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Delivered via the Federal eRulemaking Portal at www.regulations.gov

RE: IRS and REG-101268-24 (RIN 1545-BR11) Comments on Proposed Regulations Issued Under Section 603 of SECURE 2.0

My name is Sean Mullaney.[1] I am writing in response to the government's request for comments stated in the recently issued proposed regulations issued under Section 603 of SECURE 2.0 (REG-101268-24, RIN 1545-BR11). These proposed regulations were published on January 13, 2025, seven days prior to the change in Administrations.

At first, these proposed regulations appear to address mundane retirement account rules. However, there is something much more important at stake: upholding the Constitution.

I have three major concerns with the proposed regulations. They are:

- The proposed regulations should be withdrawn in their entirety because SECURE 2.0, part of the Consolidated Appropriations Act, 2023, was not passed in a Constitutionally qualified manner and is thus not the law. Any regulations issued under SECURE 2.0 are invalid.

- SECURE 2.0 Section 603, apart from being invalid, hurts millions of Americans needing to catch-up in their retirement savings.

- Defending SECURE 2.0 Section 603 wastes taxpayer dollars and government time in fruitless and counterproductive litigation.

[1] I am a financial planner and I advise clients concerning tax-advantaged retirement accounts. I blog about tax planning and financial independence at fitaxguy.com. An unsigned copy of this comment letter will be posted to fitaxguy.com on February 25, 2025.

The views stated herein are solely those of the author. They are not the views of any current or former employer of the author and they are not the views of any of the clients of my financial planning firm.

References to "Section" below are to the Internal Revenue Code. References to "SECURE 2.0 Section" are to the section number of the provision within the SECURE 2.0 bill text.

Proposal: Withdraw the Proposed Regulations as SECURE 2.0 Section 603 is Invalid

Judge James W. Hendrix issued an excellent opinion in *Texas v. Garland*[2] on February 27, 2024.

The issue was whether the Consolidated Appropriations Act, 2023, commonly referred to as the "Omnibus," was passed in a Constitutionally qualified manner. Determining that the House of Representatives did not have the required quorum when it purported to pass the Omnibus, Judge Hendrix's ruling invalidated certain Omnibus provisions as applied to the State of Texas.

Judge Hendrix determined, in a very well researched and reasoned opinion, that the Omnibus bill's purported passage in the House of Representatives occurred at a time the House did not have a sufficient quorum under the Quorum Clause to enact legislation.

It is clear that the House did not have a majority of its members present when it voted on the Omnibus. In order to establish a quorum to enact legislation, the Quorum Clause requires that a majority of the members be physically present. Judge Hendrix's opinion goes through the history and the meaning of the Quorum Clause in a convincing fashion and correctly ruled that the Omnibus was not passed in a Constitutionally qualified manner.

The convincing reasoning of Judge Hendrix's opinion equally applies to SECURE 2.0, a component of the Omnibus.[3] SECURE 2.0, having never been passed in a Constitutionally qualified manner by the House of Representatives, is not the law. Thus, the government should withdraw the proposed regulations issued January 13, 2025 under SECURE 2.0 Section 603.

Treasury Department and IRS officials considering this issue must ask themselves a difficult question: **Can government employees finalize the proposed regulations in a manner consistent with their Oath of Office?**

After reading Judge Hendrix's opinion it is exceedingly difficult to answer that question in the affirmative. All government officials considering this issue have taken an oath to defend the Constitution and "bear true faith and allegiance" to the Constitution.[4] There is no exception for the Quorum Clause.

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[2] Available at https://caselaw.findlaw.com/court/us-dis-crt-n-d-tex-lub-div/115886384.html.

[3] Shortly after Judge Hendrix issued his opinion, Thomson Reuters wrote that his ruling "could have implications for the SECURE 2.0 Act." *District Court Finds COVID Proxy Voting Rule Unconstitutional*, available at https://tax.thomsonreuters.com/news/district-court-finds-covid-proxy-voting-rule-unconstitutional/.

[4] Jeff Neal, The oath of office and what it means, available at https://federalnewsnetwork.com/commentary/2019/10/the-oath-of-office-and-what-it-means/.

The oath sworn is not to Title 26 of the U.S. Code. Even if it was, Judge Hendrix's reasoning demonstrates that SECURE 2.0 did not become part of Title 26.

Concern: SECURE 2.0 Section 603 Harms Americans Behind in their Retirement Savings

Not only is SECURE 2.0 Section 603 invalid, it is also harmful.

SECURE 2.0 Section 603 is a tax increase on working Americans age 50 and older. It denies many of them a valuable tax deduction[5] for "catch-up" contributions[6] to 401(k)s and other workplace qualified plans. SECURE 2.0 Section 603 does this by requiring that those with W-2 incomes above a modest threshold[7] in the prior year make any catch-up contributions as Roth contributions instead of as traditional deductible contributions.

Many Americans age 50 or older are behind in retirement savings. According to Vanguard, the median 401(k) account balance for those ages 55 to 64 is $87,571.[8] Assuming that the median American has three such accounts (two from former employers), many Americans heading towards retirement have less than $300,000 in workplace retirement accounts. Consequently, the median American faces a sufficiency problem in retirement, not a tax problem. Mandatory Roth catch-up contributions make it more expensive to save for retirement. The government should not make it more expensive for millions of Americans to reach a financially sufficient retirement.

Working Americans in their 50s and 60s likely face their highest tax years. Due to years of experience in the workforce, they are "ahead of the game" when it comes to salary even if they are behind the game in terms of retirement savings. That combination makes the tax deduction for catch-up contributions particularly helpful to them.

For Americans behind in retirement savings in their 50s and 60s, the "traditional" model of retirement savings works better than the Roth model. Denying these Americans access to deductible catch-up contributions is a harmful tax increase when they can least afford it.

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[5] Employee contributions to a 401(k), including catch-up contributions, are exclusions from income, as the amount is simply excluded from the employee's W-2 income. See Section 402(e)(3). This comment letter uses the colloquial term "deductible" to describe contributions to traditional retirement accounts.

[6] Section 414(v).

[7] Currently, that threshold is $145,000. See page 2 of Notice 2024-80, available at https://www.irs.gov/pub/irs-drop/n-24-80.pdf.

[8] Vanguard, *How America Saves 2024*, page 52, available at https://corporate.vanguard.com/content/dam/corp/research/pdf/how_america_saves_report_2024.pdf.

Deductible catch-up contributions to a traditional 401(k) or other qualified plan are a great way for Americans to catch-up when it comes to retirement savings. SECURE 2.0 Section 603 denies those behind in retirement savings a great tool to catch-up.

SECURE 2.0 Section 603 also causes workplace retirement plans to incur cost as they must implement systems to "properly" deny some employees traditional catch-up contributions while allowing those unaffected to still make traditional deductible catch-up contributions. The IRS and Treasury have already essentially acknowledged the implementation complexity of SECURE 2.0 Section 603 by issuing Notice 2023-62,[9] which delayed enforcement of SECURE 2.0 Section 603 for two years until January 1, 2026.

Concern: Finalizing the Proposed Regulations Will Waste Taxpayer Money and Government Time on Fruitless Litigation

Finalizing the proposed regulations invites litigation against the federal government. Taxpayers denied the ability to deduct years worth of 401(k) catch-up contributions would have incentive to sue the government. Defending against these suits would require government lawyers to argue against Judge Hendrix's convincing opinion.

Why litigate against Americans trying to save for retirement? Why spend taxpayer money arguing against Americans trying to claim a tax deduction to further an unsustainable interpretation of the Quorum Clause? Finalizing the proposed regulations sets up years of wasteful and counterproductive litigation.

Conclusion

One of the central themes of President Trump's successful 2024 campaign was that for years Washington has screwed up and the country has suffered for it.

The Omnibus is one of those occasions where Washington screwed up. The former House of Representatives did not bother to get their ducks in a row in December 2022 to pass the Omnibus in a Constitutionally qualified manner. The new Administration should not defend that screw up.

I fully appreciate that there are more pressing problems than SECURE 2.0's Constitutionality on the new Administration's plate. That said, defending the Constitution and helping Americans behind in retirement savings should be among the new Administration's top priorities.

[9] Available at https://www.irs.gov/pub/irs-drop/n-23-62.pdf.

It can be tempting to avoid rocking the boat. I understand that few want to say dozens of SECURE 2.0 retirement account provisions are invalid. But there's something much more significant at stake: the Constitution. The Trump Administration, the Department of the Treasury, and the Internal Revenue Service have a unique opportunity to uphold the Constitution and protect American workers saving for retirement by withdrawing these proposed regulations.

Sincerely,

Sean W. Mullaney