AICPA

September 13, 2023

The Honorable Jason Smith
Chairman
House Committee on Ways and Means
1011 Longworth House Office Building
Washington, DC 20515

The Honorable Ron Wyden
Chairman
United States Senate Committee on Finance
221 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Richard Neal
Ranking Member
House Committee on Ways and Means
372 Cannon House Office Building
Washington, DC 20515

The Honorable Mike Crapo
Ranking Member
United States Senate Committee on Finance
239 Dirksen Senate Office Building
Washington, DC 20510

Re: Technical Corrections Related to SECURE 2.0 Act of 2022

Dear Chairmen Smith and Wyden, and Ranking Members Neal and Crapo:

The AICPA applauds your letter dated May 23, 2023, to Secretary of the Treasury ("Secretary") Janet Yellen, and Internal Revenue Service (IRS) Commissioner Daniel Werfel, regarding your intention to introduce legislation to correct erroneous statutory language related to certain provisions in the SECURE 2.0 Act of 2022 (SECURE 2.0), signed into law on December 29, 2022, as part of the Consolidated Appropriations Act, 2023.[1]

The AICPA agrees with the need for technical corrections related to SECURE 2.0 Section 102, Section 107, and Section 601 in order to reflect the intent of the legislation. On August 25, 2023, the IRS issued Notice 2023-62, which nullifies the need for a technical correction related to SECURE 2.0 Section 603. We request that you consider legislation which also includes corrections to Section 110 and Section 302, Section 313 and Section 326 of SECURE 2.0.

I. Provisions in SECURE 2.0 Identified in the May 23, 2023, Letter with Which the AICPA Agrees Require Technical Corrections

1. Small Employer Pension Plan Startup Costs Credit (Section 102)

SECURE 2.0 enhanced the credit for small employer pension plan startup costs in part by allowing an additional credit amount for employer contributions made by certain eligible employers. In general, the new additional credit is subject to a maximum amount that does not exceed $1,000 per employee. The reading of the legislation could lead to the conclusion that the new credit is also subject to the overall limit on the credit for employer startup costs.

A technical correction is needed to make clear that the new credit is in addition to the existing credit and does not count against the limits on the existing credit.

[1] P.L. 117-328.

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2. Two Triggering Ages for the Required Beginning Date for Individuals Born in 1959 (Section 107)

As originally drafted, SECURE 2.0 increases the age which triggers the required beginning date (RBD), the point at which retirement plan participants must begin taking distributions. The RBD is increased to age 73 for individuals who have not attained age 72 as of December 31, 2022, and to age 75 effective January 1, 2033, for individuals turning 74 after December 31, 2032. Since individuals born in 1959 will turn 73 in 2032 (before 2033) and 74 in 2033 (after 2032), the legislative text results in two triggering ages for those individuals (i.e., age 73 and age 75). An individual born in 1959 will be required to take a required minimum distribution (RMD) for 2032, will be exempt from an RMD requirement for 2033, and will, again, be subject to an RMD for 2034 (and beyond).[2] Two triggering ages for these individuals will lead to confusion and penalties.

We support a technical correction that eliminates confusion for these individuals, which can be accomplished by changing the application of the age 75 trigger to cover individuals who turn 73 in 2033, which is consistent with the intent of the law. Per the Senate Finance Committee SECURE 2.0 Section-by-Section Summary,[3] "Section 107 further increases the required minimum distribution age further to 73 starting on January 1, 2023 – and increases the age further to 75 starting on January 1, 2033."

3. SIMPLE and SEP Roth IRAs (Section 601)

Employers make contributions to individual retirement accounts (IRAs) established for its employees with regard to Simplified Employee Pensions (SEPs) and Savings Incentive Match Plan for Employees (SIMPLE) IRAs. Prior to the passage of SECURE 2.0, Roth IRAs were not permitted to be part of these arrangements. Section 601 of SECURE 2.0 permits these arrangements to include Roth IRAs. However, the final legislative text could be read to limit the amount that can be contributed to a Roth IRA that is part of a SEP or a SIMPLE IRA to the annual Roth IRA contribution limit, which was not intended as part of this provision.

A technical correction is necessary to state that the same annual contribution limits that apply to contributions made under pre-tax SEPs or SIMPLE IRAs also apply to contributions made to Roth IRAs that are part of these arrangements.

[2] Under the minimum distribution rules, distributions are required for each year beginning with the year in which the individual reaches the age trigger, but the distribution for the first year (the "distribution calendar year") is not required until the following April 1 (i.e., for an individual first required to take an RMD for 2032, the RMD is not required until April 1, 2033).
[3] Senate Committee on Finance, SECURE 2.0 Section-by-Section Summary.

II. Additional Provisions in SECURE 2.0 Identified by the AICPA Which Require Technical Corrections

1. Certification Deadline for Student Loans (Section 110)

Section 110 of SECURE 2.0 permits plans that allow elective deferrals, including Internal Revenue Code (IRC) section 401(k)[4] plans, section 403(b) arrangements, eligible governmental section 457(b) plans, and SIMPLE IRAs the option to allow student loan payments to be treated as elective deferrals, thereby allowing the plan to provide a matching contribution on student loan payments as if the student loan payment were a deferral. To receive matching contributions on student loan payments, the participant must certify that a payment was made. Under procedures to be established by regulations published by the Secretary, an employer may have reasonable procedures for employees to claim matching contributions. Section 110(g)(2) of the law further provides that any annual deadline to claim matching contributions under these procedures cannot be earlier than three months after the close of the plan year.

Section 401(k) plans that are not established to meet the design-based safe harbors set forth in section 401(k)(12) or section 401(k)(13) are subject to annual nondiscrimination testing on elective deferrals contributed to the plan. Section 401(m) imposes a similar test on annual matching contributions provided under the plan. If one or both tests fail, the plan sponsor is required to take corrective action, which may include issuing refunds to certain "highly compensated employees" under the plan. The deadline for taking corrective action is 12 months after the end of the plan year for which the test is failed. If corrective refunds are not issued within 2 ½ months (6 months in the case of a plan that meets the "Eligible Automatic Contribution Arrangement" requirements of section 414(w)) after the end of the year, the employer is subject to an excise tax equal to 10% of the amount required to be refunded. Since SECURE 2.0 mandates that the certification deadline cannot be earlier than three months after the end of the year, many employers deciding to offer matching contributions on student loan payments will be prevented from performing required nondiscrimination tests within the timeframe required to avoid the excise tax. Therefore, some employers may decide not to implement this provision, which will impede achievement of the intended policy goals.

A technical correction is needed to amend Section 110(g)(2) of SECURE 2.0 to provide that the earliest deadline for an employee to certify that they are making student loan payments and claim a match be one month after the end of the plan year. This timing change will allow the employer time to perform the required nondiscrimination testing to avoid the excise tax and remove a disincentive for providing matching contributions on student loan payments.

[4] Unless otherwise indicated, hereinafter, all section references to the Internal Revenue Code of 1986, as amended, or to the Treasury Regulations promulgated thereunder.

2. **Reduction in Excise Tax on Certain Accumulations in Qualified Retirement Plans (Section 302)**

Section 302 of SECURE 2.0 reduces the penalty for failure to take RMDs from 50% to 25%. If a failure to take a RMD from an IRA is corrected in a timely manner, the excise tax on the failure is further reduced to 10%.

Two areas of Section 302(e) are unclear in their intent:

- According to Section 302(e)(2), "…For purposes of this subsection, the term 'correction window' means the period of time beginning on the **date on which the tax** under subsection (a) **is imposed**…" (**bolded** emphasis added).

  The law, as currently written, is unclear as to when the tax is imposed in the case of a missed RMD. For example, in the case of a missed RMD in 2023, it is unclear if the tax is imposed by:
  - the due date of the return for the year of the missed RMD (i.e., April 15, 2024); or
  - the extended due date (i.e., October 15, 2024, for an individual); or
  - the last day of the violation year (i.e., December 31, 2023); or
  - a different date.

- According to Section 302(e)(1)(B), the taxpayer must submit "…a return **during the correction window**, reflecting such tax (as modified by this subsection). (**bolded** emphasis added)

  The correction window can cover up to a two-year period. However, the tax return submission date for the second year falls outside the correction window, thereby shortening the effective correction period to less than the two-year intent in the original law.

If the intent of the law is that the tax is imposed on last day of the violation year (i.e., December 31, 2023), the legislation should be corrected to state that intention. Also, Section 302(e)(1)(B) could be corrected to replace the language "during the correction window," with "for the year of correction made."

In addition, currently, when a taxpayer sends a return with a waiver request to the IRS for the removal of the prior law 50% penalty, the taxpayer does not receive a response. Without a technical correction to provide for IRS responses and a deferred opt-in period for the reduced penalty, the IRS would be required to flag any return that contains a Form 5329, *Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts*, and the IRS may have difficulties in setting up an operating system that would flag Form 5329 when the return is submitted. If not identified and responded to, the taxpayer is left unaware and waiting until the statute of limitations runs out and is a burden to taxpayers and their estates that need to remain open until the statute of limitations ends. Specifically, technical correction language is needed regarding the correction window period start and end.

Also, the legislation should clarify the purpose of the due date in cases where no return is required to be filed for the year of the missing RMD (e.g., taxpayer's income is below the filing requirement). For example, provide clarification if the due date is for a waiver request under section 4974(d), and for Form 5329, required for reporting the missed RMD and penalty. In addition, we suggest that the legislation provide a requirement for IRS to respond with approvals on waivers under section 4974(d) in all events, and if a waiver is denied, that taxpayers are allowed a deferred opt into the section 4974(e) reduced penalty.

3. **Individual Retirement Plan Statute of Limitations for Excise Tax on Excess Contributions and Certain Accumulations (Section 313)**

Section 313 of SECURE 2.0 as currently written states "… include the income tax return filed by the **person** on whom the tax under such section is imposed for the year..." and "…Rule in case of **individuals**, not required to file return. In the case of a person who is not required to file an income tax return for such year— the return referred to in this section shall be the income tax return that such **person** would have been required to file but for the fact that such **person** was not required to file such return." (**bolded** emphasis added).

As the Senate Finance Committee Section by Section summary[5] states, "to provide finality for taxpayers in the administration of the excise taxes, Section 313 provides that a 3 year period of limitations begins when the taxpayer files an individual tax return (Form 1040) for the year of the violation, except in the case of excess contributions, in which case the period of limitations runs 6 years from the date Form 1040 is filed. There is a further exception from this 6-year rule for taxes that arise out of a bargain sale to the IRA. In general, these changes are intended to ensure that there is a reasonable period of limitations for violations of which taxpayers were not aware and thus did not file an excise tax return, while retaining existing law in fact scenarios that involve a bargain sale."

The statutory language as written only refers to person and individual and does not mention trust or estate, and as noted above in the Senate Finance Committee explanation, there is only reference to "individual tax return (Form 1040)" and no mention of trust or estate or the Form 1041, U.S. Income Tax Return for Estates and Trusts.

A technical correction is needed to add the terms "trust or estate" after the term "person" as the law is currently written, the term "person" implies an individual only.

[5] Senate Committee on Finance, SECURE 2.0, Section-by-Section Summary.

4. Distributions for Terminally Ill Participants (Section 326)

Section 326 of SECURE 2.0 amends section 72(t) to provide that a distribution to a participant in certain circumstances involving an employee that has been diagnosed with a terminal illness will not be subject to the 10% early withdrawal penalty under section 72(t)(2). The provision does not otherwise make that type of distribution a permissible distribution under the rules governing the various qualified retirement plans to which it applies.

To fully effectuate the intent of the law to allow terminally ill employees to take an early withdrawal from their qualified retirement plan without being subject to the 10% penalty, a technical correction is necessary to add language to allow this type of distribution. A source of that language may be found in Section 314 of SECURE 2.0 which permits certain withdrawals by domestic abuse victims to avoid the 10% early withdrawal penalty under section 72(t). Section 314 of SECURE 2.0 also contains language providing that those same withdrawals may be permitted under the distribution rules governing the eligible types of qualified retirement plans.

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We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please feel free to contact Lauren Pfingstag, AICPA Director – Congressional and Political Affairs, at (407) 257-0607, or lauren.pfingstag@aicpa-cima.com; Tom Pevarnik, Chair, AICPA Employee Benefits Taxation Technical Resource Panel, at (202) 879-5314, or tpevarnik@deloitte.com; Brooke Salvini, Chair, AICPA PFP Executive Committee at (805) 543-6622, or brooke@salvinifinancial.com; or Blake Vickers, Chair, AICPA Tax Executive Committee, at (830) 372-9692, or bvickers@alamo-group.com.

Sincerely,

Blake Vickers, CPA, CGMA
Chair, AICPA Tax Executive Committee

Brooke Salvini, CPA, PFS, CFP®
Chair, AICPA PFP Executive Committee

cc: The Honorable Janet Yellen, Secretary of the Treasury, Department of the Treasury
The Honorable Lily Batchelder, Assistant Secretary for Tax Policy, Department of the Treasury
The Honorable Daniel I. Werfel, Commissioner, Internal Revenue Service
Ms. Carol Weiser, Benefits Tax Counsel, Department of the Treasury
Ms. Rachel Leiser Levy, Associate Chief Counsel, Internal Revenue Service
Mr. William Paul, Principal Deputy Chief Counsel (Technical) and Deputy Chief Counsel, Internal Revenue Service