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By Electronic Delivery

May 28, 2021

Mark Mazur
Deputy Assistant Secretary for Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

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

RE: Priority Guidance Plan Recommendations on Retirement Security Issues

Dear Mr. Mazur and Mr. Paul:

The Investment Company Institute[1] is pleased to submit recommendations regarding retirement security issues for projects to be included on the 2021-2022 Priority Guidance Plan. A separate ICI submission will describe our recommendations regarding regulated investment companies.

I. Guidance Implementing Provisions of the SECURE Act

We request guidance relating to several changes to the Internal Revenue Code ("Code") enacted under the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act" or "Act"), which was included as Division O of the Further Consolidated Appropriations Act, 2020 (H.R. 1865).[2]

[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$29.8 trillion in the United States, serving more than 100 million US shareholders, and US$9.6 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in Washington, DC, London, Brussels, and Hong Kong.

[2] In a letter to the Department of the Treasury ("Treasury") and Internal Revenue Service (IRS) dated January 23, 2020, we requested compliance relief and guidance urgently needed to implement certain provisions of the SECURE Act that generally became effective immediately or as of January 1, 2020. The letter is available at https://www.ici.org/pdf/32170a.pdf.

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A. Modification of required distribution rules for designated beneficiaries (section 401 of the SECURE Act)

Section 401 of the Act modifies the required minimum distribution (RMD) rules for post-death distributions from defined contribution (DC) plans and IRAs to designated beneficiaries. It requires the participant's or IRA owner's account to be fully distributed within 10 years following the year of the participant's or IRA owner's death, unless the distribution is made to an "eligible designated beneficiary" (e.g., a surviving spouse, a disabled or chronically ill individual, an individual who is not more than ten years younger than the participant or IRA owner, or a child of the participant or IRA owner who has not reached the age of majority). Eligible designated beneficiaries can continue to "stretch" RMD payments over life expectancy.

The provision is generally effective for RMDs with respect to participants or IRA owners with a date of death after December 31, 2019, although there are special rules for certain situations and a delayed effective date for governmental and collectively bargained plans.

We previously requested that Treasury and the IRS provide expedited guidance addressing situations where a plan administrator or IRA provider inadvertently provides beneficiaries with outdated information regarding the applicable RMD rules.[3] Like many provisions in the SECURE Act, this provision became effective almost immediately, presenting implementation challenges to plan and IRA providers. Nearly 17 months have elapsed since enactment of these changes without any official guidance interpreting this provision. Now, there is an even greater need for relief relating to actions taken by individuals, plans, and service providers, based on good faith interpretations of the statutory changes.

Complicating efforts to comply with the new rules, the original updates to IRS Publication 590-B (Distributions from Individual Retirement Arrangements (IRAs)) for use in preparing 2020 returns, included confusing and inconsistent statements regarding the 10-year rule.[4] Although the IRS has since posted a revised version of the 2020 publication, we believe significant uncertainty remains with respect to implementation of these rules. We request that Treasury and IRS take steps to clear up the confusion and provide transition relief for reasonable, good faith efforts to implement section 401 of the Act.

In addition, section 401 raises numerous interpretive questions, for which ICI requests the following guidance:

- Confirmation that eligible designated beneficiaries may elect the 10-year payout rule instead of life expectancy distributions;[5]

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[3] Letter to Treasury and IRS, dated January 23, 2020, available at https://www.ici.org/pdf/32170a.pdf.

[4] Publication 590-B is available at https://www.irs.gov/pub/irs-pdf/p590b.pdf. We note the original version of the 2020 update is no longer posted. The original version, on page 12, suggested that non-eligible designated beneficiaries must take life expectancy distributions during the 10-year payout window, despite other language in the publication suggesting that such beneficiaries may wait until the end of the 10-year window to take distributions.

[5] Language in updated Publication 590-B suggests that eligible designated beneficiaries may elect the 10-year payout only if the owner dies before reaching his or her required beginning date. We believe this interpretation is inconsistent with the statute and Congressional intent.

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- Confirmation that the "at least as rapidly" rule no longer applies for any designated beneficiary;
- Guidance concerning the status of "look-through" or "conduit trusts," including multi-beneficiary trusts that benefit a combination of beneficiaries who would otherwise qualify as designated beneficiaries and/or eligible designated beneficiaries;
- Guidance on the implications of the special rule provided for "applicable multi-beneficiary trusts" benefitting disabled or chronically-ill individuals, including any documentation requirements;
- Guidance regarding any documentation requirements with respect to eligible designated beneficiaries who are disabled or chronically ill (and there is no conduit trust). We urge guidance allowing providers to rely on a beneficiary's representation that he or she satisfies the definition of disabled or chronically ill. Any required documentation by the beneficiary should be provided to the IRS.
- Guidance relating to other multi-beneficiary scenarios (where there is no conduit trust). Where multiple beneficiaries (who would qualify as designated beneficiaries and/or eligible designated beneficiaries) are designated and such beneficiaries do not create separate accounts by the applicable deadline, questions arise similar to the multi-beneficiary trust scenarios. For example, if the oldest designated beneficiary is an eligible designated beneficiary, would the RMD be calculated based on that beneficiary's life expectancy? In this case, what are the implications if not all of the multiple designated beneficiaries are eligible designated beneficiaries? What rules apply when the oldest eligible designated beneficiary dies?
- Additional clarification of rules applicable to successor beneficiaries;
- Guidance providing a standardized definition of age of majority; and
- Clarification of whether non-governmental 457(b) plans are covered by the 10-year payout rule.

As noted earlier, in the absence of guidance, inadvertent errors in applying the new post-death RMD rules could have far-reaching implications for plans and beneficiaries. It is imperative that Treasury and the IRS provide transition relief for reasonable, good faith interpretation of the SECURE Act changes.

B. Penalty-free withdrawals from retirement plans for individuals in case of birth of child or adoption (section 113 of the SECURE Act)

Section 113 of the Act adds a new exception from the 10 percent early distribution penalty under Code section 72(t)(2) for qualified withdrawals from a DC plan or IRA for the birth or adoption of a child ("qualified birth or adoption distributions" or QBOADs). Under the new exception:

- Qualified withdrawals are limited to $5,000 in the aggregate across an individual's accounts with respect to a birth or adoption.
- The withdrawal must be made within one year after the birth or adoption date.

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- The distribution may be recontributed to an eligible retirement plan or IRA, subject to certain limitations, and is treated as a rollover.

The provision applies to distributions made after December 31, 2019.

We previously requested that Treasury and the IRS provide expedited guidance addressing some of the more time sensitive questions arising under this provision.[6] We appreciate the guidance provided in Notice 2020-68, which addressed many of the questions on QBOADs. Questions remain however, particularly with respect to repayment of QBOADs, including whether any time limit for repayment will apply. We understand that Treasury and IRS intend to issue regulations that will address the rules for recontribution of such distributions.

In addition, it would be helpful for Treasury to provide:

- Guidance on whether the adoption of a new distribution option for QBOADs is a protected benefit under Code section 411(d)(6);
- Guidance for plan administrators on applicable tax treatment in situations where a participant is eligible for both a QBOAD and another distribution (such as a hardship distribution or a distribution upon severance from employment); and
- Guidance on whether and how repayments must be tracked by the plan; and guidance on any circumstances where repayments include after-tax basis.

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

In connection with the creation of pooled employer plans (PEPs) (a new type of multiple employer plan (MEP) for otherwise unrelated employers), section 101 of the Act amends Code section 413 to allow PEPs (and MEPs adopted by groups of related employers) to continue to be treated as satisfying the tax qualification requirements despite the violation of certain requirements with respect to one or more participating employers. In the case of a violation of the tax qualification requirements by a participating employer, the Act allows the plan to spin off the portion of the plan's assets attributable to that participating employer, into a separate plan maintained by that employer. The provision applies to plan years beginning after December 31, 2020.

Prior to enactment of the SECURE Act, Treasury and IRS proposed changes to the regulations under the "unified plan" rule that would similarly provide a process for dealing with violations of qualification requirements by one or more participating employers in a defined contribution MEP, without jeopardizing the tax-qualified status of the entire MEP. The proposal would provide an exception to the application of the unified plan rule in certain circumstances where a participating employer in a MEP fails to satisfy a tax qualification requirement or fails to provide information necessary to determine compliance with a tax qualification requirement, if the plan administrator follows prescribed procedures for addressing the non-compliant employer. We

[6] Letter to Treasury and IRS, dated January 23, 2020, available at https://www.ici.org/system/files/attachments/pdf/32170a.pdf, and Letter to Treasury and IRS, dated July 22, 2020, available at https://www.ici.org/system/files/attachments/pdf/32628a.pdf.

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previously expressed support for the proposal, recommending certain changes intended to streamline and simplify the requirements for addressing non-compliant employers.[7]

We urge Treasury and the IRS to simplify the unified plan rule proposal as recommended and update it to reflect and incorporate the SECURE Act changes to Code section 413. It should be possible to reflect the SECURE Act requirements without significant substantive changes to the proposal.

D. Combined annual report for group of plans (section 202 of the SECURE Act)

Section 202 of the Act directs the IRS and DOL to work together to modify Form 5500, Annual Return/Report of Employee Benefit Plan, so that all members of a group of DC plans meeting certain requirements (including having the same trustee, named fiduciary, and plan administrator) may file a single consolidated Form 5500. The consolidated Form 5500 must be implemented not later than January 1, 2022, and shall be effective for returns and reports for plan years beginning after December 31, 2021. Consolidated reporting will be an effective way to increase efficiency and reduce costs for plans, and we urge the IRS to work expeditiously with DOL to implement the necessary changes to the Form 5500 in time for the 2022 plan year.

Recently, we have engaged in discussions on this issue with representatives from Treasury, IRS, and DOL, along with certain other trade associations. Our collective discussions have emphasized the importance of: (1) requiring a single, aggregate audit of the group of plans (preferably of only the large plans in the group, and with no audit required in the case of a group consisting only of small plans); (2) not requiring employers within the group to sign the Form 5500 (i.e., no annual employer signature requirement); and (3) reducing the number of interactions an administrator has with EFAST as compared to filing separate Forms 5500 with respect to each plan. These efficiencies are crucial to ensuring that consolidated Form 5500 reporting will reduce costs and increase retirement plan coverage as intended.

In addition, we have noted that it is critical that any plan-specific information required as part of a group filing be information that the administrator already has access to and would otherwise be providing in a separate Form 5500 for the underlying plan. Requiring any new, additional, or unique information for plans included in a group filing will significantly increase the administrative burden and offset the important efficiency gains in other areas.

E. Guidance for IRA providers

We request that the IRS update the various model documents for IRAs and IRA-based plans, including the Form 5305 series for traditional IRAs, Roth IRAs, SEP IRAs, SIMPLE IRAs, and the Form 5304-SIMPLE, to reflect SECURE Act changes, such as the increased age for beginning RMDs. Similarly, updated Listing of Required Modifications (LRMs) for prototype IRA documents are needed. Many of the LRMs have not been updated for several years.

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[7] Letter to IRS, dated October 1, 2019, available at https://www.ici.org/pdf/31990a.pdf.

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Finally, we request confirmation that no amendments are required for IRA documents (including custodial agreements) in the absence of updated Forms and LRMs (or other specific guidance). It would be helpful to have an understanding of when amendments to IRA documents are expected (in addition to having the updated model documents themselves).

II. Other Guidance for 2021-2022 Priority Guidance Plan

ICI requests that Treasury and IRS include the following additional retirement security matters on the 2021-2022 Priority Guidance Plan. We have recommended these items in previous letters.

A. Permanence of Remote Notarization Relief

We reiterate our prior comments submitted in a joint letter (dated April 19, 2021) responding to Notice 2021-03,[8] requesting that Treasury and IRS make permanent its temporary relief from the physical presence requirement for notarization of spousal consent (and other participant elections). The temporary relief, originally announced in Notice 2020-42[9] and extended by Notice 2021-03, is set to expire on June 30, 2021. In view of the ongoing COVID-19 pandemic, the IRS should make the relief permanent or, at a minimum, extend the relief through the end of the pandemic.

As described in our joint letter, remote witnessing has worked well during the pandemic and allowed retirement plan participants to access their benefits without unnecessarily jeopardizing their health by physically meeting with a notary public or plan representative. In addition, the joint letter explains that remote witnessing under the protective conditions described in Notice 2020-42 has proven to be more secure and more convenient than physical witnessing. We urge the IRS to take swift action to permit continued remote notarization and witnessing.

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

We request that Treasury and IRS finalize the proposed regulations implementing section 1102 of the Pension Protection Act, which instructed Treasury to modify the regulations under Code section 411(a)(11) to require disclosure of the consequences of failing to defer receipt of a distribution from a DC plan.[10] We strongly recommend that you finalize the requirements as

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[8] Letter to IRS re: Permanent Relief for Remote Witnessing Procedures, dated April 19, 2021, from ICI and 16 other trade organizations.

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

[10] 73 Fed. Reg. 59575 (Oct. 9, 2008).

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proposed. As we stated in our comment letter,[11] the proposal strikes the right balance by alerting the participant that the plan may have investments, or fee structures, different from those obtainable in an IRA, and alerting the participant that more information is available. This approach will not overwhelm the participant with information that obscures the key information while also assuring the participant has access to information consequential to the decision whether to take or defer a distribution from the plan.

C. Modifications to EPCRS

The 2020-2021 Priority Guidance Plan includes guidance relating to certain IRS, Tax Exempt and Government Entities, Employee Plans programs, including the Pre-approved Plan Program, the Determination Letter Program, and the Employee Plans Compliance Resolution System (EPCRS). The most recent update to EPCRS, published in Revenue Procedure 2019-19, included helpful changes to expand the self-correction program, particularly with respect to plan loan errors. We urge the IRS to continue making helpful changes to EPCRS, including expanding the availability of EPCRS in general and self-correction methods in particular. For example, we suggest that the IRS:

- Allow self-correction, without an excise tax, of an inadvertently-missed required minimum distribution payment that is made within 180 days after the distribution was required to be made from the plan;
- Provide the same comprehensive program of correction for governmental 457(b) plans; and
- Expand EPCRS to allow custodians of IRAs to address inadvertent errors for which the individual owner was not at fault. Situations would include waiver of the excise tax for failure to make required minimum distributions where the distribution is corrected as described above for plans; and inadvertent rollovers, such as a rollover by a nonspouse beneficiary from an inherited IRA where the beneficiary had reason to believe that the distribution could be rolled over, or a rollover from a non-governmental 457 plan.

We also request that the IRS reinstate the special safe harbor correction method described in Appendix A of Revenue Procedure 2019-19, relating to employee elective deferral failures, which expired on December 31, 2020. Under the safe harbor, if the failure to implement an automatic contribution feature for an affected eligible employee, or the failure to implement an affirmative election of an eligible employee who is otherwise subject to an automatic contribution feature, does not extend beyond the end of the 9½-month period after the end of the plan year of the failure, the plan would not have to make a qualified nonelective contribution for the missed elective deferrals, subject to certain conditions (including notice requirements and corrective allocation of missed matching contributions). This correction method was a useful tool for plan sponsors and should continue to be available given the important public policy goal of encouraging adoption of automatic enrollment designs.

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

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

Pursuant to an item on the second quarter update to the 2014-2015 Priority Guidance Plan, the IRS issued Announcement 2014-32 which clarifies the impact a 2014 IRA rollover has on the one-rollover-per-year limitation contained in Code section 408(d)(3)(B). Announcement 2014-32 and previously issued Announcement 2014-15 were issued in response to *Bobrow v. Commissioner*,[12] a January 2014 Tax Court opinion which held that the one-rollover-per-year limitation applies on an aggregated basis to all of a taxpayer's IRAs and not to each IRA separately. While Announcement 2014-32 addressed certain issues relating to the section 408(d)(3)(B) one-per-year-limitation on IRA rollovers, as is further discussed below, we request additional guidance permitting waivers of inadvertent violations of the one-per-year-limit on IRA rollovers in circumstances where the inadvertent violations are beyond the control of the IRA holder. For example, as discussed below, such inadvertent violations may arise as a result of trailing dividends or in circumstances where the IRA holder has not taken an affirmative action to initiate a distribution.

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

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

Similarly, a distribution to the IRA holder may be reported under the circumstances described in Revenue Ruling 2018-17,[13] where assets in a traditional IRA are paid to a state unclaimed property fund. If such assets are later recovered by the IRA owner, the one-rollover-per-year limitation could prevent the individual from returning the funds to an IRA.

In light of these possible situations, it may be appropriate for the IRS to have a process for waiving inadvertent violations of the one-per-year limit on IRA rollovers, similar to the waiver

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

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

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process contained in Code section 408(d)(3)(I) for violations of the 60-day rule for indirect rollovers.

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If we can provide you with any additional information regarding these issues, please do not hesitate to contact David Abbey at 202/326-5920 (david.abbey@ici.org) or Elena Chism at 202/326-5821 (elena.chism@ici.org).

Sincerely,

/s/ David Abbey

David Abbey
Deputy General Counsel – Retirement Policy

/s/ Elena Barone Chism

Elena Barone Chism
Associate General Counsel – Retirement Policy

cc: Carol Weiser, Benefits Tax Counsel