NAGDCA

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January 10, 2024

Drew Crouch, Senior Counsel, Tax & ERISA
Jamie Cummins, Senior Counsel, Tax
Senate Finance Committee
219 Dirksen Senate Office Building
Washington, D.C. 20510

Richard Phillips, Pensions Policy Director
Sarah Mysiewicz, Senior Counsel, Pensions
Michael Sinacore, Pensions Policy Director
Senate Health, Education, Labor, and Pensions
428 Dirksen Senate Office Building
Washington, D.C. 20510

Payson Peabody, Tax Counsel
Kara Getz, Chief Counsel
House Ways and Means Committee
1139 Longworth House Office Building
Washington, D.C. 20515

Jeanne Wilson, Counsel
Kevin McDermott, Labor Policy Director
House Education and Labor Committee
2176 Rayburn House Office Building
Washington, D.C. 20515

Re: SECURE 2.0 Technical Corrections Discussion Draft

Dear Pensions Staff:

The National Association of Government Defined Contribution Administrators (NAGDCA) writes in response to your December 6 release of a discussion draft of technical corrections legislation to the *SECURE 2.0 Act of 2022* ("SECURE 2.0", Div. T, P.L. 117-328). We appreciate your knowledge and responsiveness during the drafting of SECURE 2.0 and your consideration of 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 seek clarification on the applicability of SECURE 2.0 Section 127 to governmental plans. 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 to include clarifying language in the statute to confirm that governmental plans can establish PLESAs that are consistent with ERISA section 801 without actually being subject to ERISA.

We furthermore kindly request exemption from SECURE 2.0 section 125 for the reasons laid out in the attached letter to the IRS dated January 10, 2024. If governmental plans cannot be exempted from this provision, then we request a delayed implementation date. This provision concerning long-term, part-time employees has an effective date of December 31, 2024. Governmental plans encounter complexities in local law enabling requirements, payroll systems, and administration that most private sector employers do not face. These realities hamper our plans' ability to respond to changes as quickly as their private sector counterparts, hence our request for a further delay to allow our members adequate time to implement this provision.

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

Enclosures:

Letters to IRS dated October 24, 2023 and January 10, 2024

NAGDCA

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October 24, 2023

By Electronic Mail

Ms. Rachel Levy
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Ms. Carol Weiser
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Ms. Helen Morrison
Deputy Benefits Tax Counsel
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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,

Matt Petersen
Executive Director

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January 10, 2024

By Electronic Mail

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Re: Proposed Rule: Long-Term, Part-Time Employee Rules for Cash or Deferred Arrangements Under Section 401(k) (REG-104194-23)

Dear Madams:

The National Association of Government Defined Contribution Administrators (NAGDCA) writes to provide comments in response to the Notice of Proposed Rulemaking: Long-Term, Part-Time Employee Rules for Cash or Deferred Arrangements Under Section 401(k) (REG-104194-23). We appreciate the help that the IRS and Treasury has historically provided in clarifying and enhancing the practicality of implementing retirement-related legislation.

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.

The *SECURE 2.0 Act of 2022* (SECURE 2.0, Div. T, H.R. 2617, 117th Cong.) built upon the retirement plan rules for long-term, part-time workers laid out in SECURE 1.0 (the *Setting Every Community Up for Retirement Enhancement Act of 2019*, H.R. 1994, 116th Cong.). Section 112 of SECURE 1.0 established new rules for plan participation by long-term, part-time workers. Section 125 of SECURE 2.0 modified 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) plan must first be eligible for a governmental defined benefit plan. Some governmental defined benefit and defined contribution plans carve out part-time and other classifications of workers from eligibility. Historically, this has been appropriate as the requirements of Code section 410(a) that prohibit the exclusion of part-time workers once they reach 1,000 hours of service do not apply to governmental plans. Therefore, we strongly assert that rules that are intended to impose further restrictions on participation by part-time workers are likewise not appropriate for governmental plans that never had any such restrictions.

In a comment letter we submitted to you in October 2023, we requested clarification 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 a new class of employees eligible for their plans, effectively exempting governmental plans from these new requirements. We greatly appreciate you considering this issue further and for soliciting additional comments before making a final decision that is reflected in the final regulations. However, we reiterate our prior position that these rules should not apply to governmental plans, consistent with the treatment under Code section 410(a). Specifically, our request for an exemption is based on the following strong factors:

- Consistent Code Treatment. Consistent treatment with the application of Code sections 410(a) and 411, and other qualified plan Code protections that are not applicable to governmental plans (such as qualified joint and survivor annuity protections). Moreover, governmental plans have long benefited from special relaxed vesting provisions (with no need to count hours of service), so to extend the special vesting rules to LTPT participants (and now the need to track hours) would be a significant sea-change for these plans.
- Grandfathered Plans. Consistent with the grandfathered treatment of governmental 401(k) plans, as only 401(k) plans established by governmental entities before May 6, 1986 exist, so no new requirements should be imposed on these grandfathered plans.
- Relief Not Applicable. Lack of relief for governmental plans. The nondiscrimination and top-heavy relief provided to nongovernmental employers that are subject to these provisions is irrelevant to governmental plans and there is no benefit or other relief for governmental employers that adopt these provisions.
- Policy Justifications. Strong policy reasons for not mandating particular coverage for governmental plans, whose benefits are often the subject of collective bargaining

agreements and require legislative amendments. Moreover, the burden placed on governmental agencies to use valuable federal, state, and local resources to comply with rules that are completely new and not merely a modification of existing rules. For example, there was no prior requirement of 1,000 hours for enrollment or vesting -- in fact, tracking hours may be a whole new concept for many governmental plan sponsors. Changes to governmental plans are also more difficult because the plan documents are generally part of legislative text and require actions by state legislatures (and governors) that are in session only periodically.

- Impacts Non-401(k)/403(b) Plans. Negative impact on other types of governmental plans. The interplay of these requirements with eligibility and other rules applicable to other types of qualified governmental plans (particularly defined benefit plans) will result in potential real costs for sponsors if these requirements are mandated.

These arguments justify special treatment for governmental plans. But if a full exemption is not granted, we respectfully request a further delay to the effective date to allow our members adequate time to implement this guidance. Governmental plans encounter complexities in local law enabling requirements, payroll systems, and administration that most private sector employers do not face that justifies such a delay. At a minimum, the effective date of these rules should be delayed two additional years beyond any transition period provided to the private sector, as is typical with amendments for other law changes.

Lastly, if the effective date of this provision cannot be changed, we seek broad transition relief similar to that granted for Roth catch-up contributions, and absent that, at the very minimum, a reasonable, good faith compliance standard (similar to what is provided for Code section 401(a)(9) compliance) for this provision due to the complexities and uniqueness of governmental plans.

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