ERIC | THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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Submitted via Regulations.gov

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Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2023-62)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2023-62, Guidance on Section 603 of the SECURE 2.0 Act with Respect to Catch-Up Contributions

To Whom It May Concern:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to submit comments on Notice 2023-62, "Guidance on Section 603 of the SECURE 2.0 Act with Respect to Catch-Up Contributions" (Notice), released by the Internal Revenue Service (IRS) on August 25, 2023. As discussed below, ERIC thanks the IRS for the administrative transition relief granted in the Notice and supports the additional guidance the IRS has previewed. Also, the IRS should provide additional relief and clarification so that plan sponsors and recordkeepers have the flexibility needed to efficiently comply with Section 603, which requires retirement plan catch-up contributions by certain employees to be made on a Roth basis.

By way of background, ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, located in every state, city, and Congressional district.

While more specific comments are offered below, ERIC urges IRS and Treasury to carefully evaluate the complexity of the guidance that it issues as it implements Section 603 and to streamline wherever possible. ERIC member companies have emphasized the potential complexity that could accompany these rules if special attention is not given to simplification.

IRS Should Empower Plans to Efficiently Comply with New Roth Catch-Up Requirements

ERIC member companies sponsor retirement plans, including defined contribution plans that are governed by the *Employee Retirement Income Security Act of 1974*, as amended (ERISA). For ERIC members with defined contribution plans subject to Section 603 of the SECURE 2.0 Act, it is critical that the IRS provide flexibility and certainty in implementing the new provisions requiring that certain catch-up contributions be made on a Roth basis. The two-year administrative transition period contained in Notice 2023-62 is a helpful start. However, more guidance is needed, as the IRS itself has acknowledged. Pursuant to the Notice, further clarification may include:

> *Guidance providing that, in the case of an eligible participant who is subject to section 414(v)(7)(A), the plan administrator and the employer would be permitted to treat an election by the participant to make catch-up contributions on a pre-tax basis as an election by the participant to make catch-up contributions that are designated Roth contributions.*

We understand that even with the administrative transition period, it is possible that plans will need flexibility in how to treat elections by participants. For workers who earn more than the $145,000 threshold - requiring Roth catch-up contributions - some plans may wish to treat a pre-tax catch-up election as a $0 election; others may wish to treat the election as a Roth election. ERIC recommends that plans be given flexibility, so long as participants are on notice about the treatment.

Relatedly, a plan should be able to comply with Section 603 by permitting the relevant catch-up contributions to be made on a pre-tax basis, but automatically converting those pre-tax contributions through an in-plan Roth rollover on a regular basis, such as during the following tax year to accommodate correction of non-discrimination testing failures. If the IRS disagrees with this recommendation, this method should be a permissible correction method for erroneous pre-tax catch-up contributions and actual deferral percentage (ADP) testing failures. In that regard, ERIC encourages the IRS and Treasury to build a simple, efficient process for any erroneous pre-tax catch-up contributions. Sponsors should have flexibility to include pre-tax amounts converted to Roth in the employee's taxable compensation in the year of the conversion, not the year the contributions were made. In addition to permitting recharacterization (with a de minimis exception), the IRS should permit a plan to refund the contributions to the employee in advance of the tax deadline in the next year, without penalty. Similarly, if a payroll provider errs and an employee is improperly treated as subject to the Roth catch-up mandate, IRS should confirm that the Roth amount may be transferred to the employee's pre-tax account and a corrected W-2 issued, consistent with current IRS guidance, should the participant choose.[1]

Additionally, some plans do not require employees to make a separate election for catch-up contributions. These plans structure deferrals to permit a participant to defer an amount up to the

[1] *See* IRS, "Fixing Common Mistakes- Correcting a Roth Contribution Failure," *available at* https://www.irs.gov/retirement-plans/fixing-common-mistakes-correcting-a-roth-contribution-failure.

applicable limit including catch-up contributions based on a single election. IRS should confirm that these single election deferrals will still be permitted and that these plans will have the same flexibility to automatically treat the election as a Roth catch-up election once a high-earning participant reaches the Section 402(g) limit (instead of having to obtain a separate Roth catch-up election from the employee).

Finally, IRS needs to provide guidance on how the $145,000 compensation limit will be indexed, as it is required to be adjusted beginning in 2025. For example, will the adjusted 2025 limit determine the application of the Roth mandate beginning in 2025 or 2026 (i.e. based on 2025 wages?)

IRS Should Provide Guidance that Wages Are Not Aggregated Between Employers and New Requirements Do Not Apply to New Hires, Re-Hires, and Transferred Employees

According to IRS, follow up guidance may also include:

> *Guidance addressing an applicable employer plan that is maintained by more than one employer (including a multiemployer plan). The guidance would provide that an eligible participant's wages for the preceding calendar year from one participating employer would not be aggregated with the wages from another participating employer for purposes of determining whether the participant's wages for that year exceed $145,000 (as adjusted). For example, under that guidance, if an eligible participant's wages for a calendar year were: (1) $100,000 from one participating employer; and (2) $125,0000 from another participating employer, then the participant's catch-up contributions under the plan for the next year would not be subject to section 414(v)(7)(A) (even if the participant's aggregate wages from the participating employers for the prior calendar year exceed $145,000, as adjusted). The guidance also would provide that, even if an eligible participant is subject to section 414(v)(7)(A) because the participant's wages from one participating employer in the plan for the preceding calendar year exceed $145,000 (as adjusted), elective deferrals made on behalf of the participant by another participating employer that are catch-up contributions would not be required to be designated as Roth contributions unless the participant's wages for the preceding calendar year from that other employer also exceed that amount.*

ERIC would welcome the guidance described in this paragraph of the notice. Further, the guidance should clarify that the controlled group rules do not apply for aggregation purposes, including application of the Roth mandate. This is important because oftentimes employers have different payroll systems even when they are part of the same controlled group. As a result, there may be no way (other than through a manual process) to track prior-year pay-history at one company within the controlled group for purposes of applying Section 603 in the current year at another company within the controlled group. Similarly, if an employee transfers from a non-participating employer (even if in the same controlled group), that employee should be able to

make pre-tax catch-up contributions in the year of the transfer. Finally, the guidance should clarify that the mandated Roth catch-ups do not apply to new hires and rehires, who should be able to make pre-tax catch-up contributions during the year of hire or rehire, irrespective of their prior-year wages. Providing this guidance would also comport with the anticipated guidance that these new requirements "*would not apply in the case of an eligible participant who does not have wages as defined in section 3121(a) (that is, wages for purposes of the Federal Insurance Contributions Act (FICA)) for the preceding calendar year* ***from the employer sponsoring the plan***" (emphasis added).

<u>IRS Should Clarify that Plan Sponsors Have the Flexibility to Impose Requirements Related to Catch-Up Contributions</u>

Additionally, IRS requested comments regarding "*whether the intended guidance should address a plan that permits eligible participants to make catch-up contributions under section 414(v) but does not include a qualified Roth contribution program. In particular, should the guidance provide that such a plan will not fail to satisfy section 414(v)(4) (which provides that all eligible participants must be allowed to make the same election with respect to catch-up contributions) or section 414(v)(7)(B), merely because the plan provides that eligible participants who are not subject to section 414(v)(7)(A) are permitted to make catch-up contributions while eligible participants who are subject to section 414(v)(7)(A) are prohibited from making catch-up contributions.*"

ERIC supports this proposal and providing plan sponsors with the flexibility to design appropriate programs, including permitting plans with Roth features and those without to limit catch-up contributions to participants who do not trigger the $145,000 earnings threshold, including requiring these employees to make catch-up contributions on a pre-tax basis. Furthermore, IRS should clarify that a plan may require all catch-up contributions be made on a Roth basis. A plan should be permitted to require this even for participants who do not trigger the mandatory threshold of $145,000. Some ERIC members have expressed interest in this option in order to simplify and standardize plan administration. Absent this, it's possible some plans (especially smaller plans) would consider wholly eliminating catch-up contributions, which seems contrary to Congress' manifest intent to encourage retirement savings.

<u>Plans Need Additional Guidance on the Interaction of the Non-Discrimination Rules with Implementation of Section 603</u>

Our members have requested additional guidance clarifying how the non-discrimination rules interact with the new Section 603 requirements. Specifically:

- For purposes of determining the actual deferral ratio (ADR) of a participant age 50 and older, IRS should confirm that all catch-up contributions may continue to be subtracted from the participant's elective deferrals for the plan year.

- If a plan satisfies the actual deferral percentage (ADP) test by use of refunds, IRS should confirm that amounts that would be refunded to a participant age 50 and older may still be reduced by treating excess amounts as catch-up contributions (up to the relevant catch-up limit), regardless of whether they must be made as Roth contributions. In this case, tax of these contributions should only occur after non-discrimination testing.

- Additionally, it is worthwhile for the IRS to explore whether the definition of "highly compensated employee" (HCE) can be harmonized with the Section 603 $145,000 threshold for Roth catch-up contributions. While the SECURE 2.0 provision is not identical, sound policy would be served by harmonizing the limitations, either by legislative or regulatory recommendations or safe harbors.

Conclusion

ERIC looks forward to working with the IRS and Treasury as additional guidance is developed and implemented to facilitate the implementation of Section 603 of SECURE 2.0. We stand prepared to meet or provide any additional information that you may find helpful.

Sincerely,

Andy Banducci