The COMMITTEE of ANNUITY INSURERS

1455 Pennsylvania Avenue NW, Suite 1200, Washington, DC 20004
(202) 347-2230 | www.annuity-insurers.org

July 21, 2023

DELIVERED ELECTRONICALLY

Carol Weiser
Benefits Tax Counsel
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Rachel Levy
Associate Chief Counsel, EEE
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Additional Request for Guidance Regarding SECURE 2.0

Dear Ms. Weiser and Ms. Levy:

We are writing on behalf of the Committee of Annuity Insurers (the "Committee")[1] to request guidance under the SECURE 2.0 Act of 2022 ("SECURE 2.0").[2] We also wrote to you on January 31, 2023 (letter linked here) to request guidance and relief on certain issues under SECURE 2.0 that we believed warranted immediate attention at that time. This letter follows up our January letter to focus on other issues under SECURE 2.0. As discussed below, the Committee respectfully requests guidance on the following provisions of SECURE 2.0:

Section 201: Removing barriers to certain types of annuity benefits under the required minimum distribution ("RMD") rules;

Section 202: Requiring modifications to certain rules in the RMD regulations for qualifying longevity annuity contracts ("QLACs");

Section 323: Clarifying certain aspects of the substantially equal periodic payment ("SEPP") rules;

Section 327: Permitting surviving spouses to use the Uniform Lifetime Table ("ULT") when calculating post-death RMDs;

[1] The Committee is a coalition of life insurance companies formed in 1981 to participate in the development of federal policy with respect to annuities. The Committee's 32 member companies represent approximately 80% of the annuity business in the U.S. and are among the largest providers of annuities in the qualified plan and IRA markets. A list of the Committee's member companies is attached.

[2] SECURE 2.0 is Division T of the Consolidated Appropriations Act, 2023, Pub. L. No. 117-328.

Section 305: Expanding the Employee Plans Compliance Resolution System ("EPCRS"), including to cover inadvertent IRA compliance issues;

Section 601: Permitting SEP and SIMPLE IRAs to be designated as Roth IRAs; and

Section 603: Requiring catch-up contributions to certain employer plans by certain employees to be made as Roth contributions.

In addition to requesting the substantive guidance on these topics described below, the Committee asks the Treasury Department and Internal Revenue Service ("IRS") to keep in mind that retirement plan administrators and recordkeepers, as well as issuers of IRAs and other annuities, will need time to absorb and implement any new substantive guidance under SECURE 2.0. Thus, we request that if any new guidance requires them to modify their documents, systems, or practices, the guidance will include prospective effective dates that give enough time to do so, without penalty for good-faith efforts to comply in the meantime. We further request that, in developing guidance on these issues, the Treasury Department and IRS keep in mind that the RMD rules for 403(b) plans currently share certain significant similarities with the RMD rules for IRAs, and therefore guidance regarding how the various provisions of SECURE 2.0 apply to 403(b) plans should continue to reflect those similarities.

(1) Section 201: Removing RMD Barriers for Certain Types of Annuity Benefits

Background:

The regulations under Code section 401(a)(9) provide that annuity payments must be "nonincreasing" unless an exception applies.[3] The regulations currently provide exceptions for certain types of increasing payments under commercial annuities, but only if the payout satisfies a test commonly known as the "minimum income threshold test," or "MITT."[4] If the MITT is not satisfied, the regulations currently prohibit the increase in payments. In contrast, new section 401(a)(9)(J) of the Code, as added by section 201 of SECURE 2.0, provides that nothing in Code section 401 shall prohibit a commercial annuity issued in connection with any eligible retirement plan within the meaning of Code section 402(c)(8)(B) (other than a defined benefit plan) from providing one or more of the following types of payments on or after the annuity starting date:

(1) annuity payments that increase by a "constant percentage, applied not less frequently than annually, at a rate that is less than 5 percent per year;"

(2) a lump sum payment (a) resulting generally in a partial or full commutation, determined using reasonable actuarial methods and assumptions as determined in good faith by the

---

[3] *See* Treas. Reg. § 1.401(a)(9)-6, Q&A-1(a); Prop. Treas. Reg. § 1.401(a)(9)-6(a)(1). References to "Code" sections are to sections of the Internal Revenue Code of 1986, as amended.

[4] *See* Treas. Reg. § 1.401(a)(9)-6, Q&A-14(c); Prop. Treas. Reg. § 1.401(a)(9)-6(o). In general, the MITT requires that the "total future expected payments" must exceed the "total value being annuitized," using certain assumptions the regulations prescribe. Under the existing and proposed RMD regulations, the MITT applies to annuity payments that increase (1) by a constant percentage applied not less frequently than annually, (2) as a result of dividend payments or other payments that result from actuarial gains, and (3) as a result of an acceleration of payments resulting from a shortening of the payment period or a full or partial commutation. Treas. Reg. § 1.401(a)(9)-6, Q&A-14(c)(1), (3), and (4); Prop. Treas. Reg. § 1.401(a)(9)-6(o)(3). Under the existing RMD regulations, the MITT also applies to lump sum return of premium death benefits. Treas. Reg. § 1.401(a)(9)-6, Q&A-14(c)(2).

contract issuer, or (b) a short-term advancement of annuity payments that are scheduled to be received within the ensuing 12 months;

(3) an amount that is "in the nature of a dividend or similar distribution," provided that the issuer determines such amount using reasonable actuarial methods and assumptions, as determined in good faith by the issuer, when calculating the initial payments and the issuer's experience with respect to those factors; or

(4) a lump sum return of premium death benefit.

Guidance Request:

- Conform the regulations to the statute. We request that the Treasury Department and IRS amend the RMD regulations to eliminate any requirement that the MITT must be satisfied with respect to the types of benefits listed above. This change is needed to conform the regulations to new Code section 401(a)(9)(J), which is already effective and which provides that nothing in Code section 401 shall prohibit those types of benefits.[5] Congress added this provision to the Code in order to remove "barriers" to the types of increasing payments listed therein, and the MITT is that barrier.[6] The regulations also should clarify what types of benefits, if any, remain subject to the MITT because they are not listed in Code section 401(a)(9)(J), such as payments that increase by a constant annual percentage of 5% or more.

- Dividends and similar payments. We request clarification that the reference in Code section 401(a)(9)(J)(iii) to "an amount which is in the nature of a dividend or similar distribution" includes payments under variable annuities and similar annuities that provide a full or partial pass-through of the investment performance of referenced assets or indexes. In that regard, we observe that the RMD regulations include an exception to the nonincreasing payment rule for "dividend payments or other payments that result from actuarial gains," which encompasses these types of annuities by defining "actuarial gains" by reference to the difference between actuarial assumptions and actual experience.[7] New Code section 401(a)(9)(J)(iii) uses similar language, referring to a "dividend or similar distribution" as being calculated based on differences between actuarial assumptions and actual experience.

- Combined increases. We request clarification, with examples, of situations in which more than one type of increasing payment described in Code section 401(a)(9)(J) may be provided. Although it seems clear that combining benefits in this manner is permitted, due to the statute's reference to "one or more …. types of payments" listed therein, confirmation with examples would be helpful. For example, one possible scenario involves annuity payments that increase annually by the lesser of (1) a constant percentage of less than 5 percent, and (2) actuarial gains

[5] *See* section 201(b) of SECURE 2.0 (applying the statutory change to calendar years ending after the date of enactment, meaning the MITT no longer applied to the listed benefits as of 2022).

[6] *See*, *e.g.*, STAFF OF THE J. COMM. ON TAX'N, *Description of H.R. __, The "Securing a Strong Retirement Act of 2021,"* at 58 (JCX-21-21, May 3, 2021) (describing the statutory change as addressing the fact that "in operation, [the MITT] does not permit certain guarantees in life annuities such as certain guaranteed annual increases, return of premium death benefits and period certain guarantees for participating annuities."); STAFF OF THE J. COMM. ON TAX'N, *Description of the Chairman's Mark of the "The Enhancing American Retirement Now (EARN) Act,"* at 64 (JCX-9-22, June 17, 2022) (discussing the MITT as present law before describing the statutory change).

[7] *See* Treas. Reg. § 1.401(a)(9)-6, Q&A-14(e)(2); Prop. Treas. Reg. § 1.401(a)(9)-6(o)(6)(ii).

measured annually. In this regard, we note that the RMD regulations already permit annual increases based on the lesser of a cost-of-living index and a fixed percentage.[8]

- Temporary percentage increases. We request clarification of whether Code section 401(a)(9)(J)(i), regarding annuity payments that increase by a constant percentage of less than 5% per year applied at least annually, covers situations where the fixed percentage increases stop applying after a specified period. For example, it would seem that a life annuity that provides an annual increase of 4% for the first 10 years but no percentage increase thereafter should be permitted. Such a payout would *frontload* the payment amounts relative to a payout that continues the annual percentage increases for the entire payout duration, and therefore would result in less tax deferral than the increasing payout the RMD rules already permit. These and similar scenarios involving temporary fixed percentage increases could facilitate more flexible product designs that would offer more choices for annuitants.

(2) Section 202: Modifying the QLAC Rules

Background:

Section 202 of SECURE 2.0 directs the Treasury Department to modify certain rules in the RMD regulations for QLACs. One change is to clarify that the permissibility of joint and survivor ("J&S") QLAC payments for an individual and their spouse is not affected by a divorce occurring after the QLAC is originally purchased "and before the annuity payments commence,"[9] provided that a qualified domestic relations order ("QDRO") in the case of a retirement plan, or a divorce or separation instrument in the case of an IRA, satisfies certain requirements. This change is effective retroactively to the original effective date of the QLAC rules in the RMD regulations.

Guidance Request:

- Divorce *on or after* the date annuity payments commence. We request confirmation that the permissibility of J&S benefits under a QLAC is not affected by a divorce of the joint annuitants *on or after* the date annuity payments commence. This treatment is consistent with the SECURE 2.0 provision described above, which makes this clarification with respect to divorces occurring *before* annuity payments commence. Clarifying that the same treatment applies with respect to divorces occurring on or after the commencement date would be consistent with the rule in the RMD regulations that a former spouse to whom some or all of an employee's benefit is payable pursuant to a QDRO continues to be treated as a spouse (including a surviving spouse) for purposes of Code section 401(a)(9), which was the rule on which the SECURE 2.0 provision was modeled, for plans as well as IRAs.[10] This treatment of post-commencement

---

[8] Treas. Reg. § 1.401(a)(9)-6, Q&A-14(b); Prop. Treas. Reg. § 1.401(a)(9)-6(o)(2).

[9] In our January 31 letter, the Committee requested guidance on this SECURE 2.0 provision (1) clarifying that the modified premium limits for a QLAC purchased or received in an exchange on or after December 29, 2022, apply to a QLAC that was originally issued before December 29, 2022, and amended on or after that date to reflect the modified premium limits, and (2) confirming that for purposes of the rules on divorces and J&S benefits, QLAC issuers may rely on representations from QLAC owners regarding whether the divorce documentation satisfies the applicable requirements. This letter supplements that request.

[10] Treas. Reg. § 1.401(a)(9)-8, Q&A-6(a); Prop. Treas. Reg. § 1.401(a)(9)-8(d)(1).

divorce also is implicit from the provisions in the RMD regulations under which, in the case of a J&S annuity, a designated beneficiary is determined as of the annuity starting date.[11]

The requested clarification is needed because the QLAC regulations prescribe very different rules depending upon whether the employee's beneficiary is their spouse. If they are, the contract can provide *both* a lump sum return of premium death benefit *and* a 100 percent survivor annuity.[12] If they are not, however, the contract can provide *either* a lump sum return of premium death benefit *or* a survivor annuity (but not both), and a non-spouse survivor annuity is subject to a required reduction in the annuity payments after the employee's death.[13] Thus, for example, if compliant J&S payments commence under a QLAC with a lump sum return of premium death benefit, and a divorce subsequently causes the rules for non-spouse joint annuitants to begin applying, the payout would thereafter violate the QLAC requirements. To prevent this potential adverse and unintended result, in theory the issuer could modify the contract's benefits after the divorce, but this may be difficult or impossible. In SECURE 2.0, Congress clearly sought to "facilitate joint and survivor benefits" under QLACs by eliminating uncertainty about the effect of a divorce,[14] so the right approach is to also eliminate any lingering uncertainty on this issue for divorces occurring after the payments commence.

(3) Section 323: Clarifying the SEPP Rules

Background:

Section 323 of SECURE 2.0 provides that annuity payments can be used to satisfy the exceptions to the 10% additional tax in Code sections 72(q)(2)(D) and 72(t)(2)(A)(iv) for distributions that are part of a series of substantially equal periodic payments (SEPPs) made at least annually for a permitted period (namely, the taxpayer's life or life expectancy, or the joint lives or joint life expectancy of the taxpayer and their designated beneficiary). This section of SECURE 2.0 also provides that annuity payments made for a permitted period are deemed to satisfy this "SEPP Exception" if they satisfy the RMD requirements, or would satisfy those requirements if they applied. These provisions apply to distributions commencing on or after December 29, 2022, and, according to the statute, the provision should not be construed as creating any inference regarding prior law. In addition, this section of SECURE 2.0 clarifies that the tax-free rollover, transfer, or exchange of all or part of a taxpayer's interest under an arrangement from which SEPPs are being made will not be treated as a modification of the stream of payments that triggers a recapture of the additional tax under Code section 72(q)(3) or 72(t)(4) (the "Recapture Tax"), if the combined distributions from both arrangements would continue to satisfy the SEPP Exception if they had been made from only the transferor arrangement.

Guidance Request:

- One-time switch to annuity payments. We request guidance that in cases where SEPPs are being made as withdrawals from a non-annuitized account using one of the safe harbor methods

[11] Treas. Reg. § 1.401(a)(9)-6, Q&As-2(b) and -10; Prop. Treas. Reg. § 1.401(a)(9)-6(b)(2) and (k)(1).

[12] Treas. Reg. § 1.401(a)(9)-6, Q&A-17(c)(1); Prop. Treas. Reg. § 1.401(a)(9)-6(q)(3)(i) and (v).

[13] Treas. Reg. § 1.401(a)(9)-6, Q&A-17(c)(2); Prop. Treas. Reg. § 1.401(a)(9)-6(q)(3)(ii) and (v).

[14] Caption to section 202(a)(3) of SECURE 2.0.

that apply to such accounts under the applicable IRS guidance,[15] a one-time switch to an RMD-compliant *annuity stream* over a permitted period will not be treated as a modification of the SEPPs for purposes of the Recapture Tax. Permitting a one-time switch to an RMD-compliant annuity stream would be consistent with Notice 2022-6 and related guidance, which permit a one-time change from the "fixed amortization method" or "fixed annuitization method" to the "required minimum distribution method" without triggering the Recapture Tax. Such a switch should be permitted even if the SEPP withdrawals commenced before December 29, 2022, especially considering that before SECURE 2.0 the IRS had taken the position that its safe harbor guidance on SEPPs did not apply to annuity payments.[16]

- Partial annuitization to distribute account-based SEPPs. We request guidance that an annuity may be purchased to distribute SEPPs that are calculated with respect to a non-annuitized account balance. For example, an individual should be permitted to calculate an annual SEPP amount with respect to their entire non-annuitized account balance using the fixed annuitization method or fixed amortization method in Notice 2022-6 (or successor guidance), then use part or all of the account to fund a fixed annuity payout to distribute that annual amount. In that regard:

  - Such an annuity payout could occur as a partial annuitization under an existing deferred annuity contract, or the individual could purchase a new single premium immediate annuity ("SPIA") within an existing account or outside of that account *via* a tax-free rollover, transfer, or exchange of all or a portion of their existing account balance.

  - If a SPIA is purchased in a rollover, transfer, or exchange, the transaction would be covered by the rules in section 323(a) and (b) of SECURE 2.0 (meaning no "modification" would occur for Recapture Tax purposes), provided that the combined distributions from the account and the SPIA would continue to satisfy the SEPP Exception if they had been made from only the account.[17]

  - This requirement should be satisfied if the annual payments under the SPIA equal the annual distribution amount that was originally calculated for the account using one of the fixed calculation methods in Notice 2022-6.[18] For this purpose, the SPIA payments would not

---

[15] Notice 2022-6, 2022-5 I.R.B. 460, *modifying and superseding* Rev. Rul. 2002-62, 2002-2 C.B. 710, *modifying* Q&A-12 of Notice 89-25, 1989-1 C.B. 662; Notice 2004-15, 2004-1 C.B. 526.

[16] PLR 201120011 (Feb. 11, 2011).

[17] Code sections 72(t)(4)(C) and 72(q)(3)(B), as added by SECURE 2.0, describe the situation where (1) SEPPs "are being made" from a plan or annuity contract, (2) a tax-free rollover, transfer, or exchange is made to another plan or annuity contract, and (3) the aggregate distributions from the plans or contracts continue to satisfy the SEPP requirements. The reference to SEPPs that "are being made" would seem to contemplate SEPPs commencing from the original plan or annuity contract before the tax-free rollover, transfer, or exchange occurs. If that is correct, then in the transaction described above, at least the initial SEPP distribution would need to be made from the original plan or annuity contract before a partial rollover, transfer, or exchange is made to a SPIA to continue those SEPP distributions. If the IRS addresses this SPIA situation in guidance, it would be helpful for the guidance to also address this point by clarifying whether or not at least one SEPP distribution must occur before the rollover, transfer, or exchange.

[18] We understand that a "modification" of the series of SEPPs could occur for Recapture Tax purposes if, after the SPIA is purchased to make the annual SEPP distributions, the individual withdraws additional amounts from their remaining account balance. Of course, the same would be true if no SPIA were purchased, *e.g.*, if the individual's aggregate withdrawals from the transferor and transferee arrangements exceed the amount determined under the original SEPP calculation, a modification could occur for Recapture Tax purposes. In these circumstances, for information reporting purposes the issuer of the transferor and transferee arrangements could still rely on the taxpayer's

need to be payable for the individual's entire life or life expectancy (or joint life/life expectancy), as long as (1) the payments continue at least until the Recapture Tax will no longer apply, and (2) the annual payment equals the amount determined under the fixed calculation method for the account, which *is* based on life expectancy.[19]

- The foregoing types of transactions are entirely consistent with the tax policy underlying the SEPP Exception, which is to require premature distributions to be spread out over life or life expectancy in order to preserve benefits for retirement, but to permit the payments to stop or to be modified after the individual attains age 59½ (or, if later, five years after the distributions commenced).

- Annuity payments commencing prior to the effective date. We request clarification that the treatment of annuity payments as SEPPs can apply to annuity payments that commenced prior to December 29, 2022, provided that the payments are calculated with respect to a permitted period and satisfy the RMD rules (or would satisfy those rules if they applied). This treatment is consistent with the statement in SECURE 2.0 that the changes to the SEPP rules shall not be construed as creating an inference with respect to prior law. In that regard, prior IRS guidance provided that SEPPs could be calculated "using a method that would be acceptable for purposes of calculating the minimum distribution required under section 401(a)(9)," without limiting that method to withdrawals from a non-annuitized account.[20]

(4) Section 327: Permit Surviving Spouses to Use the ULT for Post-Death RMDs

Background:

Section 327 of SECURE 2.0 makes several amendments to the RMD rules for surviving spouses to permit them to use the ULT (rather than the Single Life Table) when determining their RMDs. Under prior law, Code section 401(a)(9)(B)(iv) generally provided that in the case of a surviving spouse of an employee who died *before* their required beginning date ("RBD"): (1) "stretch" distributions to the spouse are not required to commence before the date the decedent would have attained RMD age (the "Spousal Delay Rule"), and (2) if the spouse dies before

---

representation that the distributions from either arrangement satisfy the SEPP Exception, because the issuer of one arrangement will not necessarily know what distributions, if any, are being made from the other arrangement.

[19] For example, assume that the owner of a non-qualified deferred annuity contract commenced a series of SEPPs in 2023, when the owner turned age 49. The owner used the fixed amortization method in section 3.01(b) of Notice 2022-6 to calculate an annual SEPP amount of $4,800. This calculation was based on their 12/31/22 account balance of $100,000, a Uniform Lifetime Table factor of 49.5 (the factor for age 49, the owner's age on their birthday in the year the SEPPs started), and an interest rate of 4.2% (which is permitted under section 3.02(c) of Notice 2022-6). The owner withdrew their first SEPP amount of $4,800 from their deferred annuity contract in 2023. Later that year, they directly transfer $40,000 from their deferred annuity to a single premium immediate annuity (SPIA) in a tax-free partial exchange under section 1035. The SPIA will pay the individual $4,800 per year, starting in 2024 and continuing for a 10-year period certain that ends in 2034. During that period, the owner does not take any more withdrawals from their deferred annuity contract, but they continue receiving the annual $4,800 annuity payment from the SPIA. When those SPIA payments stop in 2034, the owner will be at least age 59½, and more than 5 years will have passed since the SEPPs first commenced in 2023. As a result, the Recapture Tax will not apply when the payments stop. Moreover, the fact that the duration of the payout under the SPIA was a period certain of 10 years and was not based on the owner's life or life expectancy does not matter, because the $4,800 annual payment was determined under Notice 2022-6 using the ULT and all of the other assumptions that the fixed amortization method requires.

[20] *See* Q&A-12 of Notice 89-25, 1989-1 C.B. 662 (prior to modification by Rev. Rul. 2002-62).

"stretch" distributions are required to commence, the spouse is treated as the employee for purposes of the post-death RMD rules (the "Spousal Proxy Rule").

SECURE 2.0 amends Code section 401(a)(9)(B)(iv) to provide that if the surviving spouse "elects the treatment in this clause," the Spousal Delay Rule and Spousal Proxy Rule will apply, and the spouse will be treated as the employee (meaning the ULT will be used) when determining the distribution period for the spouse's RMDs (the "Spousal ULT Rule"). The flush language of revised Code section 401(a)(9)(B)(iv) states that the "election" described above shall be made "at such time and in such manner" as the Secretary prescribes, shall include "timely notice to the plan administrator," and cannot be revoked without the Secretary's consent. SECURE 2.0 also directs the Secretary to amend the existing RMD regulation that dictates the distribution period for post-death RMDs in cases where the employee dies *on or after* their RBD[21] to provide that if the surviving spouse "elects treatment under section 401(a)(9)(B)(iv)," the ULT is used to calculate their RMDs as a beneficiary of the decedent. These changes to the rules apply starting in 2024.

Guidance Request:

- Re-propose the RMD regulations on these issues. As the discussion below indicates, there are a number of interpretive issues surrounding the new Spousal ULT Rule. Accordingly, we ask the Treasury Department and IRS to re-propose those parts of the RMD regulations that touch on these issues directly or indirectly, so that stakeholders will have an opportunity to comment on the government's interpretations before they are finalized in regulations. Before final regulations are published, guidance should clarify that taxpayers may rely on their own reasonable interpretations of the statute.

- Reject "all or none" interpretation. Prior to SECURE 2.0, Code section 401(a)(9)(B)(iv) did not require an election to use the Spousal Delay Rule or the Spousal Proxy Rule. As amended, that section now states that if the spouse "elects the treatment" described therein, the Spousal Delay Rule, the Spousal Proxy Rule, *and* the Spousal ULT Rule will apply. This could be read as linking these three rules together, so that either all three rules will apply or none of them will apply to any given spouse. This would be unfortunate, and we urge the Treasury Department and IRS to adopt an interpretation that instead permits the Spousal Delay Rule and Spousal Proxy Rule to continue applying as under prior law, even if a spouse does not "elect" the Spousal ULT Rule. In that regard, some plans or IRA providers may not be willing or able to offer the Spousal ULT Rule as an option. They should not be precluded from continuing to offer the Spousal Delay Rule and Spousal Proxy Rule. If plans and IRA providers must offer all three of these options or none at all, they may feel forced to offer none, which would eliminate options that surviving spouses had under prior law – a result that Congress presumably did not intend.

- Voluntary for defined contribution plans and IRAs. We ask for confirmation that a defined contribution plan or IRA issuer can decide whether or not to make the Spousal ULT Rule available. The RMD regulations are clear that a plan or IRA can limit the distribution options that it makes available, as long as the remaining options comply with the RMD rules. For example, it is our understanding that not every plan or IRA offers beneficiaries the ability to

[21] *See* Treas. Reg. § 1.401(a)(9)-5, Q&A-5(a).

"stretch" distributions after the participant's death.[22] Such plans and IRAs would have no need to incorporate the new Spousal ULT Rule into the terms of the plan or IRA. Guidance should confirm that they are not required to do so, whether for deaths occurring before the RBD or for deaths occurring on or after the RBD.

- Election and notice requirements for IRAs. We request clarification of whether and how the new "election" and "notice" requirements in Code section 401(a)(9)(B)(iv) apply to IRAs. Generally, beneficiaries have more responsibility for managing their own RMDs under an IRA than they do under an employer plan. Guidance on the new Spousal ULT Rule should reflect this fundamental difference between employer plans and IRAs. For example, it seems that a spousal beneficiary under an IRA would not necessarily need to affirmatively "elect" the Spousal ULT Rule or give "notice" to the IRA issuer of such an election.

- IRA spousal continuation rule. Guidance should address how the new Spousal ULT Rule interacts with the longstanding rule that permits surviving spouses of IRA owners to treat the IRA as their own for federal income tax purposes. In particular:

  - *Effect of Spousal Delay Rule on spousal continuation* – In the case of IRAs, guidance should address whether and how a surviving spouse's choice to use the new Spousal ULT Rule affects their ability to subsequently choose to treat the IRA as their own.

  - *Spousal ULT rule for plans is not spousal continuation for IRAs* – Guidance should clarify that section 327 of SECURE 2.0 does not treat the surviving spouse as the employee for *all* federal income tax purposes. In other words, unlike the spousal continuation rule for IRAs, the new Spousal ULT Rule does not mean that the spouse can make their own contributions, that the lifetime RMD rules of Code section 401(a)(9)(A) apply, or that the death exception to the 10% additional tax of Code section 72(t) does not apply. We understand that some taxpayers may think otherwise, perhaps because the caption to section 327 of SECURE 2.0 refers broadly to the spouse being "treated as employee."

- Deemed elections. We request guidance clarifying whether and when a surviving spouse may be *deemed* to have made the "election" described in section 327 of SECURE 2.0. Such guidance should be prospective, should address differences between employer plans and IRAs (as noted above), and should address whether and how a spouse that is deemed to make the election can revoke it.

- 403(b) plans. We request guidance clarifying that 403(b) plans may be written so that the Spousal Delay Rule, Spousal Proxy Rule, and Spousal ULT Rule (including any deemed elections thereof) will be available only to the extent provided by the terms of the 403(b)(1) annuity contract(s) and/or 403(b)(7) custodial account(s) in which the participant's benefits are invested under the plan. Such guidance would be consistent with the existing regulations

[22] *See*, *e.g.*, Prop. Treas. Reg. § 1.401(a)(9)-1(c)(2); Prop. Treas. Reg. § 1.401(a)(9)-3(c)(5)(ii); Treas. Reg. § 1.401(a)(9)-1, Q&A-3(b); Treas. Reg. § 1.401(a)(9)-3, Q&A-4(b). Likewise, for employees who die on or after their RBD, Code section 401(a)(9)(B)(i) requires distributions to be made "at least" as rapidly as they were being made before the employee died, which means a plan or IRA can require post-death distributions to be made *more* rapidly.

regarding the written plan document requirements for 403(b) plans,[23] as well as the treatment of 403(b) plans as IRAs for most RMD purposes.[24]

- Use of the ULT under the at-least-as-rapidly rule. SECURE 2.0 directs the Secretary to amend the existing RMD regulations to provide that a surviving spouse of an employee who dies on or after their RBD may use the ULT to calculate RMDs if the spouse "elects treatment under [Code] section 401(a)(9)(B)(iv)." That Code section, however, applies only to death *before* the RBD. Guidance should clarify how and when a surviving spouse is to elect the use of a rule that applies to death before the RBD if the employee actually dies on or after their RBD.

- Clarify how to apply the tables before and after the spouse's death. Regulations should clarify the following aspects of how the life expectancy tables apply under the Spousal ULT Rule:

  - *During the spouse's life* – For calendar years up to and including the year of the surviving spouse's death, we assume that the denominator in the RMD calculation would be redetermined under the ULT each year using the spouse's age as of their birthday in that year. This would be consistent with the existing RMD regulations, which permit the annual recalculation of life expectancy for surviving spouses.[25]

  - *After the spouse's death* – For calendar years after the year in which the surviving spouse dies, we assume that the denominator in the RMD calculation would continue to be based on the spouse's remaining life expectancy, but determined under the *Single Life Table* for the year after the spouse's death and reduced by one for each subsequent year.[26] We further assume that the foregoing would apply both in cases where the employee from whom the spouse inherited the benefits died before their RBD and in cases where the employee died on or after their RBD. It would be helpful if regulations would confirm or clarify these points.

  - *Clarify ULT for younger spouses* – We request that the ULT in the RMD regulations be updated to reflect ages younger than 72. Currently, the ULT in the RMD regulations starts at age 72. This made sense before SECURE 2.0, because the ULT was used to determine RMDs only for employees, not for beneficiaries, and employees are not required to commence RMDs before age 72.[27] After SECURE 2.0, however, surviving spouses can use the ULT to determine their RMDs as beneficiaries, and some of them presumably will be younger than 72. The ULT needs to reflect this. In that regard, we observe that Appendix A to Notice 2022-6 (regarding SEPPs) includes an expanded version of the ULT that starts at

---

[23] *See*, *e.g.*, Treas. Reg. § 1.403(b)-3(b)(3)(ii) (providing that a 403(b) plan "may incorporate by reference other documents, including the insurance policy or custodial account, which thereupon become part of the plan," and permitting a 403(b) plan to "allocate responsibility for performing administrative functions, including functions to comply with the requirements of section 403(b) and other tax requirements.").

[24] *See* Treas. Reg. § 1.403(b)-6(e)(2).

[25] *See* Treas. Reg. § 1.401(a)(9)-5, Q&A-5(c)(2); Prop. Treas. Reg. § 1.401(a)(9)-5(d)(3)(iv).

[26] *See* Treas. Reg. § 1.401(a)(9)-5, Q&A-5(c)(2) ("For calendar years after the calendar year of the spouse's death, the applicable distribution period is the life expectancy of the spouse using the age of the spouse as of the spouse's birthday in the calendar year of the spouse's death, reduced by one for each calendar year that has elapsed after the calendar year of the spouse's death"). *Compare* Prop. Treas. Reg. § 1.401(a)(9)-5(d)(3)(iv) (omitting the language quoted above from existing Treas. Reg. § 1.401(a)(9)-5, Q&A-5(c)(2)).

[27] The ULT in the current RMD regulations was updated after the SECURE Act changed the RMD age from 70½ to 72.

age 10. It would seem appropriate for the RMD regulations to incorporate part of that table for ages younger than 72.[28]

- Deaths before 2024. The SECURE 2.0 amendments to Code section 401(a)(9)(B)(iv) apply to "calendar years beginning after December 31, 2023." Guidance should clarify whether and how a plan or IRA could choose to make the Spousal ULT Rule available to spouses of employees who died before 2024, including with respect to surviving spouses who are currently receiving distributions based on the Single Life Table. In addition, guidance should confirm that spouses of employees who died before 2024 may continue to use the Spousal Delay Rule and Spousal Proxy Rule without the need to make any election contemplated by section 327 of SECURE 2.0.

(5) Section 305: Expand EPCRS to Cover IRAs

Background:

Section 305 of SECURE 2.0 generally provides that any "eligible inadvertent failure" to comply with the applicable rules under Code section 401(a), 403(a), 403(b), 408(p), or 408(k) may be self-corrected under EPCRS without a submission to the IRS. It also directs the Secretary to expand EPCRS to allow IRA issuers to address "eligible inadvertent failures" with respect to IRAs, including (but not limited to) (1) waivers of the excise tax on RMD failures under Code section 4974, and (2) rules permitting a non-spouse beneficiary to return distributions to an inherited IRA described in Code section 408(d)(3)(C) when, due to an inadvertent error by a service provider, the beneficiary had reason to believe that the distribution could be rolled over tax-free.[29] In Notice 2023-43,[30] the IRS provided interim guidance on certain aspects of section 305 of the SECURE 2.0 Act until the IRS updates the EPCRS procedures. The Notice, in Q&A-12, states that "[a]n IRA custodian may not correct an Eligible Inadvertent Failure under EPCRS before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act." Thus, it appears that EPCRS remains temporarily unavailable to correct eligible inadvertent errors involving IRAs.

Guidance Request:

- Self-correction of inadvertent distributions. We request clarification that the following inadvertent errors involving distributions will be eligible for self-correction under EPCRS:
  - *Mistaken IRA distribution instead of direct transfer* – An inadvertent distribution from an IRA of an amount that the owner or beneficiary requested be transferred directly to another IRA, but, due to an error by the IRA issuer or by the individual's financial adviser, was

---

[28] We also note that taxpayers could use the Joint and Last Survivor Table to re-create the ULT by looking up the employee's age and the age of a hypothetical joint annuitant who is 10 years younger. This may be too complex for many taxpayers, so updating the ULT would be preferred.

[29] In our January 31 letter, the Committee requested (1) clarification that the provision applies to inadvertent IRA failures that occurred prior to the date SECURE 2.0 was enacted, (2) confirmation that the expansion of EPCRS to permit self-correction without a submission to the IRS applies to eligible inadvertent failures affecting IRAs, and (3) clarification of what types of failures affecting IRAs, other than those listed as examples in section 305(c) of SECURE 2.0, constitute eligible inadvertent failures for which EPCRS (and potentially self-correction thereunder) is available. This letter supplements that request.

[30] 2023-24 I.R.B. 919.

inadvertently distributed to the individual or their non-qualified account. This could include:

- The erroneous distribution was made to the IRA owner but the owner is precluded from rolling it over due to the limitation in Code section 408(d)(3)(B), prohibiting more than one tax-free rollover between IRAs within a one-year period, or because the owner inadvertently failed to roll over the distribution within 60 days.

- The distribution was made to a non-spouse beneficiary, who is not allowed to roll it over. SECURE 2.0 describes such a situation where the IRA issuer's error caused the beneficiary to believe they could roll over the distribution. Self-correction should not be limited to this situation, however, and should be available regardless of the beneficiary's belief regarding the ability to roll over the distribution, as long as the IRA issuer erred in making the distribution (or the individual's financial adviser erred in requesting the distribution) in the first place.

- In these and similar situations, the owner or beneficiary should be permitted to repay the distributed amount to an IRA or inherited IRA and reverse any tax consequences associated with the inadvertent distribution.

o *Overpayments* – An inadvertent error by a plan or IRA issuer, including due to an erroneous directive by the individual's financial adviser, that results in a distribution of an amount greater than the individual requested, or an inadvertent distribution that the individual did not request, should be eligible for self-correction. For example:

- If an employee requests a distribution of $100 from a plan or IRA, but the plan or IRA issuer mistakenly distributes $1,000, the excess amount ($900) should be eligible for self-correction.

- If an individual requests a distribution from their non-qualified annuity but the issuer inadvertently makes the distribution from an IRA annuity that the individual also owns, the error should be eligible for self-correction.

In these and similar situations, the individual should be permitted to repay the erroneous distribution to the plan or IRA from which it was distributed, or transfer the amount to an IRA or, if applicable, an inherited IRA. This is particularly important if the individual is precluded from rolling over the erroneous distribution for reasons similar to those described above. Self-correction of these types of errors should have the effect of reversing their tax consequences, and if the correction is made before information returns (such as Forms 1099-R and 5498) are due for the year in which the error occurred, the error should be ignored for purposes of such reporting.

o *Invalid rollover distributions* – A distribution that a plan inadvertently treated as an eligible rollover distribution ("ERD") when the distribution was not, in fact, an ERD, should be eligible for self-correction. This could arise, for example, where the participant receives a distribution prior to taking an RMD for the year, and the plan inadvertently treats it as an ERD.

- Self-correction of inadvertent RMD failures. We request clarification, with examples, of circumstances in which inadvertent RMD failures can be self-corrected and the IRS will

automatically waive the related excise tax under Code section 4974(d) (for instance, where reasonable steps are being taken to remedy an RMD failure that is due to an error on the part of an IRA trustee, custodian, or issuer).[31]

- Inadvertent failures to timely endorse a distributed annuity. We request clarification that EPCRS will apply where (1) an annuity contract held in a qualified retirement plan or individual retirement account is transferred to the plan participant, IRA owner, or beneficiary, as applicable; (2) the transfer is intended to qualify as a tax-free rollover or transfer to an individual retirement annuity; (3) the annuity contract is treated by the transferee and issuer as an IRA from the time of the transfer; and (4) the issuer inadvertently fails to provide the transferee with an IRA endorsement for the contract and/or a disclosure statement in connection with the transfer.

- Self-correction of inadvertent errors involving IRA types. We request clarification that self-correction is available to address errors where the wrong type of IRA was established. For example, if an individual properly completes paperwork to establish a traditional individual retirement annuity, but the issuer inadvertently issues the contract with a Roth IRA endorsement, the error should be eligible for self-correction by replacing the erroneous endorsement with the correct endorsement. This type of situation is similar to inadvertent failures to satisfy the 60-day deadline for completing indirect rollovers, where IRS guidance automatically waives the error upon the taxpayer's self-certification that (1) the error was committed by the financial institution receiving the contribution, (2) the distribution was deposited into and remained in an account that the taxpayer mistakenly thought was an eligible retirement plan, or (3) another specified circumstance caused the error.[32]

- Self-correction of inadvertent titling errors for inherited IRAs. We request clarification permitting the self-correction of inadvertent titling errors for inherited IRAs. IRS guidance generally provides that if an inherited IRA within the meaning of Code section 408(d)(3)(C)(ii) is issued to a non-spouse beneficiary in a direct rollover or direct transfer, the inherited IRA must be established and titled "in a manner that identifies it as an IRA with respect to a deceased individual and also identifies the deceased individual and the beneficiary."[33] In some cases, an IRA issuer may inadvertently fail to title an inherited IRA in this manner. Such errors should be eligible for self-correction, provided that the IRA issuer and beneficiary treated the IRA as an inherited IRA at all times, *e.g.*, the beneficiary did not make any of their own contributions to the IRA.

---

[31] *Compare*, *e.g.*, section 3.03 of Rev. Proc. 2003-16, 2003-1 C.B. 359, 360 (providing an automatic waiver of the 60-day rollover requirement under Code sections 402(c)(3)(B), 403(b)(8)(B), and 408(d)(3)(I) in certain circumstances where a rollover is not made timely due to an error on the part of a financial institution).

[32] *See* Rev. Proc. 2020-46, 2020-45 I.R.B. 995 (modifying and updating Rev. Proc. 2016-47, 2016-37 I.R.B. 346).

[33] *See*, *e.g.*, Notice 2007-7, 2007-1 C.B. 395, Q&A-13 (addressing direct trustee-to-trustee transfers from qualified plans to inherited IRAs); PLR 202140011 (July 12, 2021) (suggesting that a similar titling convention applies in the case of a trustee-to-trustee transfer from an IRA to an inherited IRA); Publication 590-B, *Distributions from Individual Retirement Arrangements (IRAs)*, pg. 6 (April 4, 2023) (describing the rules for inherited IRAs and stating that a trustee-to-trustee transfer is permitted "as long as the IRA into which amounts are being moved is set up and maintained in the name of the deceased IRA owner for the benefit of [the] beneficiary.")

- User fee. We request clarification that the user fee for a Voluntary Compliance Program submission under EPCRS that varies with the amount of assets of a "plan"[34] applies in a submission involving IRAs by treating each type of IRA (traditional or Roth) as a "plan," rather than treating each individual traditional IRA or Roth IRA account or annuity contract as a separate plan.

(6) Section 601: Roth SEP and SIMPLE IRAs

Background:

Section 601 of SECURE 2.0 provides that, starting in 2023, SEP and SIMPLE IRAs may be designated as Roth IRAs.[35]

Guidance Request:

- Forms 1099-R and 5498. We request guidance updating Form 5498 (*IRA Contribution Information*), Form 8606 (*Nondeductible IRAs*), Form 1099-R (*Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc*), and the related instructions as necessary to reflect the amount and treatment of contributions to and distributions from SEP and SIMPLE IRAs that are designated as Roth IRAs.

(7) Section 603: Roth Requirements for Certain Catch-Up Contributions

Background:

Section 603 of SECURE 2.0 generally requires that, starting in 2024, a 401(k), 403(b), or governmental 457(b) plan that permits participants to make catch-up contributions must require such contributions to be made as designated Roth contributions, if the participant's wages exceed $145,000.[36] It has come to our attention that unless transition relief is granted as soon as possible, this provision of SECURE 2.0 will cause many retirement plan participants to lose the ability to make catch-up contributions at the end of this year. This is because a large number of plans and employers will not be able to comply with the new requirement by the 2024 effective date. Thus, unless the requirement is delayed very quickly, *i.e.*, this summer, for many plans their only means of compliance will be to eliminate all catch-up contributions for 2024. If a delay is not announced until, for example, the fourth quarter, it will be too late to prevent this adverse result, since compliance systems need to be designed well before the effective date.

Guidance Request:

[34] *See* section 1.01 of Rev. Proc. 2021-30, 2021-31 I.R.B. 172, 219 (referring to the user fees set forth in Appendix A of Rev. Proc. 2021-4 (and its annual successors)).

[35] In our January 31 letter, the Committee requested guidance related to this provision of SECURE 2.0 (1) clarifying the optional nature of this Roth option, (2) clarifying whether contributions to a SIMPLE or SEP IRA must be coordinated with the contribution limit for Roth IRAs, (3) updating the IRS model forms for SEP and SIMPLE IRA plans, and (4) providing model language in the form of listings of required modifications for IRA annuity and account governing instruments. This letter supplements that request.

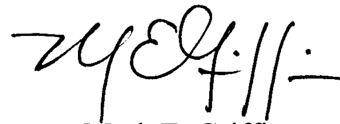
[36] In our January 31 letter, the Committee requested clarification of certain technical issues relating to section 603 of SECURE 2.0. This letter supplements that request.

- Announce a 2-year delay. We urge the Treasury Department and IRS to issue guidance as soon as possible stating that they will not seek taxes, interest, penalties, or any other sanctions from any party by reason of noncompliance with section 603 of SECURE 2.0 prior to January 1, 2026. The Treasury Department and IRS have issued similar guidance in analogous situations in the past.[37] We appreciate that such administrative relief with respect to a statutory effective date should be provided only in extraordinary circumstances, but this is clearly one of those circumstances. Timely legislation to delay the effective date may be difficult to enact, so a decision by the Treasury Department and IRS not to delay the effective date would cause a vast number of participants to lose the ability to make catch-up contributions altogether.

* * * * *

The Committee appreciates your consideration of this request for guidance. If you would find it helpful to discuss any of the issues described in this letter, the Committee's January 31 letter, or any other issues relating to SECURE 2.0, we would be pleased to schedule a call with you and your colleagues. You can reach either of us at 202-347-2230 or the email addresses listed below.

Sincerely,



Bryan W. Keene
bwkeene@davis-harman.com

Mark E. Griffin
megriffin@davis-harman.com

Counsel to the Committee of Annuity Insurers
www.annuity-insurers.org

Attachment (list of member companies)

cc: Laura Warshawsky (IRS)
Brandon Ford (IRS)

---

[37] *See*, *e.g.*, Notice 2023-10, 2023-3 I.R.B. 403 (delaying the effective date of American Rescue Plan Act changes to the reporting rules applicable to certain payments in settlement of third-party network transactions); 79 Fed. Reg. 8544, 8574 (Feb. 12, 2014) (after issuing Notice 2013-45 to delay for one year the tax penalties imposed by the Affordable Care Act's employer mandate, announcing an additional one-year delay for certain employers and in doing so citing the challenge of getting employers who did not currently offer a particular benefit – *i.e.*, employee health insurance – to offer such a benefit (which, we observe, is very similar to SECURE 2.0 forcing employers to adopt Roth catch-up contribution capabilities for the first time)); Notice 2013-14, 2013-13 I.R.B. 712 (extending the statutory deadline for submitting a pre-screening notice to claim the Work Opportunity Tax Credit); Notice 2011-69, 2011-39 I.R.B. 445 (postponing the application of reinstated excise taxes on air transportation and aviation fuels).

The COMMITTEE of ANNUITY INSURERS

Allianz Life Insurance Company, Minneapolis, MN
Ameriprise Financial, Minneapolis, MN
Athene USA, Des Moines, IA
Brighthouse Financial, Inc., Charlotte, NC
Corebridge Financial, Houston, TX
CUNA Mutual, Madison, WI
Equitable, New York, NY
Fidelity & Guaranty Life Insurance Company, Des Moines, Iowa
Fidelity Investments Life Insurance Company, Boston, MA
Fortitude Re, Jersey City, NJ
Genworth Financial, Richmond, VA
Global Atlantic Financial Group, Southborough, MA
Guardian Insurance & Annuity Co., Inc., New York, NY
Jackson National Life Insurance Company, Lansing, MI
John Hancock Life Insurance Company, Boston, MA
Lincoln Financial Group, Fort Wayne, IN
Massachusetts Mutual Life Insurance Company, Springfield, MA
Metropolitan Life Insurance Company, New York, NY
Nationwide Life Insurance Companies, Columbus, OH
New York Life Insurance Company, New York, NY
Northwestern Mutual Life Insurance Company, Milwaukee, WI
Ohio National Financial Services, Cincinnati, OH
Pacific Life Insurance Company, Newport Beach, CA
Protective Life Insurance Company, Birmingham, AL
Prudential Insurance Company of America, Newark, NJ
Sammons Financial Group, Chicago, IL
Security Benefit Life Insurance Company, Topeka, KS
Symetra Financial, Bellevue, WA
Talcott Resolution, Windsor, CT
Thrivent, Minneapolis, MN
TIAA, New York, NY
USAA Life Insurance Company, San Antonio, TX

The Committee of Annuity Insurers was formed in 1981 to participate in the development of federal policies with respect to annuities. The member companies of the Committee represent approximately 80% of the annuity business in the United States.