INVESTMENT COMPANY INSTITUTE

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Filed Electronically

Lily Batchelder
Assistant Secretary for Tax Policy
US Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

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

Re: Priority Guidance Plan Recommendations on Retirement Security Issues

Dear Ms. Batchelder and Mr. Paul:

The Investment Company Institute (ICI)[1] is pleased to submit recommendations regarding retirement security issues for projects to be included on the 2022-2023 Priority Guidance Plan. A separate ICI submission describes our recommendations regarding regulated investment companies.

This letter makes recommendations for guidance on the following topics:

- Required distributions from retirement plans to designated beneficiaries;
- Qualified birth or adoption distributions;
- The unified plan rule for multiple employer plans;
- Updated model forms and language for IRA-based plans;
- Permanent remote notarization relief;
- The notice requirement under Internal Revenue Code section 411(a)(11);

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of $29.7 trillion in the United States, serving more than 100 million investors, and an additional $9.3 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

- Improvements to the IRS correction program for retirement plans; and
- Application of the one-per-year limit on IRA rollovers.

1. 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]

1.1 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 individual retirement accounts (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" (i.e., 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.

The IRS and Treasury proposed regulations to implement the statutory changes on February 24, 2022, and ICI filed a comment letter responding to the proposal on May 25, 2022.[3] We reiterate here our comments and recommendations on the proposed regulations as described in that letter, which include the following:

- *Applicability Dates and Plan Amendment Deadlines*. Provide relief as soon as possible by delaying the applicability date of the amended regulations and the deadline for plan amendments.
- *10-Year Rule for Designated Beneficiaries - Continued Application of "At Least as Rapidly" Rule*. Reverse the proposed interpretation that would apply the "at least as

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[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.

[3] See Letter to IRS from Elena Barone Chism, dated May 25, 2022, available at https://www.ici.org/system/files/2022-05/34160a.pdf.

rapidly rule" simultaneous with the new 10-year rule for designated beneficiaries when the employee dies after the required beginning date.

- *Application of New 10-Year Rule Upon Death of Oldest Beneficiary*. Reconsider the "death of oldest beneficiary" trigger for application of the 10-year rule, which is proposed to apply in certain situations involving multiple beneficiaries.
- *Eligible Designated Beneficiary Status - Documentation of Disability or Chronic Illness*. Modify the proposal to allow plans and IRA providers to rely on a beneficiary's representation that he or she satisfies the definition of disabled or chronically ill.
- *Eligible Designated Beneficiaries Who Are Older Than Account Owner*. Eliminate the proposed rule that would require full distribution to a beneficiary who is older than the account owner when the beneficiary's remaining life expectancy is less than or equal to one.
- *IRAs – Time Limit for Spousal Election and Recapture of Hypothetical RMDs*. Eliminate the proposed rule that would deny eligible rollover treatment for certain distributions that hypothetically would have been treated as RMDs, when the spouse elects to roll over amounts after missing the deadline for electing to treat the IRA as the spouse's own.
- *Request for Comments on 403(b) Plans*. Structural and administrative differences between 403(b) and tax-qualified 401(a) plans would make application of the tax-qualified plan RMD rules unworkable.

Our May 25, 2022 comment letter explains these recommendations in greater detail.

1.2 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.
- 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.[4] 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.

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

We request that Treasury and the IRS finalize, with certain modifications, the proposed regulations published on March 28, 2022, relating to the "unified plan rule" for multiple employer plans (MEPs). The unified plan rule provides that the failure by one employer maintaining a MEP, or by the plan itself, to satisfy an applicable tax-qualification requirement will result in the disqualification of the MEP for all participating employers.[5] In connection with the creation of pooled employer plans (PEPs), a new type of MEP available to 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 March 2022 proposed regulations would implement the SECURE Act changes to the unified plan rule.

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[4] See 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.

[5] Code section 413(c) contains the unified plan rule for MEPs.

We reiterate our comments on the proposal, submitted in a letter dated May 27, 2022.[6] Our comment letter expresses general support for the proposed regulations and makes recommendations on the following issues:

- *Inclusion of Procedures in Plan Terms*. The letter recommends eliminating the proposed requirement for the plan document to include detailed procedures for addressing a participating employer failure.
- *Time Limit for Completing Spinoff*. The letter recommends clarification that the 180-day safe harbor period for completing a spinoff would not include periods during which the plan administrator waits for information or action from the unresponsive participating employer.
- *Option for Spinoff Initiated by Plan Administrator*. The letter recommends providing an option for the plan administrator to voluntarily initiate a spinoff of the assets attributable to the employees of the unresponsive participating employer to a separate single-employer plan, followed by a termination and distribution of the assets of such plan.
- *Model Plan Language*. The letter recommends providing model plan language as soon as possible to allow plans adequate time to incorporate the model language.
- *Crediting Service for Employment with Other Participating Employers*. The letter recommends reconsidering, in a separate rulemaking, the preamble's presumption that employers participating in a PEP would be required to credit an employee with service for periods the employee was employed by another employer participating in the PEP, for purposes of plan eligibility and vesting.

These recommendations, detailed in our May 27, 2022 comment letter, will enhance the ability of MEP and PEP administrators to address compliance issues more effectively.

1.4 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, it is crucial to update the Listing of Required Modifications (LRMs) for prototype IRA documents. Many of the LRMs have not been updated for several years.

In Announcement 2022-6, the IRS announced a temporary suspension of the prototype IRA opinion letter program, intended to allow the IRS to update the program, issue revised model forms and LRMs, and issue related guidance to reflect recent legislation, including the SECURE Act. The Announcement provides that, until the program is re-opened, adopters of prototype IRAs, SEPs, and SIMPLE IRA plans may rely on a previously received favorable opinion letter;

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[6] See Letter to IRS from Elena Barone Chism, dated May 27, 2022, available at https://www.ici.org/system/files/2022-05/34164a.pdf.

and that sponsors of prototype IRAs, SEPs, and SIMPLE IRA plans may amend their documents to reflect recent legislation without affecting that reliance. We note, however, that the Announcement does not include any extension of the current deadline (December 31, 2022) for amending IRA documents to reflect SECURE Act changes. We urge the IRS to publish the updated model forms and LRMs as soon as possible or provide an extension of the SECURE Act amendment deadline.

2. Other Guidance for 2022-2023 Priority Guidance Plan

ICI requests that Treasury and the IRS include the following additional retirement security matters on the 2022-2023 Priority Guidance Plan. We have recommended these items in previous letters.

2.1 Permanence of Remote Notarization Relief

We reiterate our prior comments submitted in a joint letter (dated September 30, 2021) responding to Notice 2021-40,[7] requesting that Treasury and IRS make permanent the 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[8] and extended by Notices 2021-03, 2021-40 and 2022-27, is set to expire on December 31, 2022.

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.

2.2 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

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[7] Letter to IRS re: Permanent Relief for Remote Witnessing Procedures, dated September 30, 2021, from ICI and 15 other trade organizations, available at https://www.ici.org/system/files/2021-10/33806a.pdf

[8] 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.

distribution from a DC plan.[9] We strongly recommend that you finalize the requirements as proposed. As we stated in our comment letter,[10] 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.

2.3 Modifications to EPCRS

The 2021-2022 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 2021-30, included helpful changes to expand the self-correction program, including an extended correction period. We urge the IRS to continue improving EPCRS, including by 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 non-spouse 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 further extend the special safe harbor correction method described in Appendix A, section .05(8) of Revenue Procedure 2021-30, relating to employee elective deferral failures, which will expire on December 31, 2023. 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

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

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

requirements and corrective allocation of missed matching contributions). This correction method is 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.

2.4 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*,[11] 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,[12] where assets in a traditional IRA are paid to a state unclaimed

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

[12] 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).

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 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
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cc: Carol Weiser, Benefits Tax Counsel