COMMITTEE ON EMPLOYEE BENEFITS AND COMPENSATION

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RE: Comment Letter on SECURE 2.0 Guidance Priorities

Dear Ms. Weiser and Ms. Levy:

The Committee on Employee Benefits and Executive Compensation of the New York City Bar Association (the "Committee") is composed of a diverse group of lawyers who represent clients with many different roles in the employee benefits field, including law firms, plan sponsors, consultants and participants. We were pleased when the employee benefit reforms contained in the Consolidated Appropriations Act, 2023, commonly referred to as SECURE 2.0, were enacted last December. SECURE 2.0 implements changes for which the benefits community advocated for many years. We are conscious of the enormous task of issuing guidance interpreting these changes.

We are writing to request clarification of a number of provisions of SECURE 2.0 effective in 2023 and 2024. Some of these are mandatory and some are voluntary, but although they will require administrative changes that require significant time to implement, the statute does not provide much detail. Without early guidance on the issues raised in this letter, plan sponsors and their service providers and advisers will be unsure how to implement these changes or whether they are in compliance.

We have copied Amy Moskowitz of the Internal Revenue Service's Office of the Associate Chief Counsel because one section of this letter contains comments on recently issued Notice 2023-43, which provides interim guidance on self-correction of inadvertent qualification failures under Section 305 of SECURE 2.0. We will also file it as an official comment on Notice 2023-43. We have also copied the Department of Labor, as our comments on corrections implicate fiduciary responsibilities, and the Pension Benefit Guaranty Corporation, as certain of these comments may implicate their operations as statutory trustee of assumed defined benefit pension plans.

The discussion below groups similar issues and is not intended to follow the ordering of provisions in SECURE 2.0, the Employee Retirement Income Security Act of 1974 ("ERISA") or the Internal Revenue Code of 1986 (the "Code"), in each case as it may be amended and the rules and the regulations promulgated thereunder.

I. Section 603-Requirement that Certain Catch-up Contributions Be Made on a Roth Basis

Beginning in 2024, any participant in a 401(k), 403(b), or governmental 457(b) plan who has wages, as defined under Code Section 3121(a), ("FICA wages")) in excess of $145,000 for the preceding year, adjusted for cost-of-living increases in years beginning after 2024, (the "Annual Wage Limit"), may elect to make catch-up contributions under Code Section 414(v) only as designated Roth contributions (as defined in Code Section 402A(c)(1)). Plans must offer Roth catch-up contributions to catch-up eligible participants who are not subject to the requirement that catch-up contributions be made on a Roth basis if at least one participant is subject to the Roth catch-up requirement for a plan year.

This provision increases the complexity and costs of plan administration, especially for plans not currently offering a Roth contribution feature. Some plan sponsors may wish to eliminate all catch-up contributions to avoid complicating plan administration and incurring additional costs or risking inadvertent noncompliance due to payroll and record-keeping systems issues. Guidance is needed on how the required and elective Roth catch-up contributions will coordinate with current rules for participant deferral elections and catch-up contributions, as well as with applicable nondiscrimination requirements under the Code.

It is not clear whether the Roth contribution requirement applies to higher earners who do not have FICA wages. Guidance is needed on elections and on corrections where a participant is determined to be subject to the requirement for mandatory Roth catch-up contributions only after the start of a plan year and the participant has elected to make pre-tax catch-up contributions.

Guidance Requested.

1. **Separate Catch-up Elections**. SECURE 2.0 suggests that high-earning employees must elect to have catch-up contributions made on a Roth basis. However, it is common for plans to automatically treat contributions exceeding the applicable elective deferral limit as catch-up contributions without requiring a separate election. Therefore, plan sponsors will need to know if separate deferral elections for catch-up contributions will be necessary to comply with this requirement, or

whether advance notice that amounts in excess of the applicable elective deferral limit will be treated as taxable Roth catch-up contributions unless the participant elects otherwise would be deemed a sufficient participant election.

2. **Treatment of Plans Without a Current Roth Contribution Feature**. The statutory provision appears to contemplate allowing plans to add the Roth contribution feature for catch-up contributions only and not for all participant elective deferrals. However, current Treasury regulation 1.401(k)-1(f)(1) would appear to require plans to add a full Roth elective deferral contribution feature. Accordingly, clarification is needed on whether allowing catch-up contributions on a Roth basis will require plans without a Roth feature to add a full Roth elective deferral contribution feature. If a bifurcated structure (i.e., adoption of a Roth contribution feature for catch-up contributions only) will be permitted, relief will be necessary from the Code's nondiscrimination requirements under Code Section 401(a)(4) and Treasury regulations 1.401(a)(4)-4(e)(3) and 1.401(k)-1(a)(4)(iv)(B) with respect to benefits, rights, and features.

3. **Plan Design Issue: Elimination of Catch-up Contributions for Eligible Participants**. Plan sponsors not currently offering a Roth contribution feature may wish to amend their plan to eliminate catch-up contributions completely to avoid administrative complexities or operational issues. Relief from the requirement to implement Roth catch-ups for everyone would be welcome as an alternative to complete elimination of catch-up contributions. Clarification or guidance is requested on whether a plan may exclude all participants with wages over the Annual Wage Limit from catch-up contributions. This alternative would permit lower paid catch-up eligible participants to continue to save additional amounts while almost exclusively affecting highly compensated employees (as defined under Code Section 414(q)). Such relief would also involve clarification regarding the applicability of the "universal availability" rule under Code Section 414(v)(4).

4. **Controlled Group Employers with Multiple Plans and Multiple-Employer Plans**. SECURE 2.0 provides that participants with wages at or under the Annual Wage Limit must have the option to elect Roth catch-ups if at least one catch-up eligible participant with wages in excess of the Annual Wage Limit participates in the plan during a year. The universal availability rule of Code Section 414(v)(4) generally requires a plan to allow all eligible participants (with certain exceptions) "to make the same election with respect to the additional elective deferrals under this subsection". This is understood to require the same opportunity to make catch-up contributions. Regulations further describe this rule as requiring the same "effective opportunity to make the same dollar amount of catch-up contributions". For this purpose, all plans of a controlled group are treated as one plan. Clarification is needed on whether the universal availability rule will mandate that every plan in a controlled group that has catch-up contributions offer a Roth catch-up option if any catch-up eligible participant in any plan in the employer's controlled group has wages over the Annual Wage Limit.

With respect to multiple-employer plans covering unrelated employers, including multiple-employer governmental 457(b) plans, guidance is also needed clarifying whether the determination of whether the plan covers a participant with wages over the Annual Wage Limit is made on an employer-by-employer basis, similar to the way applicable nondiscrimination rules are applied in such plans, or on a plan-wide basis. For large multiple-employer plans with any participating employers that do not currently offer a Roth contribution option and are attempting to comply with the new Roth catch-up contribution requirement, applying the determination on a plan-wide basis may lead to the elimination of all catch-up contributions because of the difficulty in ensuring that all participating employers offer a Roth contribution option prior to the compliance date.

5. **Application to Participants Without "Wages" as Defined in Code Section 3121(a)**. Clarification is requested as to whether the Roth requirement applies to participants, such as partners in a partnership, with income in excess of the Annual Wage Limit's dollar amount but who do not have FICA wages.

6. **Corrections of Incorrect Pre-tax Catch-up Contributions Due to Errors in Wage Determinations**. SECURE 2.0 anticipates administrative issues with determining wages and provides that "[t]he Secretary may provide by regulations that an eligible participant may elect to change the participant's election to make additional elective deferrals if the participant's compensation is determined to exceed the limitation under subparagraph (A) after the election is made."

   Recommendation. Affected participants should be permitted to change their deferral election to retroactively eliminate catch-up contributions for a year after the beginning of the plan year. Regulations and interim guidance should provide a corrective mechanism for erroneous contributions and associated earnings. The alternative method of correcting this error by automatically transferring pre-tax contributions (plus earnings) to a Roth account for an employee would be inconsistent with the requirements that Roth contributions be made in accordance with a participant's election that is irrevocable and made in advance of a contribution and could also circumvent the participant's intentions.

7. **Coordination with Actual Deferral Percentage ("ADP") Testing Corrections**. Guidance is needed on ADP testing corrections. In particular, guidance is requested to clarify whether plans will be permitted to treat excess elective deferral contributions as Roth catch-up contributions for participants with wages over the Annual Wage Limit for the testing year, especially where a participant has not elected catch-up contributions for the year.

8. **Governmental Plan Catch-up Contribution Limit**. Prior to amendment by Section 603(b)(2) of SECURE 2.0, Code Section 457(e)(18) provided that a participant in a governmental 457(b) plan who is eligible for both the catch-up contribution under Code Section 414(v)(2) ("age 50 catch-up") and the special catch-up contribution under Code Section 457(b)(3) ("457 catch-up") was limited to a deferral for a year equal to the plan ceiling under Code Section 457(b)(2) plus

the greater of the two catch-up amounts. SECURE 2.0 changes the formula for determining the maximum contribution limit for eligible participants by substituting the amount of any "designated Roth contributions made by the participant to the plan" for the dollar limitation under Code Section 414(v)(2) if the Roth contribution amount is less than the age 50 catch-up amount. The amendment appears to have the potential to significantly reduce the contribution limit available to a participant in a governmental 457(b) plan who has contributed any Roth contributions to the plan. Reducing the availability of an age 50 catch-up contribution to a governmental 457(b) plan based on whether a participant otherwise contributes to a Roth account in the plan does not appear to be consistent with the stated purpose of Section 603(b)(2) of SECURE 2.0 as a conforming amendment. We therefore request guidance clarifying this provision or alternatively recommend a technical correction to Section 603(b) of SECURE 2.0.

II. Section 604-Election to Receive Employer Contributions as Roth Contributions

Section 604 of SECURE 2.0 amended Code Section 402A to permit participants in 401(k), 403(b) and 457(b) plans to elect to receive employer matching and nonelective contributions on a Roth basis.

These changes are effective in 2023, but there is insufficient guidance in the statute to permit plan sponsors and recordkeepers to take advantage of this provision at this time. Since, in many ways, this election creates the functional equivalent of an in-plan Roth conversion, which is already the subject of formal guidance, (see Notices 2013-74 and 2010-84), we urge Treasury to clarify whether guidance is expected to be modeled on this prior guidance in addition to addressing the issues below.

Guidance Requested

1. **Application of Vesting Requirement**. Section 604 provides that these contributions must be vested, but many plans provide for graduated vesting either in accordance with the minimum vesting requirements in Code Section 411 or on a faster basis. An important issue is whether a participant whose account is partially vested may make an election with respect to a percentage of the contribution equal to the participant's vesting percentage-for example, 40% of the contribution if the participant is 40% vested. If participants may not do so, and must wait until their accounts are 100% vested, additional earnings will be subject to income tax when the election is first permitted to be made, frustrating the ability of participants to take maximum advantage of the Roth option.

2. **Other Roth Options**. The in-plan conversion guidance requires plans to permit deferrals to be made on a Roth basis as a condition of making in-plan Roth conversions available. Treasury should clarify whether this rule will apply to the employer contribution elections and, if so, whether plans must also provide for in-plan Roth conversions before they can include the election to take employer contributions on a Roth basis. It is also unclear whether a participant must make Roth deferrals in order to elect to receive employer contributions on a Roth basis.

3. **Default Provisions**. A plan with automatic enrollment may designate Roth deferrals as the default for participants who do not make another election. Is it permissible for plan sponsors to additionally provide that, in the case of auto-enrolled participants who have made no other election, Roth will also be the default for any employer contributions?

4. **Standing Elections**. Please clarify whether there is a limit on the number of elections a participant may make and whether standing elections are permissible. If employer contributions are made on a payroll period basis, may a participant make one election with respect to all employer contributions made in or with respect to the plan year in which the contributions will be counted as annual additions under Code Section 415(c)?

5. **Holding Period**. Earnings on Roth contributions may escape taxation if they satisfy a five-year holding period. When will the holding period start for these contributions? Will a separate holding period apply to employer contributions elected to be taken on a Roth basis, similar to the rule that applies for IRAs?

6. **Retroactive Contributions**. Employer contributions may be made after the end of the plan year. Guidance is needed whether a participant who receives a contribution in 2024 for the 2023 plan year and has made a Roth election will have to report the contributions as taxable income in 2023 or 2024. Will this depend on whether the election was made in 2023 or 2024? While the conversion rules tax converted amounts in the year of the conversion, which is easily determined, Roth conversions are made from amounts already in the participant's account at the time of the election.

   Recommendation. Given that employer contributions for a prior plan year could be made after the participant's tax return due date, we recommend that guidance provide that retroactive contributions are taxable to the participant in the year made even if (A) a Roth election with respect to the contributions was made in the prior year; or (B) the contribution is treated as an annual addition under Code Section 415(c) for a prior plan year.

7. **FICA Treatment**. How will these contributions be treated for FICA purposes? Employee deferrals are subject to FICA, yet traditional employer contributions are not.

8. **Income Tax Withholding**. Will these contributions be subject to federal income tax withholding? We note that Notice 2013-74 does not require withholding under Code Section 3405 when there is an in-plan Roth conversion.

9. **Tax Reporting**. Please clarify whether these contributions will be reported on Form W-2 or Form 1099.

10. **Application of Code Section 411(d)(6)**. Will the right to elect to receive employer contributions on a Roth basis be protected under Code Section 411(d)(6)?

    Recommendation. We recommend that this right be treated as not protected. This is consistent with the position taken with respect to in-plan Roth conversions.

III. Sections 314, 331, and 326-New Distribution Events

SECURE 2.0's distribution provisions create a number of new penalty-free distribution events for defined contribution plans, likely modeled on prior distributions permitted for catastrophic events including natural disasters and COVID-19. On the surface the new withdrawal opportunities seem positive, but without proper guidance, plan sponsors may be hesitant to make them available to participants in need out of fear of jeopardizing the plan's tax benefits or incurring liability.

Guidance Requested.

1. **Natural Disasters**. Plan sponsors can now make available to plan participants penalty-free distributions up to $22,000 for injuries or loss sustained because of a natural disaster. The dollar limit applies in the aggregate to all employer-sponsored plans and IRAs in which the individual participates. To be eligible, the plan participant's "principal place of abode" must be in the area designated as a disaster area by the Federal Emergency Management Agency (FEMA).

    a. Does a participant need to substantiate economic loss to the plan administrator? If yes, how?

    b. Many employees may split their time between two locations, particularly if they work remotely. Is the plan administrator required to determine whether the residence in question is the employee's "principal place of abode"?

    c. If the employee participates in another employer-sponsored plan or IRA of which the plan administrator has no knowledge (e.g., an hourly employee works for two employers, averaging 30 hours per week for each employer) and exceeds the limits, what liability falls on the plan administrator?

    d. What is the result of employee misrepresentation?

    e. Money purchase pension plans may not make in-service distributions prior to the participant's attainment of age 59 1/2, but money purchase plans may make natural disaster distributions. Please confirm that a money purchase plan will not be disqualified if it makes natural disaster distributions to active employees younger than age 59 ½.

2. **Domestic Abuse**. Effective in 2024, plan sponsors may make available penalty-free distributions up to the lesser of $10,000 or 50% of the participant's vested benefit to plan participants experiencing domestic abuse. Distributions can be made within one year of said abuse. A plan sponsor may rely on the self-certification of

the plan participant. Similar to the penalty-free distribution allowable for natural disasters under Section 314 of SECURE 2.0, this relief is also applied across all of the participant's eligible qualified plans. We request guidance on the following issues:

a. If the employee participates in another employer-sponsored plan to which the plan administrator has no knowledge (e.g., an hourly employee works for two employers, averaging 30 hours per week for each employer) and exceeds the limits, what liability falls on the plan administrator?

b. What is the result of employee misrepresentation?

Recommendation. As explained above, broad protections should be provided to plan administrators acting in good faith. We believe that, unless the plan administrator has reason to believe that the employee is making a false statement, no liability should be incurred by a plan administrator who relied on the statement.

3. **Terminal Illness**. Under Section 326 of SECURE 2.0, a plan participant may also be eligible for a penalty-free distribution if the participant is terminally ill. A physician must certify that the employee has a condition that is terminal and will result in death within 84 months. We request clarification of the following questions:

a. Since no dollar amount is mentioned in the statute, can a participant withdraw the entire vested account balance?

b. If the plan participant is divorcing and the plan received, but has not yet approved, a draft qualified domestic relations order, and the plan participant requests the entire account balance, what portion of the account is subject to withdrawal?

c. Please clarify which plans may provide for this distribution.

4. **General Guidance on Compliance and Plan Sponsor and Administrator Liability**.

a. Are plan sponsors relieved of responsibility for any participant improprieties related to self-certification or distributions in excess of the Code limits? For example, if a plan is audited by the IRS, will the plan sponsor be requested to provide evidence supporting the eligibility for withdrawals or will the IRS be satisfied with the self-certification of the participant? Should plan participants follow the rules in Section 2022(a)(4) of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)?

Recommendation. We believe that guidance with respect to all of these distributions with dollar or vesting caps should be similar to that issued under the CARES Act, where participants were responsible for eligibility

and observing the limits if they were in multiple plans. An exception could require monitoring the limits for plans within the same controlled group.

b. Plan leakage often leads to plan participants having insufficient assets at retirement. Many plans already permit hardship distributions, loans, and in-service withdrawals when participants attain age 59 ½. We are concerned that even though these distributions are technically optional, their availability may make the existing problem of plan leakage worse. We note that, in the case of small plans and employers participating in multiple-employer plans, there will be competitive pressure to include these distributions. We also note that leakage in very small plans may result in increased fee burdens that could result in employers cutting back on or discontinuing contributions. This results from the fact that recordkeepers impose minimum fees on very small plans regardless of the value of plan assets, and not all fees can be passed on to plan participants.

Recommendations. Given that these distributions are not mandated, we recommend that Treasury allow plan sponsors to control leakage by allowing restrictions such as frequency and dollar limits to be placed on these distributions. We also recommend issuance of a model notice for participants explaining how plan leakage reduces future retirement income. This notice could be similar to the existing rollover notices under Code Section 402(f).

c. If a plan sponsor determines that a plan participant misrepresented the participant's need for a withdrawal, does the period of time between the withdrawal and the realization matter for purposes of utilizing self-correction? There is no time limit addressed in the statute but a statement affirming that self-correction is available without regard to when the failure occurred is requested.

d. Is the right to these distributions protected under Code Section 411(d)(6), or may they be removed from a plan without creating permanent rights?

Recommendation. Existing guidance provides that hardship distributions are not protected under Code Section 411(d), and we suggest that similar treatment would be appropriate for these newly authorized distributions.

IV. Section 125-Coverage for Long-Term Part-Time Workers under 403(b) Plans

Section 125 of SECURE 2.0 amends both ERISA and the Code to apply the participation requirements enacted in Section 112 of the Setting Every Community Up for Retirement Act, commonly referred to as SECURE 1.0, to 403(b) plans for the first time. SECURE 2.0 also reduces the service requirement to be completed before long-term part-time employees can contribute from three years in which at least 500 hours of service must be completed to two. Section 125 of SECURE 2.0 also amends Code Section 403(b)(12) to add a new subsection (D) providing that the

participation requirement added to ERISA does not apply to employer nonelective or matching contributions.

In addition, Section 125 adds a conforming amendment to Code Section 403(b)(12)(A). Code Section 403(b)(12) sets out the nondiscrimination requirements for Section 403(b) plans and establishes a universal availability rule in place of nondiscrimination testing for contributions made in accordance with a salary reduction agreement. There are a limited number of exceptions to the universal availability rule, including for (A) employees who are students performing services described in Code Section 3121(b)(10), and (B) employees who normally work fewer than 20 hours per week. Both exceptions are subject to the conditions under Code Section 410(b)(4), meaning that the exclusion must cover all employees in these categories. Code Section 3121(b)(10) refers to services performed in the employ of a school, college, or university.

As amended, Code Section 403(b)(12)(A) now reads in relevant part, "Subject to the conditions applicable under Code Section 410(b)(4) **and Section 202(c) of the Employee Retirement Income Security Act of 1974** there may be excluded for purposes of this subparagraph employees who are students performing services described in Code Section 3121(b)(10) and employees who normally work less than 20 hours per week" (emphasis added).

Prior to the amendment, 403(b) plans were permitted to exclude student employees providing services described in Code Section 3121(b)(10) from the opportunity to contribute elective deferrals. Thus, prior to amendment of Code Section 403(b)(12)(A), this provision has operated as a classification exclusion, and 403(b) plans could exclude qualifying students based on their status as students regardless of the number of hours they worked. The amendment appears to impose an additional requirement on 403(b) plans, meaning that students could be excluded only if they also did not meet the service threshold of the amendment.

Prior to SECURE 2.0, Code Section 403(b)(12) allowed a plan to meet the universal availability requirement while excluding employees who normally work less than 20 hours per week from making elective deferral contributions (interpreted as fewer than 1,000 hours per year in Treasury regulation 1.403(b)-5(b)(4)(iii).) The SECURE 2.0 amendment superimposes another rule on the original exception and requires the plan to determine whether part-time employers have not just completed 1,000 hours of service in a year, but also if they have completed 500 hours of service for any two consecutive years. Many of the employers that maintain 403(b) plans are educational organizations, and due to the nature of academic work the number of hours worked for many of their employees is not easily quantified. The interposition of these two rules is likely to be very challenging to administer for many employers.

Guidance Requested

1. **Clarify Student Exclusion**. It is not clear if Congress intended to apply the rule added by Section 202(c) of ERISA to student employees and to convert what previously had been a classification exclusion into a service requirement, particularly as the original exclusion remains in the Code. The nature of student employment at colleges and universities makes it challenging to track the exact hours that students work during a computation period. Given that the student

exemption has been in place for many decades as a classification exclusion, requiring employers to count hours for those employees will impose a significant additional administrative burden. We request Treasury to provide guidance that clarifies whether the student exclusion in Code Section 403(b)(12)(A) is now subject to the requirement established in Section 125 of SECURE 2.0, or whether it remains solely a classification exemption and will be enforced as such.

2. **Tracking Hours of Service**. We request that Treasury ease the administrative burden of tracking the hours of service where necessary by issuing guidance that clarifies that an employer can use any reasonable method of calculating hours of service that can serve as an equivalent to actually counting hours or establishes acceptable alternatives to actually counting hours.

V. Section 305-Expanded Self-Correction of Inadvertent Errors

Section 305 of SECURE 2.0 substantially expands the ability of plan sponsors to self-correct inadvertent qualification failures without making a formal application under the Employee Plans Compliance Resolution System, commonly referred to as EPCRS. Importantly, it does not contain special deadlines that applied to self-correction of "significant" failures under Revenue Procedure (Rev. Proc.) 2021-30, the most recent update of EPCRS. The SECURE 2.0 changes are effective on enactment, but the statute gives Treasury up to two years to update Rev. Proc. 2021-30.

We commend Treasury for providing interim guidance in Notice 2023-43 answering basic questions about Section 305 of SECURE 2.0, including confirming that Section 305 may be used to correct pre-enactment failures. However, we believe that additional interim or temporary guidance would be appropriate to clarify the issues identified below. This would better enable plan sponsors, administrators and recordkeepers to understand what can and cannot be self-corrected and further implement the intent of Congress in enacting section 305 to expand the availability of self-correction.

Guidance Requested.

1. **Provide Examples of Ineligible Failures**. While the statute provides general factors to be reviewed to determine whether a failure is an "eligible inadvertent failure", these can be interpreted subjectively. It would be helpful for Treasury to provide some examples of failures that would not qualify because they were not "inadvertent." Further, Section 305(e)(2) of SECURE 2.0 identifies certain egregious failures that may not, by definition, be self-corrected. Guidance should clarify if this list is exhaustive. If Treasury contemplates that failures not listed could still be considered egregious, the determining factors or examples should be set out in future guidance.

2. **Reasonable Period for Self-Correction**. Failures identified as "significant" under Rev. Proc. 2021-30's standards could be self-corrected by the end of the third plan year following the plan year for which the failure occurred. This was subject to extension if the failure occurred with respect to transferred assets. Section 305(a) of SECURE 2.0 provides in relevant part that, except where the Secretary has

identified the failure prior to a commitment to implement self-correction, "[f]or purposes of self-correction of an eligible inadvertent failure, the correction period under Section 9.02 of Revenue Procedure 2021-30 (or any successor guidance), except as under such Code, regulations, or other guidance of general applicability prescribed by the Secretary, is indefinite and has no last day… ." Notwithstanding this language, Q7 of Notice 2023-43 provides that, except with respect to an employer eligibility failure, a reasonable safe harbor period for correction is generally considered to be the last day of the 18th month following the date the failure was identified by the plan sponsor. The intent of Section 305 of SECURE 2.0 is clearly to expand, rather than restrict, self-correction. However, depending upon when the violation is discovered, the safe harbor period in Q7 could cut back on the time period for correction of significant failures as defined in Rev. Proc. 2021-30.

Recommendations.

a. A reasonable period for correction should be presumed to be the greater of the period provided in Rev. Proc. 2021-30 or the period provided in Q7 of Notice 2023-43.

b. Treasury should confirm that a period longer than that provided in Q7 may be considered reasonable based on the facts and circumstances and provide examples of factors that would justify additional time to make corrections.

3. **Restrictions on Terminating Plans**. Among the restrictions on a plan sponsor's ability to self-correct under Q2 of Notice 2023-43 is a rule that terminated plans may not self-correct failures treated as significant under Rev. Proc. 2021-30. No such explicit prohibition is set out in Rev. Proc. 2021-30. Many adopting employers of pre-approved and small plans do not apply for determination letters on termination, and if this rule is not changed, and such plans are identified for audit, plan sponsors with significant failures will be forced to use the more expensive closing agreement program to effect any required corrections without having had any prior opportunity to self-correct.

Recommendation. Given that Section 305 of SECURE 2.0 is intended to expand eligibility for self-correction and to eliminate distinctions between significant and insignificant failures, we believe that this restriction should be removed.

4. **Excise Taxes and Penalties**. Q9 of Notice 2023-43 provides that self-correction does not constitute a waiver of any otherwise applicable excise or additional taxes. Such a waiver may be obtained only through a Voluntary Correction Program (VCP) submission. However, if the applicant has already self-corrected using applicable procedures, the work in reviewing such a submission will be less than for a traditional VCP application. Treasury should consider establishing a streamlined procedure for such reviews and setting the fee for them at a minimal level to reflect the anticipated reduction in time needed to review the application.

VI. Section 301-Recovery of Overpayments

SECURE 2.0 amends Section 206 of ERISA and Code Section 414 to add new provisions on recovery of plan overpayments. While not identical, these sections permit, but do not require, fiduciaries to forgo recouping "inadvertent" pension overpayments to "non-culpable" participants. They limit the amount of recoupment through benefit offset. They impose limits on threatening suit to recover overpayments. They limit the relief that may be sought and the parties against whom relief can be sought. The provisions are effective on the date of enactment, though plan fiduciaries are protected if they followed pre-enactment guidance in attempting to recoup pre-enactment overpayments. Section 301 provides that fiduciaries and sponsors may rely on a good faith interpretation of then existing administrative guidance for inadvertent benefit overpayment recoupments and recoveries that commenced before the date of enactment.

Rev. Proc. 2021-30, which governs EPCRS, addresses some of these issues, in particular for defined benefit plans. However, Rev. Proc. 2021-30 does not address other issues covered in SECURE 2.0, such as the three-year stale claims rule, the ten-percent recoupment cap, and the prohibition against charging interest on overpayments. With the passage of SECURE 2.0, Rev. Proc. 2021-30 is now significantly out of date in this area.

Current Department of Labor (DOL) regulations at 2550.203-3 address only benefit offsets for overpayments due to the participant's reemployment, though early DOL opinion letters permit consideration of hardship and collection costs, e.g., ERISA Adv. Op. 77-03, 77-08. Pension Benefit Guaranty Corporation (PBGC) regulations at 4022.81-82, a source for some of the new standards (see H.R. Rep. 117-283 at 103), apply only to terminated, PBGC-covered plans.

The legislative history discusses some of the new standards and provides some examples. H.R. Rep. 117-283 at 104-107. However, it is not clear whether SECURE 2.0 displaces case law on such subjects as:

- the relevance of plan language. E.g., Zirbel v. Ford Motor Co., 980 F.3d 20 (6th Cir. 2020);

- whether the equities must be considered, and if so whether specific factors must be considered. E.g., Gabriel v. Alaska Elec. Pension Fund, 773 F.3d 945 (9th Cir. 2014); and

- for pre-enactment cases, whether recoupment is a benefit denial, for which an internal appeal must be provided. Penn. Chiropractic Association v. Blue Cross Blue Shield Assn, 214 WL 1276585 (N.D. Ill. Mar. 28, 2014).

Guidance Requested

1. **Define Basic Terms.** Guidance is needed to define basic terms used in SECURE 2.0, including:

    a. an "inadvertent" overpayment, the threshold requirement for application of the new provision;

b. "hardship" to be taken into account in determining the amount of a proposed recoupment, and whether to rely on hardship withdrawal standards;

c. when a participant is "culpable" such that the participant is not entitled to all the protections of the new provision, including when a participant had "good reason to know under the circumstances" that the participant was overpaid, and whether a participant's financial literacy is relevant in making this determination; and

d. the related but clearly distinct standards for threatening suit for non-culpable and culpable participants, whether the plan "reasonably believes it could prevail" and whether the plan (or more accurately its counsel) "could make the representations required under Rule 11" of the Federal Rules of Civil Procedure, respectively.

2. **Clarify Status of Case Law**. Guidance should clarify the continued vitality of case law where Section 301 of SECURE 2.0 is silent. This would be especially important for pre-enactment overpayments.

3. **Claims and Appeals**. Guidance should clarify the standards that apply under Section 503 of ERISA if a participant challenges an attempt to recoup overpayments.

4. **Relationship with Benefit Suspension Regulations**. Guidance should clarify whether SECURE 2.0 affects either the DOL suspension of benefits regulations or the PBGC recoupment regulations, and, if so, how. The DOL regulations are issued pursuant to an express grant of rulemaking authority in Section 203(a)(3)(B) of ERISA. However, the relationship between Section 301 and suspension of benefits for reemployment is unclear.

5. **PBGC**. Guidance should clarify whether Section 301 of SECURE 2.0 applies to the PBGC. PBGC's recoupment regulation is based on Section 4022 of ERISA, which governs guaranteed benefits. Guaranteed benefits, in turn, are those for which a participant has met the conditions for entitlement under Title 1 of ERISA. And PBGC is also a statutory trustee under Section 4042 of ERISA, so it is mindful of the norms for ongoing plans even if Section 4042 of ERISA does not extend those norms to PBGC as a matter of law.

6. **Maximize Good Faith Compliance**. Recognizing that issuance of comprehensive guidance will require coordination between Treasury, DOL and PBGC, temporary or interim guidance on correction of overpayments should be flexible.

Recommendation. This guidance should provide maximum protection to fiduciaries who are acting in good faith and in accordance with their understanding of applicable law, including case law.

VII. Section 335-Mortality Tables for Defined Benefit Plans

Section 335 of SECURE 2.0 requires IRS to amend the regulations relating to "Mortality Tables for Determining Present Value under Defined Benefit Pension Plans", to provide that for valuation dates occurring during or after 2024, such mortality improvements shall not assume for years beyond the valuation date future mortality improvements at any age which are greater than 0.78 per cent. Additionally, the Secretary shall modify the 0.78 per cent as necessary to reflect material changes in the overall rate of improvement projected by the Social Security Administration. Section 335 of SECURE 2.0 does not amend Code Section 430.

Guidance Requested

1. **Clarify Relationship With Code Section 430**. Guidance should be provided as to the relationship between Section 335 and Code Sections 430(h)(1)(A) and (B) and 430(h)(3)(A), (B) and (C).

2. **Clarify Application to Lump Sum Distributions**. Code Section 417(e)(3)(B) defines "applicable mortality table", for purposes of determining the present value of a lump sum distribution in a tax qualified defined benefit plan, as a mortality table, modified as appropriate by the Secretary, based on the mortality table specified in Code Section 430(h)(3)(A). Treasury should clarify whether Section 335 affects these calculations.

   Recommendation. The use of the phrases "as appropriate" and "based upon" provide the IRS with discretion to modify the 0.78 per cent mortality improvement for purposes of determining a plan participant's lump sum distribution from a defined benefit plan. Section 335 of SECURE 2.0 was a revenue raising provision, designed to reduce employer contributions to defined benefit plans, but it should not affect the manner in which single sum distributions are calculated.

3. **Definition of "Material"**. Section 335 does not define what changes are "material." Guidance should be provided as to whether that determination will be solely quantitative in nature.

4. **Overall Rate of Improvement**. Guidance should provide clarification whether reference to the "overall rate of improvement" means that material changes in mortality at a specific age or a specific age range will not necessarily constitute an "overall rate of improvement" in mortality rate.

VIII. Section 204-Eliminating a Penalty on Partial Annuitizations

Section 204 of SECURE 2.0 provides that the regulations under Code Section 401(a)(9) are to be amended to provide, for individual account plans, that "the plan may allow the employee to elect to have the amount required to be distributed from such account under such section for a year to be calculated as the excess of the total required amount for such year over the annuity amount for such year". The "total required amount" for a year is defined as the amount which would be required to be distributed under Treas. Reg. 1.401(a)(9)-5 for the year. The amount of the account balance to be used to determine the required distribution amount will include the value

of all annuity contracts which were purchased with a portion of the account and from which payments are made in accordance with Treas. Reg. 1.401(a)(9)-6.

This provision corrects situations in which participants who only partially annuitized their accounts did not have an appropriate offset made when determining their required minimum distributions, but there are a number of questions that are raised by the amendment regarding annuity valuation and the plans that may be aggregated when doing the required minimum distribution calculations.

Guidance Requested

1. **Valuation Methods**. The statute requires that the account balance on the valuation date will include the value on that date of all annuity contracts purchased with a portion of the account. Are participants required to request a present value calculation from the insurance company that issued the annuity? If an insurance company is unable or unwilling to provide the present value calculation, the participant should not be foreclosed from using the method established by this provision for meeting the required distribution amount. May the participant use other calculation methods to determine the present value of an annuity, e.g., along the lines of the determination of present value under Code Section 417(e)(3)?

   Recommendation. Clarify that any reasonable approach taken by a taxpayer to determine the value of the annuity will meet the requirement of this section.

2. **Aggregation with Section 403(b) Plans and IRAs**. For 403(b) plans and IRAs, if participants have multiple 403(b) annuity contracts or individual retirement annuities, can participants aggregate the value of their 403(b) annuities together or their individual retirement annuities together in the same manner as provided under Treas. Regs. 1.403(b)-6(e)(7) and 1.408-8, A–9? Or must the value of the annuity contract only be used to offset the required distribution amount from the account from which it was purchased?

   Recommendation. Guidance should confirm that participants holding multiple 403(b) annuity contracts and individual retirement annuities will be able to aggregate the value of their respective contracts or annuities in order to determine the additional distribution, if any, that they need to take to meet their required distribution amount from their aggregated accounts.

IX. Section 307- Expansion of IRA Tax Exempt Charitable Distributions

IRA distributions made directly to a charity after the depositor has attained age 70 ½ may be excluded from income up to a $100,000 annual cap as qualified charitable distributions ("QCDs"). SECURE 2.0 expands the IRA charitable distribution provisions to now include a one-time distribution to charities through charitable gift annuities, charitable remainder unitrusts, and charitable remainder annuity trusts (arrangements which could not receive QCDs before), subject to a limit of $50,000 (indexed.) The transfers to these split-interest trusts must be fully deductible and are subject to certain other conditions. This provision is effective for distributions made in 2023 and subsequent taxable years.

Section 307 of SECURE 2.0 is silent as to the manner and timing of elections; when elections are in effect for a year; whether this one-time election is in addition to or part of the presently available $100,000 (to be indexed) charitable distribution; and the manner and responsibility of reporting of the distributions to these split-interest trusts.

Guidance Requested

1. **Interaction of Limits**. Please explain whether the $50,000 one-time charitable distribution to a split-interest entity counts against the $100,000 limit.

2. **Elections**. Guidance should clarify how the election is made, the deadline for making the election, and whether it is revocable. The timing of the election is not necessarily the same as the timing of the distribution from the IRA. Under pre-SECURE 2.0 law, to report a QCD on Form 1040, a taxpayer would deduct the QCD from the taxable amount of the IRA distribution. However, reporting a QCD in that manner will not be sufficient to identify the distribution as a one-time distribution to a split-interest trust. Is the election revocable or irrevocable? Must the election be made in the year to which the distribution applies, or can it be made no later than the due date (including extensions) for filing the taxpayer's federal income tax return?

3. **Clarify "in effect"**. What does it mean for an election to be in effect for a preceding taxable year?

4. **Term of Years Charitable Trusts**. Code Section 408(d)(8)(F)(iv)(I) provides that a distribution satisfies the requirements of this section if no person holds an income interest in the split-interest trust other than the individual for whose benefit such trust is maintained, the spouse of such individual, or both. Under a term of years charitable trust, if the non-charitable beneficiary and spouse died before the term ended, their children or another person or persons would receive the remaining payments. Those children or other contingent beneficiaries would have contingent remainder income interests in the trust, and the statute appears to exclude contributions to such a trust from receiving treatment as a QCD, and to make contributions to such a trust ineligible for the $50,000 exclusion. Please indicate whether that is the intended result.

5. **Disallowed Deductions**. To constitute a QCD, the distribution must be otherwise fully deductible. Treas. Reg. 1. 664-1(a)(4) states that, in order for a trust to be a charitable remainder trust, it must meet the definition of and function as a charitable remainder trust from the creation of the trust. Deductions for charitable remainder trusts have been disallowed, even in totally non-abusive situations where the disallowance was based upon poor drafting. See, Estate of Block, TC Memo, 2023-30, rejecting taxpayer's substantial compliance argument. (We note that the IRS has also expressed its concern about abusive charitable remainder trusts. For example, on March 3, 2023, the IRS included in its list of "Dirty Dozen" arrangements aimed at high wealth taxpayer arrangements involving charitable remainder annuity trusts). Other instances in which deductions for charitable

remainder interests have been disallowed include Estate of Tamulis, 509 F. 3d 343 (7th Cir. 2007); Estate of Atkinson, 115 TC 26, aff'd 309 F. 3d 1290 (11th Cir. 2002); Alpha I, LP v. United States, 86 Fed. Cl. 126 (Fed. Ct .Cl. 2009); CCA 200628026; and Private Letter Rulings 201714002 and 201714003. If the IRS disallows a deduction in whole or in part, clarify whether that will result in a failure, in whole or in part, to satisfy the minimum distribution requirements of Code Section 401(a)(9). An analogous situation was unlikely under pre-SECURE 2.0 law, where contributions were made to 501(c)(3) organizations.

6. **Multiple Distributions**. Clarify whether the one-time distribution needs to be a single distribution, or whether there can be distributions to multiple trusts not to exceed $50,000 but all within one taxable year.

7. **Consequences If No Tax Benefit**. If the IRS disallows a deduction on the distribution that was intended to be the one-time distribution to a split-interest trust, please clarify whether the IRA owner can again attempt to make a one-time distribution under Code Section 408(d)(8)(F), because the IRA owner obtained no tax benefit under Code section 401(a)(9) from the distribution, or whether the deductibility of the transaction is not taken into account.

   Recommendation. We recommend that a disallowed deduction for a distribution should not be taken into account because there was no tax benefit.

8. **Responsibility of Trustee/Custodian**. Clarify the responsibility of IRA trustees or custodians making the one-time distribution to the split interest trust.

   Recommendation. Guidance should provide that an IRA trustee or custodian has no responsibility to determine that any distribution made from the IRA is intended to or will satisfy the one-time distribution requirement.

9. **Reporting**. Presently, QCDs are not reported on Form 1099-R. Please clarify the manner in which an IRA owner should evidence this one-time distribution from the owner's IRA to a split-interest trust.

10. **Status of Individual Retirement Annuities**. Clarify whether the one-time $50,000 contribution to a split interest trust is available to individual retirement annuities, as well as individual retirement accounts.

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The members of the task force who were drafters of these comments would be pleased to discuss any of the issues raised in this letter, either individually or as part of a conference call. Please contact me at gillian.moldowan@shearman.com or Carol Buckmann at carol@cohenbuckmann.com to arrange for such a discussion.

Sincerely,

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