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March 23, 2023

By Electronic Mail

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Re: SECURE 2.0 IRS and Treasury Guidance

Dear Madams:

The National Association of Government Defined Contribution Administrators (NAGDCA) writes to request certain urgently needed guidance relating to the implementation of the *SECURE 2.0 Act of 2022* (SECURE 2.0, Div. T, H.R. 2617, 117th Cong.). We appreciate the help that the IRS and Treasury has historically provided in clarifying and enhancing the practicality of implementing prior retirement-related legislation and look forward to receiving clarifying guidance on the issues detailed in this letter. We would appreciate the opportunity to meet with you at your convenience to further discuss the topics contained in this letter.

NAGDCA governmental members oversee plans for participants from 60 state and territorial government entities and 146 local government entities, including counties, cities, public safety agencies, school districts, and utilities. NAGDCA's members administer governmental deferred compensation and defined contribution plans, including Code section 457(b), 401(k), 401(a), and

403(b) plans. The association provides a forum for working together to improve defined contribution plan operations and outcomes by sharing information on investments, marketing, administration, and the federal laws and regulations governing these plans.

On behalf of our government members, we respectfully bring to your attention the following provisions from SECURE 2.0 on which we need guidance from the IRS and Treasury. The need for guidance on these topics is especially urgent for governmental plans because they often face complexities in local law enabling requirements, payroll systems, and administration that most private sector employers do not. Further, although Congress provided for delayed governmental plan amendment deadlines, because Congress did not explicitly provide for delayed effective dates for governmental plans, many of our members now face implementation deadlines that fall far earlier than they are procedurally able to address under local laws.

I. Catch-Up Contributions

In a letter dated February 7, 2023, we wrote to you regarding the catch-up contribution rules addressed in section 603 of SECURE 2.0. We submitted that Treasury could issue guidance to the public now following the approach it used in Notice 2007-99 with respect to the interpretation of Code section 402(l) as added by the Pension Protection Act of 2006; that is, that the agency is issuing guidance in expectation of a future legislative correction based on legislative intent. We have been encouraged by public reports that the agency is considering issuing guidance under this approach and appreciate your taking our input. We now expand upon our letter with two additional questions:

First, we ask that the IRS and Treasury confirm that the amendment to Code section 457(e)(18)(A)(ii) found in SECURE 2.0 section 603(b)(2) concerning “designated Roth contributions” was not meant to distinguish between how this limit is applied based on whether a participant contributes pre-tax or Roth contributions to a 457(b) plan. One reading that has been suggested is that designated Roth contributions could reduce the limit below the maximum amount that could be contributed if Roth contributions for a year are less than the Code section 414(v) catch-up limit. There is no evidence of this intent, but if the IRS and Treasury read this SECURE 2.0 change as such, governmental plans will need to begin work now on their communications and systems to be ready for the 2024 year.

Second, we ask that the IRS and Treasury utilize its regulatory authority to provide effective date or other relief for the requirements set forth in SECURE 2.0 section 603(b)(1). As already noted, modifying governmental plan-related communications, recordkeeping systems, and payroll systems often requires a very long lead time for implementation. In fact, some of our members have already indicated that they have significant concerns that they will not be ready for the requirement that Code section 414(v) catch-up contributions be made on a Roth basis for individuals earning in excess of \$145,000 in the prior plan year. The implementation of this new requirement is further complicated by our understanding that a significant number of governmental plans lack any form of Roth contributions in their plan, a fact which could necessitate collective bargaining, systems, and legislative changes. To ensure that the hundreds of thousands of governmental participants we have already identified do not potentially lose their ability to utilize catch-up contributions in 2024, we ask that the IRS provide the following relief:

- *Effective Date.* We respectfully ask that the IRS and Treasury use your broad authority to provide for a delayed effective date for governmental plans concerning section 603. Specifically, we seek a delay in line with the customary delayed effective dates for governmental plans. Specifically, this delay would not require governmental plans to implement section 603 until ninety (90) days after the third legislative session commencing on or after December 29, 2022. This customary delay would be appreciated by our members as they work to accommodate the bargaining, systems, and legislative changes necessitated by this legislation. If the IRS and Treasury are not able to provide this relief, we ask that the IRS establish a low or no cost closing agreement program that recognizes the good faith efforts of governmental plans to come into compliance in the same customary effective date window described above. We make such an ask because there is a significant risk that governmental plans will, whether due to state law legislative or bargaining reasons, have to retain catch-up contributions in pre-tax only form for this transition period. Such a closing agreement program would be consistent with the flexible treatment afforded to governmental plans as part of the definition of “governmental plans” in the ANPRM process that has extended for over a decade and was also generally the case with initial governmental plan determination letter plan applications in the IRS’ prior determination letter “cycle” program.
- *Calculation of \$145,000 Limit.* We ask that the IRS and Treasury provide guidance to the effect that the IRS will honor reasonable, good faith compliance with any definition of compensation that falls within a permissible definition in Code section 415(c)(3) in determining whether a participant is subject to mandatory Roth catch-up contributions because of having prior compensation in excess of the \$145,000 threshold in effect for 2024.

II. Required Minimum Distributions

SECURE 2.0 section 107 increased the required beginning date to age 73 for a person who attains age 72 after December 31, 2022 and age 73 before January 1, 2033. NAGDCA greatly appreciates the guidance and relief provided in Notice 2023-23. However, most recordkeeping systems continue to have delays in implementing the increase to an age 73 required beginning date, which triggers changes in rollover eligibility, rollover notices, and distribution processing. Given these delays, we ask that the IRS and Treasury provide guidance allowing governmental plans to notify participants by September 30, 2023 of their right to rollover funds prematurely distributed based on an age 72 instead of age 73 requiring beginning date.

III. Long-Term, Part-Time Workers

Section 112 of SECURE 1.0 (the *Setting Every Community Up for Retirement Enhancement Act of 2019*, H.R. 1994, 116th Cong.) established new rules for plan participation by long-term, part-time workers. Section 125 of SECURE 2.0 built on those rules by reducing by one year the required years of service before long-term, part-time workers are eligible to contribute to a plan, effective beginning after December 31, 2024. Many governmental defined contribution plans provide that the individuals eligible to participate in a governmental 401(k) or 403(b) must be eligible for a governmental defined benefit plan to be eligible for the defined contribution plan.

Some governmental defined benefit and defined contribution plans carve out part-time and other classifications of workers from eligibility.

Based on this history, we ask the IRS confirm through guidance that the addition of long-term, part-time employee eligibility rules in SECURE 1.0 and SECURE 2.0 does not require a governmental 401(k) or 403(b) plan to make new classes of employees eligible for their plans. Any other approach would be impractical for a 2024 implementation and would, at a minimum, require extensive transition relief for governmental plans. Further, adopting an approach other than allowing classification carve outs would run directly contrary to the fact that governmental plans are not subject to Code section 410.

IV. ERISA Incorporation

A number of the SECURE 2.0 provisions that amend the Code include cross references to various provisions of ERISA. As IRS and Treasury consider these provisions, we respectfully request that any guidance make it clear that governmental plans are not required to comply with ERISA, even if some ERISA provisions are incorporated into the Code by reference. For example, SECURE 2.0 section 127 amends Code section 402A to permit employers to offer “pension-linked emergency savings accounts” (PLESAs) provided the accounts are “established pursuant to section 801” of ERISA. Congress presumably intended to permit governmental plans to establish PLESAs given the explicit references to 457(b) plans in the amendments to Code section 402A. However, it would be helpful if IRS and Treasury could confirm that 457(b) plans can establish PLESAs that are consistent with ERISA section 801 without actually being subject to ERISA.

* * *

Thank you for your time and consideration. We would be happy to meet with you to discuss this matter further if it would be helpful. Please call David Levine at 202-861-5436, Brigen Winters at 202-861-6618, or the undersigned at 859-469-5789 if you have any questions.

Sincerely,



Matt Petersen
Executive Director