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Invested in America

February 20, 2024
VIA ELECTRONIC SUBMISSION
Office of Associate Chief Counsel
Employee Benefits, Exempt Organizations, and
Employment Taxes
Internal Revenue Service
Washington, DC 20044

Re: IRS Notice 2024-2: Miscellaneous Changes Under the SECURE 2.0 Act of 2022

Dear Mr. Morgan:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to submit this letter to the Internal Revenue Service in response to IRS Notice 2024-2. Below are our comments on the guidance on Sections 117, 326, and 601 of the SECURE 2.0 Act of 2022.

Section 117

Section 117 of the SECURE 2.0 Act increases both the annual salary reduction contribution/elective contribution limit and the limit on additional catch-up contributions beginning at age 50 for a SIMPLE IRA or a SIMPLE 401(k) plan for certain eligible employers. The increased limits are 110 percent of the otherwise applicable limits for 2024.The notice also states in Q&A E-2 that the 110% limit "automatically" applies to employers with 25 or fewer employees. For an employer that has more than 25 employees who received at least $5,000 of compensation for the preceding year, the increased limits apply only if the employer makes an election for the increased limits to apply. If the employer makes an election for the increased limits to apply, the employer must provide higher matching or nonelective contributions. However, the notice later says in Q&A E-6 that employers have to notify employees of these increased limits in the annual notice.

[1] SIFMA is the leading trade association for BDs, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 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 (the "GFMA").

Notice 2024-02 was issued well after the start of the enrollment period for 2024, making it challenging for employers to comply with the deadline described in Q&A E-7. We recommend that the IRS provide transitional relief for this deadline by allowing employers to notify employees on a one-time basis regarding the increase in contributions for 2024. In addition, if such notification is provided and it meets the requirements described in Q&A E-6, employees may be permitted to make a onetime change in their salary deferral election for the automatic increase described in Q&A E-2. We would also like to request similar transitional rule guidance for employers that have more than 25 employees. In the case that an employer makes the election described in Q&A E-4, and provides the notification required in Q&A E-6 regarding the 1% increase in matching or non-elective contributions for 2024 and the resulting increase for salary-deferrals, that employees be permitted to make a onetime election to increase their salary deferrals for the year.

Section 326

Section 326 of SECURE 2.0 added a new exception to the 10 percent additional tax for any distribution made to a terminally ill individual. The guidance defines "terminally ill distribution" as any distribution from a qualified retirement plan to an employee who is a terminally ill individual that is made on or after the date on which the employee has been certified by a physician as having a terminal illness. A terminally ill individual distribution may be made from a qualified retirement plan, which would include section 401(a) qualified plans, section 403(a) annuity plans, section 403(b) annuity contracts, or an individual retirement account described in section 408(a) or an individual retirement annuity described in section 408(b).

The notice states in Q&A F-14 that "As provided in section 72(t)(2)(L)(iii), an employee generally will not be considered terminally ill unless the employee provides sufficient evidence of the terminal illness to the plan administrator. The only documentation required to be provided to the plan administrator is the certification from a physician that meets the requirements of Q&As F-6 and F-13 of this notice." The requirements for the physician certification include not just a statement, date, and signature, but also a narrative description of the evidence used to support the statement of illness or physical conditions. In Q&A F-13, the notice refers to the individual providing the "plan administrator" the certification, with "plan administrator" being defined as "a plan administrator as defined in section 414(g), or an IRA trustee, custodian, or issuer."[2]

We are very concerned about this type of information being provided to, and being held by, the IRA custodian or trustee. Currently, we do not capture this information, and believe it is best not to hold such information due to HIPAA[3] compliance and challenges with holding protected health information (PHI). It has been long-standing policy under HIPAA that handling of an individual's health information should not be undertaken lightly. We urge you to bear those policy considerations in mind. While plan sponsors and plan administrators may have some

[2] https://www.irs.gov/pub/irs-drop/n-24-02.pdf

[3] The Health Insurance Portability and Accountability Act of 1996. Pub. L. 104-191. Stat. 1936.

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.

We do not understand the rationale for self-certification being insufficient for terminal illness distributions. We do understand the rationale for the taxpayer receiving and retaining the certification from the physician and needing to retain this certification in case of an audit. For purposes of the distribution from the IRA or retirement plan, however, it is our view that the trustee, custodian, or plan's administrator can rely on the self-certification of the individual. Other distributions from IRAs and 401(k) plans allow for self-certification, including distributions related to birth and adoption, federal disasters, domestic abuse, emergency expenses and hardships. We recommend the IRS allow for self-certification for terminal illness distributions. This will ensure that the information is properly protected and requirements are aligned with similar types of distributions.

Section 601

Section 601 of SECURE 2.0 allows an employee who participates in a SIMPLE or SEP IRA to designate a Roth IRA as the IRA to which contributions are to be made. The notice states "The employer must report employer matching and nonelective contributions made to a Roth IRA on Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit Sharing Plans, IRAs, Insurance Contracts, etc., in the same manner as the reporting that would have applied if (1) there were no after-tax contributions made to any of the employee's IRAs, and (2) the matching or nonelective contributions were made to an IRA that was not a Roth IRA and then immediately converted to a Roth IRA. Thus, the contributions must be reported using Form 1099-R, for the year in which the contributions are made to the employee's Roth IRA, with the total reported in boxes 1 and 2a of Form 1099-R, using code 2 or 7 in box 7, and the IRA/SEP/SIMPLE checkbox in box 7 checked."

The Small Business Job Protection Act of 1996 created SIMPLE IRAs to serve as simplified retirement plans for small employers. Congress specifically intended that this simplicity be achieved through the absence of complex rules. Despite the statutory changes that have been made since 1996, the importance of simplicity is as strong as ever, and any implementation efforts should reinforce the lack of complex rules and the preservation of design choices for SIMPLE IRAs. A SEP (Simplified Employee Pension) Plan is an employer sponsored plan that only allows for employer contributions. The contribution amount is either 25 percent of the employee's compensation, or the dollar limit applicable to contributions to a qualified defined contribution plan; whichever is the smaller amount. Under SECURE 2.0, SEP and SIMPLE plans can be designated as Roth IRAs. Therefore, any contributions to a SEP or SIMPLE plan designated as Roth are not excluded from gross income.

We agree that the employer is the appropriate party to report the taxable income created by their employee's election and understand the employer contributions are not treated as wages.

However, we are concerned that instructing the employer to issue a 1099–R tax form intended for reporting retirement account distributions and to code and report them as if the amount was previously contributed to another type of IRA then converted is confusing to the taxpayer, particularly in the SIMPLE and SEP plan space. Should this continue to be the approach used, we would ask the service to confirm that a 1099-R issued by the SIMPLE IRA's trustee/custodian will satisfy the employer's requirement to issue a 1099-R as part of the final guidance.[4]

As we noted above, the proposed approach is likely to be more confusing for taxpayers and potentially for those who review the accuracy of tax returns. SIFMA believes a better alternative exists that would be less confusing for the taxpayer and for employers who sponsor plans intended to be easy to administer. We would suggest the following as potentially better approaches:

- Include it only on the Form 5498, instead of the dual reporting that occurs with the 1099-R;[5]
- Modify the W-2 to define a new code, "Employer Plan Contributions Taxable as non-wage income" to be used in box 12 of the W-2.[6]

We believe this would be less confusing for the taxpayer and would still provide important information to the IRS.

Lastly, we would ask the service to confirm if prototype and model plan custodians may exclude the option for employers to offer employer Roth non-elective and matching contributions to Roth SAR SEP and Roth SIMPLE and only offer the Roth option for salary reduction.

We look forward to working together with the IRS as they consider our comments regarding the notice. Please do not hesitate to contact me at lbleier@sifma.org or (202) 962-7329 if you have any questions.

Respectfully Submitted,

Lisa J. Bleier

[4] For self-employed or partners, instructions should be updated to say that employer Roth contributions made on the business owner's behalf should not be listed as an adjustment to income on Schedule 1 (Form 1040) Line 16

[5] This could be clarified in the Instructions for the Form 5498 for those sole proprietors who file a Schedule C.

[6] See footnote 4.