Invested in America

June 5, 2023

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

Ms. Rachel Levy
Associate Chief Counsel
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Re: SECURE 2.0 Provisions

Dear Ms. Weiser and Ms. Levy:

The Securities Industry Financial Markets Association ("SIFMA")[1] would like to request guidance and share its members' perspectives relating to several provisions of the SECURE 2.0 Act of 2022[2]. This letter is in addition to our letter dated May 9, 2023, which focused on the SECURE 2.0 changes to Section 529 of the Internal Revenue Code.

SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. SIFMA's members include broker-dealer firms with a total of more than $96 billion in more than 1.7 million SIMPLE IRA accounts sponsored by more than 300,000 sponsoring employers, so we offer a unique perspective on SIMPLE IRAs in particular. SIFMA's members also provide other retirement accounts and related services to their customers.

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] The Consolidated Appropriations Act, 2023, Division T- SECURE 2.0 Act of 2022.

I. Executive Summary

Before turning to specific statutory provisions, we emphasize two overriding principles – (1) the regulations should make it clear which party is responsible for tax compliance, and (2) adequate lead time is needed for any implementation.

Any regulations should make it clear that the financial institutions should not be responsible for monitoring the tax compliance of their customers. For example, section 110 of SECURE 2.0 allows matching contributions to be made on account of a "qualified student loan payment" and includes a detailed definition of that term. The statutory text clearly requires the employee to certify to the employer that the relevant loan payments were actually made, but it does not specify who is responsible for evaluating whether a loan payment is a "qualified student loan payment." Financial institutions should not be responsible for making these kinds of determinations, and any rulemaking under SECURE 2.0 should specifically state who is responsible for making them.

Regulations should also provide delayed applicability dates to provide financial institutions adequate time to design, build, test and implement computer software and related processes and procedures. While the amount of time needed depends on the complexity involved, financial institutions generally need at least several months of lead time and, typically, a minimum of 12 to 18 months is needed. In this regard, we note that we still do not have final regulations on the SECURE 1.0 changes to the RMD rules. (We submitted comments on the proposed regulations in a letter dated May 25, 2022.) It is not reasonable to expect systems updates to occur until after the publication of final regulations, because a meaningful possibility that the rules contained in proposed regulations will not be adopted as part of the final regulations, or will change significantly, is at the heart of notice and comment rulemaking. A delayed applicability date of less than 18 months would not be reasonable for these particular final regulations. Similarly, reasonable time should be provided for SECURE 2.0 changes that will require significant systems and document updates. Examples include section 324 (Treasury guidance on rollovers) and section 501 (provisions relating to plan amendments). While section 501 includes a statutory grace period for making plan amendments, we note that taxpayers will need new model documents from the IRS for both SEPs and SIMPLEs, in addition to adequate lead time to amend existing documents. Further, while regulations are being promulgated and during the necessary comment periods, we ask that the Department make clear that parties may move forward with reasonable interpretations and that good faith reliance will be allowed until guidance is finalized.

II. Section 107

Confirm that the required beginning date for individuals born in 1959 is upon attainment of age 75. Section 107 of SECURE 2.0 transitions the required beginning date age for RMDs from 72 to 75. In general, the required beginning date age is 73 for 2023 through 2032 and 75 beginning in 2033. For someone born in 1959, however, there is a statutory ambiguity. Under new section 401(a)(9)(C)(v)(I), the required beginning date age for someone born in 1959 is 73 for 2023 through 2032, because the individual attains age 73 in 2032, which is after December 31, 2022, and before January 1, 2033. Under new section 401(a)(9)(C)(v)(II), however, the required beginning date age for someone born in 1959 is age 75 for 2023 through 2032, because the individual attains age 74 in 2033, which is after December 31, 2032. In sum, it is ambiguous whether the required beginning date for someone born in 1959 should be based on turning 73 in 2032 or turning 75 in 2034. Congress may address this ambiguity before 2032, but in the meantime, it seems reasonable to assume that Congress intended the later required beginning date and it would be helpful to have guidance confirming this point.

Provide transition relief to individuals eligible for increased RBD. We also request guidance similar to Notice 2020-51, which provided transition relief when the required beginning date age increased from 70 ½ to 72 under SECURE 1.0. We are thankful for the reporting relief provided in Notice 2023-23, which directly benefitted SIFMA's members, but we are asking for this additional relief for the benefit of our members' customers. The reasons for granting this transition relief for 2023 are the same as the reasons for granting the transition relief provided in Notice 2020-51: distributions were taken in 2023, just as distributions were taken in 2020, under the mistaken impression that they were RMDs because of the increase in the required beginning date age that year.

III. Section 601

As noted above, SIFMA's members offer a unique perspective on SIMPLE IRAs. The Small Business Job Protection Act of 1996 created SIMPLE IRAs (as well as SIMPLE 401(k) plans) because "Congress believed it appropriate to encourage small employers to adopt retirement plans by providing a simplified retirement plan that is not subject to the complex rules applicable to tax-qualified plans."[3] Thus, as their name implies, SIMPLE IRAs (and SIMPLE 401(k) plans) are intended to be simple retirement savings vehicles. Moreover, Congress specifically intended that this simplicity be achieved through the absence of complex rules and not through the lack of design choices or a rigid, one-size-fits-all approach. Congress deliberately chose to create both SIMPLE IRAs and SIMPLE 401(k) plans, because Congress intended meaningful differences between the two to provide employers with more plan design choices. Despite the statutory changes that have been made since 1996, the importance of simplicity is as strong as ever, and any SECURE 2.0 rulemaking or other implementation efforts should reinforce the lack of complex rules and the preservation of design choices for SIMPLE IRAs.

Section 601 of SECURE 2.0 allows SIMPLE IRAs and SEPs (simplified employee pensions, another type of IRA-based retirement plan) to accept Roth contributions. Given their status as IRAs, the guiding principle for SIMPLE IRAs and SEPs should be that the longstanding IRA rules under sections 408 and 408A should apply. Combining that principle with the importance of design flexibility, taxpayers/employers should be allowed to choose whether, for example, with a SEP plan, if employer contributions will be made solely as Roth contributions or traditional (pre-tax) contributions on behalf of the employee, or in a SIMPLE plan that employee contributions should be permitted to be made as either Roth contributions, traditional (pre-tax) contributions, or any combination of the two. Guidance clarifying the availability of these design choices would be helpful.

[3] Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 104th Congress, JCS-12-96 (December 18, 1996), 139.

Finally, we believe the deletion of section 408A(f)(2) was unintended. Before the enactment of SECURE 2.0, section 408A(f)(1) prohibited Roth contributions from being made to SEPs or SIMPLE IRAs and section 408A(f)(2) provided that contributions to a SEP or SIMPLE IRA did not count toward the Roth IRA contribution limit. We believe Congress intended to eliminate section 408A(f)(1) but not section 408A(f)(2). In other words, we believe Congress intended to allow Roth contributions to SEPs and SIMPLE IRAs but did not intend to count those contributions toward the Roth IRA contribution limit. We ask for guidance clarifying that the IRS will interpret the law in this manner.

IV. Section 603

With the exception of SEPs and SIMPLE IRAs, for taxable years beginning after December 31, 2023, Section 603 of SECURE 2.0 requires any catch-up contribution made by an eligible participant who earned more than $145,000 (to be annually indexed) in wages from the plan sponsor in the previous calendar year to be made as a designated Roth contribution.

Make clear that plan sponsors are responsible for monitoring. Because the mandatory Roth characterization of catch-up contributions depends on the wages earned by the eligible participant from the sponsor in the previous year, it is the plan sponsor, and not the account custodian, who will be appropriately positioned to monitor which participants are subject to the rule and which are not. Accordingly, this responsibility should rest with the plan sponsor.

Allow current year corrections. There may be instances in which an individual thought to be eligible for non-Roth catch-up contributions is later determined to be ineligible. For example, an employer might have reported $144,000 in wages, and later identified additional wages that should have been reported, prompting the employer to issue a Form W-2c reporting $146,000 in wages. In most instances, one would expect such a change to be discovered during the plan year for which the non-Roth catch-up contributions were made such that any correction could be made within the employee's taxable year. There may also, however, be instances in which the discovery is made after the close of the employee's taxable year. We believe taxpayers should be permitted flexibility to correct this situation in the current year by including the ineligible contributions and associated earnings in income rather than going back to the year of the error to unwind.

Retain design flexibility concerning catch-up contributions. It would be helpful to plan sponsors, and vendors, to confirm that the mandatory Roth treatment of catch-up contributions under section 603 of SECURE 2.0 does not curtail existing design flexibility. Specifically, we ask you to confirm that a plan is permitted to be designed to not provide for catch-up contributions, to provide catch-up contributions only on a Roth basis (even as to participants earning $145,000 or less), or to prospectively modify existing catch-up provisions to either of these designs.

Confirm that partners are not subject to Roth basis catch-up contribution requirement. Section 603 defines the threshold at which the Roth requirement attaches as "wages (as defined in section 3121(a)) for the preceding calendar year from the employer sponsoring the plan [that] exceed $145,000." Section 3121(a) defines "wages" for purposes of the Federal Insurance Contributions Act. Subject to a variety of nuances and exceptions, "wages" include "all remuneration from employment." "Employment" is defined (again, subject to all manner of exceptions) to mean "any service, of whatever nature, performed . . . by an employee for the person employing him . . . ." It is without question that wages are paid only in an employment relationship, and not in other service provider relationships, such as a partner providing services to a partnership. Importantly, if the plan is so designed, a partner is permitted to participate in a qualified defined contribution plan, and, if otherwise eligible, make catch-up contributions to that plan. A partner, however, does not receive wages from the sponsor because a partner cannot also be an employee. As such, we ask you to confirm that a partner's compensation from the plan sponsor is not wages for purposes of the catch-up contribution requirement.

Provide transition relief for collective bargaining agreements. It has come to our attention that certain collective bargaining agreements that are currently in place have provisions that conflict with section 603. Specifically, certain collective bargaining agreements prohibit the plan sponsor from including designated Roth contributions as an option in the plan. Given that the parties have bargained over these terms, it may be inequitable to force an outcome without allowing time for the terms to be renegotiated based on what is permissible following SECURE 2.0. In any event, custodians should not be placed in the position of interpreting how SECURE 2.0 should apply to a contrary preexisting contract, so clarifying guidance is needed.

V. Section 326

SECURE 2.0 Section 326 provides an exception from the 10% additional tax on early distributions from qualified retirement plans if the distribution is made to a terminally ill individual certified by a physician as having an illness or physical condition expected to result in the individual's death within 84 months of the certification. The statute provides that an individual will not be considered terminally ill unless sufficient evidence, as prescribed by the Secretary, is furnished to the plan administrator.

Do not require custodians to maintain individualized health information. It has been long-standing policy, codified into the United States Code by the Health Insurance Portability and Accountability Act of 1996, that handling of an individual's health information should not be undertaken lightly. We urge you to bear those policy considerations in mind when crafting the requirements for implementation of Section 326. While plan sponsors and plan administrators may have some experience with handling individualized health information due to existing circumstances, such as Family and Medical Leave Act rules, and health and welfare plan administration, asset custodians do not have this experience and are not well positioned to take on such a task. Introducing a new category of institutions to the world of individualized health information unnecessarily expands the footprint for such information, increasing the risk that such information will be inadvertently disseminated.

VI. Section 307

An IRA owner who is at least 70½ years old may take a qualified charitable distribution (QCD) from the IRA, designating a direct transfer to a charity. The QCD counts toward the owner's required minimum distributions but is not taxed to the owner. Up to $100,000 (following SECURE 2.0, this cap will be indexed) per year in QCDs is permitted. Prior to SECURE 2.0's enactment, the QCD could only go to a qualified charity. Section 307 of SECURE 2.0 provides a one-time election allowing a QCD of up to $50,000 to be designated for certain split-interest entities, such as charitable remainder annuity trusts.

Confirm that the $50,000 split-interest entity election does not count toward the annual $100,000 limit. The statute does not make clear whether the $50,000 election operates separately from the $100,000 limit. That is, for example, if an otherwise eligible IRA owner determines in a given year to make the split-interest entity election, it is unclear whether the owner may also make an additional $100,000 QCD to a non-split interest entity in that year. We urge you to adopt the more administrable interpretation, allowing the two limits to operate independently, rather than having the $50,000 election count against the $100,000 QCD limit.

VII. Conclusion

We would be happy to discuss any of these matters with you if that would be helpful. Please contact me at 202-962-7329 or lbleier@sifma.org.

Sincerely,

Lisa J. Bleier

Lisa J. Bleier
Head – Wealth Management, Retirement and State Government Affairs