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April 5, 2024

Internal Revenue Service
CC:PA:LPR:PR (Notice 2024-22)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice 2024-22 – PLESAs and Revenue Rulings 74-55 and 74-56

Dear Sir or Madam:

The SPARK Institute, Inc. appreciates the opportunity to comment on Notice 2024-22 and its guidance on the reasonable anti-abuse procedures that plans may employ to limit the frequency or amount of matching contributions made with respect to participant contributions made to a pension-linked emergency savings account ("PLESA"). Additionally, we appreciate the opportunity to comment on Revenue Rulings 74-55 and 74-56.

The SPARK Institute represents retirement plan recordkeepers, mutual fund companies, brokerage firms, insurance companies, banks, consultants, trade clearing firms, and investment managers. Collectively, our member firms administer the retirement plans for over 110 million American workers.

The SPARK Institute is pleased that, through Section 127 of the SECURE 2.0 Act of 2022 ("SECURE 2.0"), Congress created a new tool that enables employers to use their retirement plans to help employees save for emergencies; and by proving this safety valve for emergency expenses, we are hopeful that this new feature will encourage long-term retirement savings. This new option, however, includes a series of complex rules that require additional guidance from regulators before plans and service providers can confidently implement this new option. While we greatly appreciate all of the guidance that has already been issued by the Department of the Treasury ("Treasury"), Internal Revenue Service ("IRS"), and Department of Labor ("DOL"), additional guidance is still needed. Accordingly, in this letter, we are providing comments on the anti-abuse rules addressed in Notice 2024-22, other guidance needs relating to PLESAs, and Revenue Rulings 74-55 and 74-56. With regard to our general guidance needs relating to PLESAs, many of our comments reiterate the requests included in our April 10, 2023 guidance request to Treasury and IRS.

A. PENSION-LINKED EMERGENCY SAVINGS ACCOUNTS

SECURE 2.0: Section 127 of SECURE 2.0 creates a new in-plan emergency savings feature for non-highly compensated employees called a PLESA. Section 127 applies to plan years beginning after December 31, 2023.

Guidance Request:

- ***Anti-Abuse Procedures.*** The SPARK Institute very much appreciates the flexibility provided to plans through the guidance included in Notice 2024-22. For example, we appreciate the discussion, and the associated example, indicating that a plan may decide not to impose any restrictions specifically meant to prevent manipulation of matching contributions based on PLESA contributions. For plans that do wish to impose such procedures, however, Notice 2024-22 does not clearly identify the procedures that may be implemented to prevent manipulation and could be interpreted as discouraging a plan from adopting such procedures.

  Accordingly, we request that Treasury and IRS issue guidance providing additional clarity on the types of reasonable procedures that plans may adopt to limit the frequency or amount of matching contributions made with respect to PLESA contributions. Specifically, we request:
  - Clarification that plans are permitted to impose the following restriction: if a participant receives a distribution of PLESA amounts that were matched when initially contributed, the participant may only receive matching contributions for future PLESA contributions to the extent that any future PLESA contributions exceed the amount of the distribution of previously matched PLESA dollars;
  - Clarification that matching contributions are not required to be made on account of PLESA contributions that were distributed prior to the allocation of such matching contributions. For example, if a plan makes matching contributions on a plan year basis as soon as administratively feasible after the close of the plan year, the plan should be permitted, but not required, to limit matching contributions to only those PLESA contributions that were not distributed as of the last day of the plan year. In this regard, we are also requesting confirmation that a plan can limit the frequency of the PLESA match to once per plan year; and
  - Clarification that a plan can limit the amount of PLESA contributions taken into account in determining the match to the amount provided in Internal Revenue Code ("Code") section 402A(e)(3)(A)(i) – i.e., $2,500 (as adjusted annually).

  Furthermore, Treasury and IRS should clarify that, even though it may be challenging for some plan sponsors to identify manipulative practices, different plan sponsors may reasonably reach different conclusions about the extent to which certain practices manipulate a plan's matching formula. For this reason, the SPARK Institute requests flexibility in determining whether to use any or all of the limitations proposed above.

- ***Non-ERISA Plans.*** Revised Code section 402A(e)(1)(A) indicates that an "applicable retirement plan" that may offer a qualified Roth contribution program may include a

pension-linked emergency savings account established pursuant to section 801 of Employee Retirement Income Security Act of 1974 ("ERISA"). Based on the uncertainty created by this cross-reference to ERISA, the SPARK Institute requests confirmation that non-ERISA 401(k), 403(b), and governmental 457(b) plans can establish a PLESA.

- ***Applicable Retirement Plans.*** Code section 402A(e)(1)(A) indicates that an "applicable retirement plan" may include a pension-linked emergency savings account established pursuant to section 801 of ERISA. Code section 402A(f) defines an applicable retirement plan to include: (A) a 401(a) plan; (B) a 403(b) plan; and (C) a governmental 457(b) plan. ERISA section 801 provides in part that a plan sponsor of *"an individual account plan"* may offer a PLESA provided it meets the account requirements set forth in ERISA section 801. Also, when defining an "eligible participant" under Code section 402A(e)(2)(A), the plan for which a PLESA is part of is referred to as a defined contribution plan.

  Some plan sponsors have inquired whether they can add a PLESA provision to a profit-sharing only plan or other plan that does not include a cash or deferred arrangement ("CODA"). The SPARK Institute requests guidance clarifying whether a PLESA may be added to an individual account plan (i.e., defined contribution plan) that does not otherwise include a CODA, such as a profit sharing only or money purchase pension plan.

- ***Identifying HCEs.*** The ERISA and tax provisions creating the PLESA structure state that highly compensated employees (as defined in Code section 414(q)) ("HCEs") are not eligible to contribute. The SPARK Institute requests guidance on this requirement, and when and how the bar for HCEs will operate. For example, the determination of whether an employee is an HCE is generally made with respect to a given plan year using data from the preceding plan year – e.g., taking into account each employee's annual compensation, the number of an employer's employees, and each employee's ownership percentage. It is not uncommon for a plan not to know which employees are HCEs on the first day of a plan year. And even if a plan administrator is able to determine the exact time that a non-HCE becomes an HCE, the SPARK Institute requests guidance on whether the PLESA contribution election can "spill over" to a participant's designated Roth account, similar to when a non-HCE exceeds the PLESA account limit. Also, in this case, any potential correction involving the lag in determining the HCE status could require a distribution of any contributions made after the status change (as opposed to transferring such amount from the PLESA to a designated Roth account under the retirement savings portion of the plan).

  Given these administrative realities, we request that, for purposes of the PLESA eligibility and contribution rules, any guidance provide maximum flexibility so as not to disrupt or accelerate any existing practices for determining HCEs. Additionally, we request that Treasury and IRS allow for a grace period where no corrective action is required for PLESA contributions made on behalf of HCEs within a reasonable period of time after they have switched from a non-HCE to an HCE. The uncertainty regarding the

application of the limit on HCEs remains among one of the greatest obstacles to the wide-spread availability and adoption of PLESAs.

- ***$2,500 Limit.*** The SPARK Institute appreciates the PLESA guidance that was jointly issued by DOL, Treasury, and IRS allowing the $2,500 PLESA limit to be administered including or excluding earnings.[1] More guidance on this limit, however, is needed. For example, the SPARK Institute requests confirmation that, if a participant with a PLESA account balance in excess of $2,500 takes a PLESA distribution that causes their account to fall below $2,500, the participant can subsequently contribute to a PLESA until the $2,500 limit (or any lower plan limit) is reached.

  In addition, under Code section 402A(e)(3)(B)(i), once the $2,500 limit (or any lower plan limit) is reached, if the participant has another designated Roth account under the plan, any excess amount may be directed by the participant or the plan to such other designated Roth account. The SPARK Institute requests confirmation that such action by the participant, or the terms of the plan, is not dependent on whether the participant has a balance in the other designated Roth account.

- ***Rollover Treatment.*** New Code section 402A(e)(10) states that following a participant's termination of employment or the termination of a PLESA, a distribution from a PLESA generally shall be treated as an eligible rollover distribution. Accordingly, we understand that a PLESA distribution, in this circumstance, may be directly rolled over to a designated Roth account or Roth IRA. Also, it appears that indirect rollovers to a Roth IRA are permitted. Indirect rollovers to a designated Roth account, however, do not appear permitted because all PLESA distributions are treated as qualified distributions, and distributions from designated Roth accounts are only permitted to be indirectly rolled over to another designated Roth account to the extent that the distribution is includible in income.[2] The SPARK Institute requests confirmation that a PLESA distribution, in this circumstance, will be treated in the same manner as any other eligible rollover distribution from a designated Roth account.

  Notwithstanding the general rule treating a PLESA distribution as an eligible rollover distribution following a participant's termination of employment or the termination of a PLESA, new Code section 402A(e)(10)(B) says that such a distribution is not an eligible rollover distribution for purposes of 401(a)(31)(B). Because there is no exception from Code section 401(a)(31)(A), we assume that plans must offer distributions in this instance as a direct rollover. Nevertheless, the SPARK Institute requests confirmation that our understanding is correct. Additionally, to the extent that a plan directly transfers a PLESA to another plan upon a participant's or plan's termination, we request guidance on any associated reporting requirements, including whether a plan must break out basis from earnings.

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[1] DOL FAQs: Pension-Linked Emergency Savings Accounts (Jan. 18, 2024), #7.

[2] *See* Treas. Reg. section 1.402A-1, Q&A-5.

- ***Interaction with Hardships.*** Under Treasury Regulation section 1.401(k)-1(d)(3)(iii)(B)(1), a participant may not receive a hardship distribution unless "[t]he employee has obtained all other currently available distributions (including distributions of ESOP dividends under section 404(k), but not hardship distributions) under the plan and all other plans of deferred compensation, whether qualified or nonqualified, maintained by the employer." The SPARK Institute requests guidance clarifying how this regulatory condition applies to a plan that includes hardship distributions and a PLESA. For example, if a participant must distribute his or her entire PLESA account before receiving a hardship distribution, Treasury and IRS should expressly confirm this through guidance.

- ***Interaction with Loans.*** The maximum amount a participant may borrow from his or her plan is 50% of his or her nonforfeitable accrued benefit or $50,000, whichever is less. An exception to this limit is if 50% of the nonforfeitable accrued benefit is less than $10,000: in such case, the participant may borrow up to $10,000. The SPARK Institute requests confirmation that PLESA accounts should be included in the "nonforfeitable accrued benefit of the employee under the plan" for purposes of the loan limits described in Code section 72(p)(2).

- ***Cash-Out Limits.*** The SPARK Institute requests guidance on two issues relating to cash-out limits. First, we request guidance indicating whether amounts held in a PLESA must be taken into account when determining the present value of a participant's nonforfeitable accrued benefit for purpose of the cash-out rules in Code section 411(a)(11)(A). Second, we request guidance on whether a plan administrator can automatically cash-out and not roll over a terminated participant's PLESA account even if the distribution exceeds $1,000. On this issue, Code section 402A(e)(10) indicates that, upon the termination of the participant or the PLESA, a distribution from a PLESA account shall not be treated as an eligible rollover distribution for purposes of Code section 401(a)(31)(B).

- ***Automatic Enrollment.*** SECURE 2.0 permits employers to automatically enroll employees into making a contribution of up to 3% of compensation to a PLESA. We request maximum flexibility on how automatic enrollment under a PLESA interacts with the automatic enrollment provision of Section 101 of SECURE 2.0 as well as any optional non-PLESA automatic enrollment provisions under the Code.

  It appears that any mandatory automatic enrollment under Section 101 of SECURE 2.0 would apply independently from the optional automatic enrollment provision available to PLESAs due to, at the least, the conflicting investment requirements (i.e., a QDIA for Section 101 of SECURE 2.0 and a principal preservation option for PLESAs). Guidance on the interaction between these provisions, however, is needed. Additionally, guidance is needed on the interaction of a PLESA's automatic enrollment feature and other automatic enrollment provisions provided by the Code, such as the qualified automatic contribution arrangement ("QACA") and eligible automatic contribution arrangement ("EACA") rules.

- ***Eligible Participant.*** ERISA section 801(b)(1), as interpreted by DOL PLESA FAQ #2, provides that an individual who meets any age, service, and other eligibility requirements of the plan and is not an HCE must be eligible to participate in a PLESA. The SPARK Institute requests clarification on what this means for plans that have different eligibility requirements for various components of the plan. Similarly, we request additional guidance on whether there can be different eligibility requirements to participate in the PLESA versus the non-PLESA portion of the plan. This question was posed in DOL PLESA FAQs #3 but the answer is not clear.

  Additionally, we request clarification on what it means for an individual to meet any age, service and other eligibility requirements of the plan for purposes of the PLESA rules. For example, a plan may permit eligible employees to make rollovers as of their date of hire, permit them to make salary deferrals upon completion of 3 months of service, and receive employer contributions upon completion of 1 year of service. Would that plan be required to permit employees to participate in the PLESA upon their date of hire or could it require employees to complete 3 months of service?

- ***ADP Testing.*** For purposes of ADP testing, the SPARK Institute requests clarification on whether all PLESA contributions that are made during the plan year are counted, including those that are withdrawn during the plan year.

- ***Statutory Limits.*** DOL PLESA FAQ #6 provides that PLESA contributions count toward the Code section 402(g) limit on elective deferrals. However, since the FAQs are silent with respect to the limitation under Code section 415(c), the SPARK Institute requests confirmation that PLESA contributions are considered annual additions.

- ***Separate Accounting of Earnings.*** DOL PLESA FAQ #7 permits plans to have flexibility to either include or exclude earnings on a participant's PLESA contributions to determine the maximum PLESA limit. If a plan excludes earnings for such purpose, it is unclear how earnings would be treated for participants who take a partial distribution. For example, would a pro rata portion of earnings be required to be taken for any partial PLESA distribution or could a plan administrator apply a specific ordering rule (e.g., contributions before earnings)? The SPARK Institute requests guidance on this issue and requests flexibility since there is no tax consequence in either situation; however, it impacts the amount of PLESA contributions that a participant can make after taking a partial distribution.

B. Revenue Rulings 74-55 & 74-56

Revenue Rulings 74-55 and 74-56 generally stand for the proposition that employer contributions allocated on the basis of after-tax employee contributions that may be immediately withdrawn are subject to manipulation and violate the regulatory qualification requirement to have a definite predetermined formula.[3] Notice 2024-22 indicates that Treasury and IRS do not

[3] *See* Treas. Reg. section 1.401(b)-1(b)(1)(ii).

view Revenue Rulings 74-55 and 74-56 as applicable in the context of PLESAs, regardless of whether the contributions are matched.

The SPARK Institute agrees with the interpretation expressed in Notice 2024-22 and appreciates the guidance clarifying that Revenue Rulings 74-55 and 74-56 do not apply to PLESAs. Furthermore, we urge Treasury and IRS to revoke Revenue Rulings 74-55 and 74-56. These rulings do not reflect modern plan design or meaningfully prevent abuse and simply serve, at this point, to confuse the few plan sponsors who even are aware of them. It is arguable, in fact, that they were not correct when issued, as they arbitrarily expand upon the regulatory requirement for plans to have a "definite predetermined formula": a participant's ability to obtain a matching contribution under a formula through contributions and withdrawals does not make the formula any less "definite" or "predetermined." To the extent the rulings have any value any more, they might be helpful if a plan sponsor is concerned that a participant might use after-tax employee contributions to manipulate a plan's matching formula. To the extent this is a real problem, however, plan sponsors already have the power to impose reasonable procedures to prevent such practices. It is well past time to let these rulings head off into the sunset.

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The SPARK Institute appreciates the opportunity to provide these comments to Treasury and IRS. If you have any questions or would like more information regarding this letter, please contact the SPARK Institute's outside counsel, Michael Hadley (mlhadley@davis-harman.com) or Adam McMahon (armcmahon@davis-harman.com), Davis & Harman LLP.

Sincerely,



Tim Rouse
Executive Director