



201 East Main Street, Suite 810, Lexington, KY 40507
(859) 514-9161 • Fax: (859) 514-9188 • www.nagdca.org

October 24, 2023

By Electronic Mail

Ms. Rachel Levy
Associate Chief Counsel
Employee Benefits, Exempt Organizations, and Employment Taxes
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

Ms. Carol Weiser
Benefits Tax Counsel
Office of Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Ms. Helen Morrison
Deputy Benefits Tax Counsel
Office of Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: Notice 2023-62, Guidance on Section 603 of the SECURE 2.0 Act with Respect to Catch-Up Contributions and Additional SECURE Compliance Matters

Dear Madams:

The National Association of Government Defined Contribution Administrators (NAGDCA) writes to provide comments in response to Notice 2023-62, Guidance on Section 603 of the SECURE 2.0 Act with Respect to Catch-Up Contributions. (The *SECURE 2.0 Act of 2022* (SECURE 2.0, Div. T, H.R. 2617, 117th Cong.)) We also write with respect to additional requests for guidance relating to SECURE 1.0 (the *Setting Every Community Up for Retirement Enhancement Act of 2019*, H.R. 1994, 116th Cong.) and SECURE 2.0. We appreciate the help that the IRS and Treasury has historically provided in clarifying and enhancing the practicality of implementing retirement-related legislation, and the institution of a two-year transition delay for section 603 is no exception. We hope our comments below are of value to you and we would welcome the opportunity to meet with you at your convenience to discuss them.

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.

As mentioned above, we gratefully express our thanks on behalf of our government members for the delay to section 603 provided in Notice 2023-62. Governmental plans often need additional time to implement new laws and regulations due to complexities in local law enabling requirements, payroll systems, and administration that most private sector employers do not face. We appreciate your efforts in crafting SECURE 2.0 guidance to date and provide the following feedback in response to your request for comments.

I. Calculation of the \$145,000 Limit

We seek guidance on three issues relating to the compensation threshold for application of section 603.

a. Defining "compensation"

We ask that the IRS and Treasury provide guidance to the effect that the IRS will treat any Code section 415(c)(3)-compliant definition of compensation as a permissible definition to use 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. This approach is consistent with how the IRS and Treasury have historically allowed for a number of permissible definitions of compensation under the general language of Code section 415(c)(3). Further, adopting this position would help avoid the need for complex payroll system changes and technology interface updates at employers and recordkeepers, and reduce the likelihood that a plan failure will result from the need for a plan to use multiple definitions of compensation.

b. Multiple employer plans

Consistent with long-standing practice, many governmental retirement systems that cover the employees of multiple governmental operational units within a state operate in a manner consistent with ERISA-covered governmental plans. We appreciate the statements in Notice 2023-62 regarding the testing of the \$145,000 compensation threshold for Roth catch-up contributions on a participating employer by participating employer basis. We request that future guidance specifically indicate that this approach can be applied to governmental plans with more than one participating employer.

c. FICA wages

Notice 2023-62 mentioned that the agency intends to issue clarifying guidance that Code section 414(v)(7)(A) does not apply to workers who do not have FICA wages, as can occur with

participants in some state and local government plans. We therefore understand that the agency's forthcoming guidance will formally exclude those Social Security-exempt workers from compliance with section 603. We support this exclusion with the request that due consideration be made toward simplifying administration for plans that may have both participants who have FICA wages and participants who do not. We furthermore request adequate flexibility for plans with this mixed population to determine for themselves the application of section 603, the calculation of the \$145,000 limit and the participation in Roth catch-ups (such as by using a Code section 415(c) definition of compensation in determining whether or not non-FICA covered participants will be required to make Roth catchups).

II. Long-Term, Part-Time Workers

Section 112 of SECURE 1.0 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) plans 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 Internal Revenue Code (the "Code") section 410.

III. Emergency Savings Accounts

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 clearly 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 governmental plans can establish PLESAs that are consistent with ERISA section 801 without actually being subject to ERISA. Further, as you are aware, most governmental plans are not subject to ERISA and any PLESA-related guidance should clearly state that governmental plans will not become subject to ERISA because of their adoption of a PLESA.

Lastly, our members would appreciate guidance specifying what types of investments are satisfactory for PLESAs. SECURE 2.0 section 127 added Section 801(c)(1)(a)(iii) of ERISA to require that the short-term savings account "be, as selected by the plan sponsor, held as cash, in an interest-bearing deposit account, or in an investment product" that is "offered by a State- or federally-regulated financial institution" that is designed to maintain a value "equal to the

amount invested” and to “preserve principal and provide a reasonable rate of return.” Many NAGDCA members offer custom institutional short-term investment options. For example, NAGDCA members may offer a custom stable value fund that includes stable value investments offered by State- or federally-regulated financial institutions. It would be helpful if IRS and Treasury could confirm that governmental plans can establish PLESAs using their pre-existing custom short-term investment options and specifically their custom stable value funds.

* * *

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,

A handwritten signature in black ink, appearing to read "Matt Petersen", with a stylized flourish at the end.

Matt Petersen
Executive Director