October 24, 2023

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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, DC 20044

Re: SECURE 2.0's Roth Catch-Up Requirement (Notice 2023-62)

Dear Sir or Madam:

The SPARK Institute greatly appreciates the two-year administrative transition period and other guidance that the Department of the Treasury ("Treasury") and Internal Revenue Service ("IRS") announced through Notice 2023-62. That guidance appropriately recognizes the extreme administrative challenges created by SECURE 2.0's Roth catch-up requirement and offers relief that will prevent plans from unnecessarily eliminating catch-up contributions in a contorted effort to comply with SECURE 2.0. However, it is critical that Treasury and IRS issue additional guidance as soon as possible to allow plan sponsors, payroll providers, recordkeepers and other service providers to prepare for January 2026. Without that guidance and sufficient time to implement necessary systems, configuration changes, and participant communications, the transition period cannot be used for its intended purpose.

As part of Notice 2023-62, Treasury and IRS announced that they intend to issue further guidance on SECURE 2.0's Roth catch-up requirement. That forthcoming guidance is expected to clarify that: (1) SECURE 2.0's Roth catch-up requirement does not apply to eligible participants who do not have wages as defined in Code section 3121(a) for the preceding calendar year (e.g., self-employed partners, ministers, and certain state and local government employees whose services are excluded from the definition of employment under Code section 3121(b)(7)); (2) plan administrators and employers are permitted to avoid violations of the Roth catch-up requirement by treating participant elections to make pre-tax catch-up contributions as participant elections to make designated Roth contributions; and (3) in the case of a plan maintained by more than one employer, a participant's wages for the prior year from one employer will not be aggregated with the wages from a different employer for purposes of determining whether the participant exceeds the $145,000 wage threshold.

The SPARK Institute greatly appreciates this regulatory preview. Additionally, we believe that these anticipated interpretations are consistent with our interpretations of the issues that were addressed in Notice 2023-62. The SPARK Institute also believes, however, that future guidance

should provide additional clarification on these topics, and must address the issues that were identified as guidance priorities in the letter that the SPARK Institute sent to Treasury and IRS on April 10, 2023. Accordingly, below are our responses to the specific requests for comments in Notice 2023-62, as well as our other requests for guidance on SECURE 2.0's Roth catch-up requirement that were not addressed by Notice 2023-62.

- ***Governmental 457(b) Plans.*** Section 603(b)(2) of SECURE 2.0 includes a conforming amendment that has been interpreted as potentially requiring all participants in governmental 457(b) plans to make 414(v) catch-up contributions as designated Roth contributions, regardless of their wages. As part of our April 10, 2023 guidance request, the SPARK Institute requested guidance either: (1) clarifying that Section 603(b)(2) of SECURE 2.0 does not require participants in governmental 457(b) plans with FICA wages of $145,000 or less to make 414(v) catch-up contributions to a designated Roth account; or (2) indicating that the IRS will apply the 414(v) catch-up contribution rules as though Congress has made any necessary technical corrections.[1]

  Section III.A. of Notice 2023-62 clearly states that the deletion of 402(g)(1)(C) by SECURE 2.0 does not result in the loss of catch-up contributions generally. We also read Notice 2023-62 as confirming that SECURE 2.0 did not inadvertently eliminate pre-tax catch-up contributions for governmental 457(b) plans. Specifically, Section III.A. of Notice 2023-62 states: "If an eligible participant is subject to the requirements of section 414(v)(7)(A), then any catch-up contributions that are made to the plan on behalf of the participant must be designated as Roth contributions. However, if an eligible participant is not subject to the requirements of section 414(v)(7)(A), then any catch-up contributions that are made to the plan on behalf of the participant are not required to be designated as Roth contributions." In addition, Section III.A. of Notice 2023-62 references the contribution rules for 457(b) plans multiple times.

  We understand that sponsors of governmental 457(b) plans generally agree with this reading, and do not plan to force catch-up eligible participants to make catch-up contributions on a Roth basis starting in 2024. After all, the entire purpose of Notice 2023-62 is to provide an administrative transition period for the new Roth catch-up contribution rule. It may be helpful for Treasury or IRS officials to clarify this reading publicly, and for future guidance to expressly reference Section 603(b)(2) of SECURE 2.0 as being covered by the guidance in Section III.A. of Notice 2023-62.

- ***Wage Aggregation Across Multiple Employers.*** As summarized above, Notice 2023-62 indicates that Treasury and IRS expect to issue guidance clarifying that, in the case of a

[1] The reason for this request is because of the confirming change in Section 603(b)(2) of SECURE 2.0, which modifies the rule in Code section 457(e)(18) that addresses the coordination of the catch-up contribution rule in 414(v) with the special three-year catch-up rule for 457(b) plans. The conforming change could be read, incorrectly in our view, as resulting in a requirement that all catch-up contributions in a 457(b) plan must be made on a Roth basis.

plan that is maintained by more than one employer (including a multiple employer plan), a 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). Although the phrase "a plan that is maintained by more than one employer" is used in the Code to mean a plan maintained by more than one *unrelated* employer (see Code section 413), the Notice itself does not define what the phrase means.

With regard to this issue, the SPARK Institute requests additional clarification on whether the disaggregation rule explained in Notice 2023-62 only applies to multiple employer plans, pooled employer plans, and multiemployer plans, or alternatively, whether it will also apply to distinct employers that participate in a single plan but are otherwise treated as a single employer under Code sections 414(b), (c), (m), or (o).

- ***Multiemployer Plans.*** Even though Notice 2023-62 does clarify that guidance regarding multiemployer plans being exempted from wage aggregation is expected, the implementation of Section 603 continues to be impracticable for multiemployer plans, and the SPARK Institute requests that multiemployer plans be exempted from Section 603.

  Multiemployer plans are not sponsored by an employer, but rather they are sponsored by a joint board of trustees consisting of union and management representatives and cover employees of multiple unrelated employers. Because Code section 414(v)(7) states that the $145,000 limit applies on a plan basis to the wages paid from the *employer sponsoring the plan*, multiemployer plans should be exempted from Section 603 for this fact alone; multiemployer plans are not "sponsored" by employers, and multiemployer plan sponsors do not pay (or track) wages paid by the employer.

  It is also important to call out the complications Section 603 will introduce for collective bargaining agreements ("CBAs"), which dictate required employer contributions. Today, most multiemployer plans do not offer Roth due to its administrative complexity. Section 603 will place additional administrative burdens on employers and plan sponsors. As a result, many multiemployer plans are contemplating removing catch-up contributions rather than adding Roth, which goes against the spirit of SECURE 2.0. This decision may potentially complicate CBA negotiations between labor and management. Also, CBAs generally have a three-year term, and to make changes prior to their expiration may not be possible and may open the door to other issues.

  For the reasons noted above, we request that multiemployer plans be exempt from Section 603. Alternatively, we request that the effective date for multiemployer plans be aligned with the expiration of their respective CBAs post-2026.

- ***Limiting Catch-Up Contributions to Employees Earning $145,000 or Less.*** In response to the specific request for comments in Notice 2023-62, and consistent with our April 10,

2023 guidance request, the SPARK Institute encourages Treasury and IRS to issue guidance permitting a plan to limit catch-up contributions to those employees whose wages are $145,000 or less for the preceding calendar year. Such guidance would eliminate many of the administrative burdens created by SECURE 2.0's Roth catch-up requirement by permitting plans that do not currently have a designated Roth contribution program to comply with SECURE 2.0 without adopting such a program.

In addition, some plans do not currently have a designated Roth contribution program because it would be too operationally complex or expensive to implement or due to the plan sponsor's general philosophy regarding plan design. If catch-up contributions cannot be limited to employees earning $145,000 or less, some plan sponsors may simply terminate the ability to make the catch-up contributions under the plan altogether to the detriment of the retirement savings opportunities afforded to lower-wage, older employees.

With regard to plan design, SPARK also encourages Treasury and IRS to issue guidance clarifying that a plan may be drafted to require all catch-up contributions to be made as designated Roth contributions, regardless of a participant's wages. We believe that nothing in Section 603 of SECURE 2.0, or in the current law provisions of Code section 414(v), prohibit this.[2]

The SPARK Institute also requests confirmation that a plan may restrict its qualified Roth contribution program to catch-up contributions only. This plan design will enable plan sponsors to meet the Code requirements while adhering to their plan design philosophy as much as possible. Furthermore, if a plan only permits designated Roth contributions as catch-up contributions, we request guidance indicating that this design will not violate the benefits, rights, and features rules of Code section 401(a)(4) (to the extent applicable), provided that designated Roth contributions are universally available to all catch-up eligible participants.

- ***Negative Election for Mandatory Roth Catch-Up Contributions.*** As summarized above, the SPARK Institute greatly appreciates the statements in Notice 2023-62 indicating that future guidance is expected to clarify 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 believe that this language is intended to cover situations in which a participant has

[2] Section 603 of SECURE 2.0 requires that, if a plan offers catch-up contributions and has at least one participant over the wage limit, the plan must provide that any eligible participant may make Roth catch-up contributions. Congress did not explicitly prohibit, however, a plan requiring *all* catch-up contributions to be made on a Roth basis.

elected to make *any* pre-tax deferrals in violation of Code section 414(v)(7)(A) – i.e., even when the participant election is not made specifically for catch-up contributions. However, because Notice 2023-62 expressly contemplates a participant election "to make catch-up contributions on a pre-tax basis," we are seeking confirmation that it also applies when a participant has elected to generally make all elective deferrals on a pre-tax basis. This would be helpful to provide maximum flexibility for plan administrators, as plans have different procedures for collecting contribution elections from participants.

We also request that the Service clarify that it would be permissible to treat contributions designated as pre-tax catch-up contributions as Roth contributions even if those contributions are later determined *not* to be catch-up contributions. In other words, if a participant designates a portion of their contributions as pre-tax catch-up contributions in anticipation of exceeding a plan or IRS limit, plan administrators may treat those contributions as Roth contributions to satisfy SECURE 2.0's Roth catch-up requirement. Similarly, plan administrators should not be required to recharacterize those contributions, or any portion of those contributions, as pretax (if, after the end of the plan year, the plan administrator determines that some or all of those designated catch-up contributions are in fact regular deferrals).

- ***Wages for Governmental Employees and Self-Employed Individuals.*** As summarized above, Notice 2023-62 indicates that future guidance is expected to clarify that SECURE 2.0's Roth catch-up requirement does not apply to State or local government employees whose services were excluded from the definition of employment under Code section 3121(b)(7) and self-employed individuals because they do not have FICA wages for the preceding calendar year. The SPARK Institute does not have a position as to the correct interpretation of the law, but we do strongly believe that plans that cover state and local government employees and self-employed individuals will need as much advance notice as possible regarding the Service's final interpretation to prepare for the end of the administrative transition period and to timely amend plan documents.

  We also recommend that the Service provide maximum flexibility to state and local government employers as to how to determine whether an employee is over the $145,000 threshold. State and local governments should be able, for example, to use the definition of compensation used for their pension plans or another definition so long as it is applied consistently and is a Code section 415(c)(3)-compliant definition of compensation. This flexibility is consistent with other circumstances under which governmental plans can comply with a reasonable good faith interpretation of the rules.

- ***ADP Testing / Recharacterization.*** Treasury Regulation section 1.414(v)-1(d)(2)(ii) states that "For purposes of the correction of excess contributions in accordance with section 401(k)(8)(C), elective deferrals under the plan treated as catch-up contributions for the plan year and not taken into account in the ADP test under paragraph (d)(2)(i) of this section are subtracted from the catch-up eligible participant's elective deferrals under

the plan for the plan year." The SPARK Institute requests clarification that Roth catch-up contributions are eligible for this special recharacterization rule.[3]

In addition, we request guidance addressing how such a recharacterization might work in practice, as most plans will not have the results of their ADP test and will not have made corrective distributions until March 15, which is after the W-2s for the prior year have been issued. If a plan needs to recharacterize contributions as catch-up contributions, which means that (for employees over the wage threshold) the contributions retroactively become Roth contributions, it will be too late to report those taxable contributions as taxable to the employee on a Form W-2 for the year in which the contributions were made. To address these practical issues, we recommend guidance that would permit these recharacterizations to be reported on a Form 1099-R, rather than a Form W-2, essentially similar to an in-plan Roth conversion. We believe this is the most administratively feasible approach and is entirely consistent with the statute. Additionally, we request guidance indicating that recharacterized amounts may be reported as taxable to the participant in the year of the recharacterization, similar to the tax treatment available to distributions of excess contributions.[4] For many SPARK members, this is the most important issue to have resolved quickly because it will impact many thousands of plans.

- ***Delayed Wage Determination / Recharacterization.*** Beyond ADP testing, there is also a separate recharacterization issue related to the Roth catch-up contribution issue for which we are seeking guidance. That is, we are concerned that there will be circumstances in which an employee will make pre-tax catch-up contributions very early in a year based on the assumption that the employee did not receive wages in excess of $145,000 in the preceding calendar year. However, it may be subsequently determined that the employee, in fact, received wages in excess of $145,000 in the preceding calendar year. In addition, we expect that there will be errors made by the payroll provider in switching a participant into Roth, especially in the early years the rule is in place. To resolve these types of errors, we request guidance indicating that a plan may correct this mistake by recharacterizing any previously contributed pre-tax catch-up contributions as Roth catch-up contributions that may be reported on Form 1099-R.[5] Such treatment would also be very helpful for resolving other potential scenarios involving an employee who makes

[3] In a similar regard, we are also requesting confirmation that SECURE 2.0's Roth catch-up requirement does not prevent a plan from treating elective deferrals as catch-up contributions, even as mandatory Roth catch-up contributions, in order to avoid violations of Code section 415(c).

[4] If this type of recharacterization is permitted for ADP testing purposes or any other purpose, and it is a participant's first Roth contribution, we also request clarification on how it would impact the participant's five-taxable-year period for purposes of determining whether a distribution from a designated Roth account is a "qualified distribution".

[5] In addition, the Service should consider creating a "grace period" – prior to which recharacterization is not necessary – at the beginning of the following year, prior to the issuance of a Form W-2. After the issuance of the Form W-2, the ability to recharacterize will be needed.

pre-tax catch-up contributions when they are otherwise required to make such contributions as designated Roth contributions.

- ***15 Years of Service Catch-Ups for 403(b) Plans.*** The SPARK Institute requests confirmation that the Roth requirements of Section 603 of SECURE 2.0 do not apply to the 15 years of service catch-up contributions described in Code section 402(g)(7).

- ***Special 457(b) Catch-Ups.*** The SPARK Institute requests confirmation that the Roth requirements of Section 603 of SECURE 2.0 do not have any impact on the amount or type (pre-tax or Roth) of special catch-up contributions described in Code section 457(b)(3).

- ***Dual-Qualified Plans.*** The SPARK Institute requests confirmation that SECURE 2.0's Roth catch-up requirement does not apply to plans that are dual-qualified under the Puerto Rico tax code because dual-qualified plans are not permitted to have a designated Roth contribution program.

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The SPARK Institute again wishes to express our appreciation for the transition relief and guidance already provided through Notice 2023-62. Additionally, we appreciate the opportunity to provide these comments as Treasury and IRS work to publish additional guidance on SECURE 2.0. If Treasury and IRS have any questions or would like more information regarding our comments, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com).

Sincerely,

Tim Rouse
Executive Director