP/PEP? The merging of a plan into a MEP should not impact its grandfathered status.
- Can a change in plan design or service provider cause a plan to lose grandfathered status? Such change should not cause the plan to lose its grandfathered status.
- Are there any new notice requirements other than what is required for current eligible automatic contribution arrangements and how would the current notices need to be modified? If a modification is required, Treasury should provide a model notice.
- Does the requirement that <u>all</u> contributions be invested in accordance with 29 CFR Section 2550.404c-5 (fiduciary relief for providing a QDIA) mean that all contributions must be invested in a QDIA without regard to 29 CFR Section 2550.404c-1 or does it mean that because of the mandatory automatic enrollment, there must be a default available? This question will need to be addressed in consultation with DOL.

Reporting and Disclosure

Under Section 319, not later than 3 years after enactment, the Secretary of Labor, the Treasury and the Director of the PBGC must issue a report (after consultation with participant

and employer groups) on the effectiveness of the appliable reporting and disclosure requirements and make recommendations to consolidate, simplify, standardize and improve the reporting and disclosure so that participants can better understand the information they need to monitor their plans, plan for retirement and obtain benefits. The report must include an analysis of how participants and beneficiaries are provided preferred contact information, methods by which disclosures are furnished, the rate at which participants and beneficiaries are receiving, accessing, understanding and retaining disclosures.

The Chamber believes that participant communication is key to understanding the importance of retirement benefits. However, many disclosure requirements are based on plan designs from nearly 40 years ago, many of which do not exist today or which have been severely modified. For example, what is the utility of a summary annual report for a participant in a 401(k) plan? Today, plan sponsors spend millions of dollars on required notices and disclosures to participants, most of which remain unread. Participants need to know what their benefits are and how they can obtain them. This information also needs to be delivered in a clear, concise format in the medium the participant prefers because there is no sense in providing disclosures if they are not read. Because the Chamber represents plans sponsors, service providers and benefits consultants, our members bring a unique perspective on what communications do and do not work. We look forward to sharing this with the Agencies as they fulfill this requirement.

Consolidation of Defined Contribution Plan Notices

No later than 2 years after the date of enactment, the Secretaries of Labor and the Treasury must adopt regulations providing that an ERISA plan may, but is not required to, consolidate 2 or more notices required under ERISA sections 404(c)(5)(B) (default investment notice) and Section 514(e)(3) (automatic contribution arrangement notice) and Code Sections 401(k)(12)(D) (safe harbor notice), 401(k)(13)(E) (qualified automatic contribution arrangement notice) and 414(w)(4) (eligible automatic contribution arrangement notice) into a single notice. Our members would be interested in a model notice that consolidates the required notices to make plan administration easier and less expensive and increase the chances that participants will read it.

Rollovers

Section 324 provides that with the aim of simplifying, standardizing, facilitating and expediting rollovers, no later than January 1, 2025, the Secretary of the Treasury must develop and issue:

- Sample forms for rollovers to be used by both distributing and receiving plans; and
- Sample forms (including relevant procedures and protocols) for trustee-to-trustee transfers to be used by both transferring and receiving plans.

In developing the forms, the Secretary must obtain relevant information from participants and plan sponsors and consider coordination with Section 319 (report to Congress on reporting and disclosure) and 336 (report to Congress on rollover notices). The Chamber is

especially interested in working with Treasury on this to ensure that rollover forms and notices actually provide participants with information needed to decide whether to roll over their accounts and the simplest method to do this if they decide to do so. Although the current IRS model notice contains all of the information an individual might possibly need relating to rollovers and tax consequences, at 9 pages, it is far too long for most participants to read or comprehend. We look forward to working with Treasury on streamlining this notice and the required forms and working with technology to embed or link to other information that a participant may need, but which would streamline the actual notice. For example, the current notice lists all of the scenarios in which the 10 percent penalty does not apply (which is almost ¾ of a page). Instead of including this list, the rollover notice could state that there are situation where the penalty will not apply and include a link to the list.

Saver's Credit

For taxable years on and after December 31, 2026, a government matching credit of 50 percent (phased out) of the individual's contribution to an applicable retirement savings vehicle, up to $2,000, will be available to individuals with income below a specific level.

The matching contribution is reduced by the aggregate distributions to the individual during the testing period which is the taxable year, the two proceeding tax years, and the period after the taxable year but before the filing due date.

The government pays the amount to the individual's applicable retirement savings vehicle, and it is made as soon as practicable after the individual claims the credit on the individual's tax return.

An applicable retirement savings vehicle is an account the individual elects which is:

- The portion of the plan which is an eligible deferred compensation under a 457(b) plan, the cash or deferred arrangement under 401(k) or an annuity contraction under 403(b) AND is a qualified Roth contribution program, or an individual retirement account;
- Is for the benefit of the eligible individual;
- Accepts saver's match contributions; and
- Is designated by the individual.

There are certain limits on the match, such as it may not be distributed as a hardship and an additional tax is imposed on early distributions that are subject to Code Section 72(t) 10 percent penalty, unless repaid.

Because this is not effective until tax years beginning after December 31, 2027, it is not a top priority for many of our members. However, given the complexity of this provisions, plan sponsors are beginning to think about some of the issues, such as:

- Is a qualified plan required to accept the saver's match?
- Is a Roth or traditional IRA custodian required to accept the saver's match?

- What information is a plan sponsor/IRA custodian required to provide to individuals or the IRS, e.g. amount of distributions, information on how to make the match, whether the individual took an early distribution and/or repaid it?
- How must the match be invested if the participant does not make an election?
- Is a plan required to inform individuals whether it will accept the saver's match?
- How will the match be made?
- What is the procedures for an individual to make repayments if distributed?

Conclusion

We know that implementing SECURE 2.0 will take time and effort, and we look forward to working with you on this.

Sincerely,

Chantel L. Sheaks

Chantel L. Sheaks
Vice President, Retirement Policy