

National Conference of State Legislatures (NCSL)
National Association of Counties (NACo)
United States Conference of Mayors (USCM)
National League of Cities (NLC)
International City/County Management Association (ICMA)
National Association of State Treasurers (NAST)
Government Finance Officers Association (GFOA)
National Association of State Auditors, Comptrollers and Treasurers (NASACT)
International Association of Fire Fighters (IAFF)
National Association of Police Organizations (NAPO)
National Council on Teacher Retirement (NCTR)
National Conference of Public Employee Retirement Systems (NCPERS)
National Association of Government Defined Contribution Administrators (NAGDCA)
National Association of State Retirement Administrators (NASRA)

May 11, 2023

By Electronic Mail

Carol Weiser
Benefits Tax Counsel, Office of Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: SECURE 2.0 Guidance for Governmental Plans

Dear Ms. Wisner:

On behalf of the national organizations listed above, representing state and local governments and their elected officials, finance officers, retirement plans and employees, we are writing regarding expected guidance surrounding the “SECURE 2.0” retirement security provisions enacted recently in P.L. 117-328. We appreciate the assistance that Treasury and IRS have historically provided governmental plans with regard to implementing federal retirement-related legislation and regulations. In particular, there has been long-standing recognition of the state and local statutory and regulatory governance structures in place for public retirement plans, which are not preempted by or subject to the Employee Retirement Income Security Act (ERISA) like those in other sectors. We strongly urge Treasury and IRS to again acknowledge and respect these unique legal constructs when issuing guidance surrounding SECURE 2.0 for governmental plans.

First, we request that Treasury and IRS recognize that many governmental plans will need additional time to come into compliance with the catch-up contribution provisions in SECURE 2.0. These provisions would require, beginning in 2024, that such contributions be made on an after-tax (Roth) basis for individuals earning more than \$145,000 in the prior plan year, and that those making less than \$145,000 be given the option to make contributions on a Roth basis. Many governmental plans do not currently provide for Roth contributions in their structure or have the legal authority under state or local statutes to offer after-tax catch-up contributions. As a result, statutory changes permitting such treatment will be required, and they cannot reasonably be

enacted and implemented before the current effective date.

Treasury and IRS have long acknowledged that, unlike other plans, governmental plan provisions that may require modifications in order to be in compliance with new Federal requirements are often embodied in state and/or local statutes and may therefore require additional time to be adopted.¹ In addition, Treasury-IRS have recognized the unique challenges posed by changes to governmental retirement plans given the constitutional protections provided to benefits under both state and federal law. For example, the IRS provided such appropriate relief using a transitional compliance period in the early 2000s with the implementation of the Treasury Regulations under Code Section 401(a)(9). Specifically, during the process of finalizing the 401(a)(9) Regulations, the IRS recognized the difficulty that state and local governments face in changing plan provisions due to state constitutional or statutory prohibitions on benefit reductions. Therefore, in addition to the transitional provisions provided to all retirement plans, the final regulations provided grandfathering relief and “good faith” compliance for governmental plan provisions in effect on a certain date.²

Importantly, given the unique nature of governmental plans, without a similar type of relief – a delayed effective date³ or grandfathering relief assuming “good faith” compliance for governmental plans will satisfy the Code requirements – some governmental plans will be forced to suspend all catch-up contributions until the necessary authority to offer Roth contributions can be added to their structure. Certainly, the inability to make catch-up contributions to a retirement plan during the crucial years prior to retirement would be counter to Congress’ goals of encouraging retirement savings. Furthermore, some plans do not have the legal authority to suspend catch-up contributions and will be faced with either being out of compliance with the new IRC requirements or in violation of their state or local statutes. This also does not seem to be the intended goal of SECURE 2.0.

Second, we also urge Treasury and IRS, when promulgating regulations for governmental plans, to keep in mind their exemption from ERISA and many sections of the Internal Revenue Code, as well as their coverage under state and local statutes. Guidance should not run contrary to these exclusions or fail to acknowledge the governing statutes and definitions in place at the state and local levels of government. For example, with regard to the new catch-up contributions, we ask that Treasury and IRS honor reasonable, good faith compliance with the definition of compensation that is used under the terms of the plan and/or applicable state and local statutes and regulations. Similarly, Treasury and IRS have and should continue to recognize that eligibility

¹ Significant lead time may be necessary in order to, among other things: i) meet legislative bodies’ pertinent filing deadlines; ii) secure passage by the legislative bodies with the authority to amend the plan; iii) acquire final approval by the applicable executive; and iv) finalize implementation by the affected plans. Further, some state legislatures meet only biennially; others require plan amendments, once passed, to receive a fiscal impact report and then obtain approval in a subsequent legislative session; and many local governmental plan provisions are subject to collective bargaining agreements that may also take time to be modified, where necessary.

² This relief provided that governmental plan distribution options in effect on April 17, 2002, “will not fail to satisfy section 401(a)(9) merely because the annuity payments do not satisfy the requirements of A-1 through A-15 of [1.401(a)(9)-6].” However, the grandfathered options “must satisfy the statutory requirements of Code Section 401(a)(9), based on a reasonable and good faith interpretation” of that section. Treas. Reg. § 1.401(a)(9)-6, Q&A 16.

³ For example, recent guidance (Notice 2022-33) that extended plan amendment deadlines included the following effective date for governmental plans: “90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after December 31, 2023.”

rules for participation in governmental plans are enshrined in state and local statutes and Congress specifically excluded state and local government retirement plans from the participation requirements of IRC Code Section 410.

Finally, with regard to any provisions that may require technical corrections legislation, it would be extremely beneficial if Treasury and IRS issued timely guidance in expectation of a future legislative correction based on legislative intent. This has been done in the past and we are encouraged by public statements that the agency is considering issuing similar guidance under this approach for SECURE 2.0. In this regard, we would stress the need for such guidance to be as timely as possible to permit governmental plans to take all appropriate steps to be in compliance with the new law's requirements.

Thank you for your time and consideration. We would greatly appreciate the opportunity to meet with you to discuss these matters further. Please feel free to contact our organizations' representatives below:

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