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Omnibus funding package with retirement security provisions headed to White House

Congress has approved and will send to President Biden a roughly $1.7 trillion omnibus spending package that would fund federal departments and agencies for the remainder of fiscal year 2023 and avert a partial shutdown of government operations once the current stopgap measure keeping the government's doors open expires at midnight on December 23.

The Consolidated Appropriations Act, 2023, cleared the Senate on December 22 by a vote of 68-29 and was approved in the House on December 23 by a vote of 225-201. (One House member voted "present.") President Biden is expected to sign the omnibus into law, although it was unclear at press time whether the administrative processes necessary to transmit the measure to the White House would be completed by the midnight funding deadline. To prevent a possible lapse in funding, lawmakers also approved a short-term continuing resolution, through December 30, that will serve as a backstop in case of any administrative delays in the bill signing.
URL: https://www.appropriations.senate.gov/imo/media/doc/JRQ121922.PDF

Tax package limited to retirement security

The omnibus measure is likely to be the last major bill to move in the closing days of the 117th Congress, and various constituencies on Capitol Hill had hoped in the aftermath of the 2022 midterm elections that it would provide a vehicle for a robust set of tax provisions such as a delay in mandatory amortization of research expenses, relief from tighter limitations on business interest expense deductions, and an extension of some now-expired enhancements to the child tax credit. (For prior coverage of these and other tax items that many lawmakers sought to advance as part of the year-end legislative agenda, see *Tax News & Views*, Vol. 23, No. 38, Nov. 16, 2022.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2022/TNV/221115_1.html

But prospects for a broad bipartisan deal on taxes appeared to dwindle over the last few weeks and the omnibus measure as introduced includes only a limited tax title (Division T) focusing primarily on retirement security provisions that build on earlier retirement legislation—dubbed the "SECURE Act" that was enacted in 2019.

The new retirement protections—known as the SECURE 2.0 Act of 2022 and found in Division T of the omnibus legislation—include provisions that generally would:

- Allow plan participants nearing retirement to contribute more to their retirement accounts, by increasing the limits on catch-up contributions for certain employees and by indexing the limit on IRA catch-up contributions for inflation;
- Allow plan participants to take advantage of the benefits of tax-deferred earnings over a longer period of time by raising the age for taking mandatory minimum distributions from plans and IRAs;

- Expand the universe of workers that participate in employer-sponsored retirement plans—for example, by requiring automatic enrollment of employees in new employer plans (subject to an employee opt-out), allowing employers to treat student loan payments made by their employees as elective deferrals for purposes of determining retirement plan matching contributions, and reducing the service requirements for part-time employees to participate in an employer plan;
- Modify certain retirement plan design rules to ease administrative burdens for plan sponsors and provide additional flexibility and other relief for plan participants; and
- Remove barriers to offering certain types of annuity products within a defined contribution plan.

These provisions would be offset largely by expanding "Roth" treatment of certain retirement accounts and contributions. ("Roth"-style retirement accounts, named for former Senate Finance Committee Chairman William Roth, R-Del., require contributions to be made with after-tax funds rather than on a pre-tax basis, with distributions paid out tax-free during retirement.) Another notable offset would curb perceived abuses of certain conservation easement arrangements by denying a tax deduction for conservation contributions in some circumstances.

The Joint Committee on Taxation staff has estimated that the retirement security provisions would decrease federal receipts by some $38.2 billion between 2023 and 2032, while the revenue provisions would increase receipts by roughly $38.8 billion over the same period.
URL: https://www.jct.gov/publications/2022/jcx-21-22/

The SECURE 2.0 Act provisions are drawn largely from the Securing a Strong Retirement Act of 2021 (H.R. 2954), which cleared the House of Representatives this past March by a vote of 414-5, and the Enhancing American Retirement Now (EARN) Act (S. 4804), which was unanimously approved by the Senate Finance Committee in June.
URL: https://www.congress.gov/bill/117th-congress/house-bill/2954/text/eh
URL: https://www.congress.gov/bill/117th-congress/senate-bill/4808/text

Major provisions in the SECURE 2.0 Act are highlighted below. It is worth noting, though, that in addition to these provisions, the legislation includes a number of incentives targeted to individuals with modest incomes, certain public safety officers and members of the military, and small businesses that currently do not offer retirement plans.

Notable savings and tax incentives for retirement plan participants

Several provisions in the SECURE 2.0 Act would allow plan participants nearing retirement to contribute more to their retirement accounts and allow plan participants of any age to take advantage of the benefits of tax-deferred earnings over a longer period of time.

The legislation also includes provisions that would enhance certain current-law incentives for charitable distributions from retirement plans, allow taxpayers to purchase long-term care insurance with retirement funds, and permit rollovers from section 529 education savings accounts into Roth IRAs under certain conditions.

Increased age for required minimum distributions: The legislation would allow individuals to delay tapping into their retirement account savings by increasing the age for beginning required minimum distributions from a qualified plan or IRA to 73 (from 72 under current law) beginning on January 1, 2023, and to age 75 beginning in 2032.

This provision would be effective for distributions required to be made after December 31, 2022, with respect to individuals who reach age 72 after that date.

Higher catch-up contribution limits for individuals aged 60-63: Under current law, participants in a section 401(k) plan, section 403(b) plan, or governmental section 457(b) plan who are aged 50 or older generally may make additional annual catch-up contributions of up to $6,500 (the inflation-adjusted amount in effect for 2022). A $3,000 annual catch-up limit (the inflation-adjusted limit for 2022) applies for eligible participants in a Savings Incentive Match Plan for Employees (SIMPLE plan). Recently announced inflation adjustments will increase these amounts for 2023 to $7,500 for 401(k), 403(b), and 457 plans, and to $3,500 for SIMPLE plans.

Under the SECURE 2.0 Act, catch-up amounts for 401(k), 403(b), and governmental 457(b) plans generally would increase, beginning in 2025, to the greater of $10,000 or 50 percent more than the regular catch-up amount in effect for 2024 for participants who reach age 60, 61, 62, or 63 by the end of 2025. The catch-up amount for SIMPLE plans generally would increase, beginning in 2025, to the greater of $5,000, or 50 percent of the regular catch-up limit in effect for these plans for 2025. The higher catch-up amounts would be indexed annually for inflation after 2025. The provision would be effective for taxable years beginning after December 31, 2024.

IRA catch-up contributions indexed for inflation: IRA holders aged 50 and older are permitted under current law to make additional catch-up contributions of up to $1,000 a year, but that limitation is not subject to a cost-of living adjustment. This legislation would adjust the $1,000 cap annually for inflation for taxable years beginning after December 31, 2023.

Increase in qualified charitable distribution limitation; one-time election for charitable distribution to split-interest entity: The legislation would index the current-law annual IRA charitable distribution limit of $100,000 for inflation for taxable years beginning after 2023.

The legislation also would permit taxpayers to make a one-time, $50,000 distribution to charities through charitable gift annuities, charitable remainder unitrusts, and charitable remainder annuity trusts, effective for distributions made in taxable years beginning after the date of enactment. This $50,000 limit would be adjusted for inflation beginning with taxable years beginning after 2023.

Long-term care contracts purchased with retirement account distributions: The legislation would permit qualified retirement plans, 403(b) plans, and eligible 457(b) plans to distribute up to $2,500 per year (indexed annually for inflation) for the payment of premiums for certain certified long-term care insurance contracts. Distributions from plans to pay such premiums would be includable in income but exempt from the additional 10 percent tax on early distributions (which generally applies to distributions taken before a retirement plan participant reaches age 59-1/2). A certified long-term care contract in this context generally describes a policy that, among other requirements, would provide meaningful financial assistance in the event that an insured individual needs home-based assistance or nursing home care. The provision would be effective three years after date of enactment.

Distributions from long-term qualified tuition programs to Roth IRAs: The legislation would permit tax- and penalty-free rollovers from tax-preferred section 529 education savings accounts to Roth IRAs under certain conditions. Beneficiaries of section 529 accounts would be permitted to roll over amounts from any 529 account in their name to their Roth IRA, subject to a lifetime cap of $35,000. Roth IRA annual contribution limits would apply. Rollover amounts would have to be distributed from a section 529 account that has been open for more than 15 years. This provision would be effective for distributions after December 31, 2023.

Expanding retirement coverage

The SECURE 2.0 Act also includes provisions intended to expand the universe of workers that participate in employer-sponsored retirement plans.

Automatic enrollment: The measure would require new 401(k) and 403(b) plans to automatically enroll participants for retirement plan coverage once they become eligible. (An employee may elect to opt out of coverage, however). The initial automatic enrollment amount (that is, salary to be deferred from an employee's pay) would be at least 3 percent but not more than 10 percent. Each year thereafter that amount would be increased by 1 percentage point until it reaches at least 10 percent, but not more than 15 percent.

All 401(k) and 403(b) plans established prior to the date of enactment would be exempt from the automatic enrollment requirement (but remain free to offer automatic enrollment). Additional exceptions to the automatic enrollment requirement would apply to small businesses with 10 or fewer employees, new businesses (those that have been in business for less than three years), church plans, and governmental plans.

This provision would be effective for plan years beginning after December 31, 2024.

Targeted participation provisions: In addition to the broad proposal to provide for automatic retirement plan enrollment, the legislation includes several proposals to increase retirement plan participation rates among specific segments of the workforce who may find it too difficult to contribute to an employer-sponsored plan or who work in domestic household positions where employer-provided coverage is not readily available.

- **Student loan payments treated as elective deferrals:** To assist younger workers who may lack the disposable income to save for retirement while they are paying down student loan debt, the legislation would allow employers to treat student loan payments as elective deferrals for purposes of determining employer matching contributions to an employer-sponsored retirement plan, such as a

401(k) plan, a SIMPLE plan, a 403(b) plan, or an eligible 457 plan maintained by a governmental entity. The maximum amount that a plan can treat as a deferral for this purpose is equal to the annual dollar limit on elective deferrals, reduced by any elective deferrals the participant actually contributes during the year. The plan must also provide matching contributions on student loan repayments at the same rate that matching contributions are provided on elective deferrals under the plan. The provision includes special rules to assist an employer whose plan provides matching contributions on student loan repayments in meeting nondiscrimination testing requirements applicable to the plan. This provision would be effective for plan years beginning after December 31, 2023.

- **Reduced service requirement for part-time workers:** As enacted in 2019, the SECURE Act expanded retirement plan coverage for part-time workers by generally requiring an employer to allow part-time workers to participate in the employer's 401(k) plan if the employee has completed one year of service (subject to a 1,000-hour rule) or three consecutive years of service (where the employee completes at least 500 hours of service per year and has reached the age of 21 by the end of the three-consecutive-year period). Under the SECURE Act, an employer was not required to start counting part-time service until 2021 (meaning that the earliest a long-term part-time employee with less than 1,000 hours of service in a year could begin participating was January 1, 2024). The SECURE 2.0 Act would reduce the three-year rule to two years, effective for plan years beginning after December 31, 2024, and further provide that for purposes of determining whether an employee has met the reduced, two-year service requirement, 12-month periods completed prior to 2023 will not be taken into account. The effect of this is that the earliest an employee with less than 1,000 hours of service in a year could begin participating under the new two-year rule is 2025. The three-year rule as enacted by the SECURE Act remains in place, which would allow an employee who worked three consecutive years of part-time service to begin participating effective January 1, 2024. The SECURE 2.0 Act also would provide that pre-2021 service is disregarded for vesting purposes, reversing a position taken in IRS guidance indicating that years of part-time service completed prior to 2021 could be considered for vesting purposes. This provision related to vesting service would be effective as if included in the SECURE Act to which the amendment relates. (The new coverage rules for part-time employees also would apply to 403(b) plans that are subject to ERISA.)
- **SEP coverage of domestic household employees:** The legislation would permit employers of domestic household employees (such as nannies) to provide retirement benefits for those employees under a Simplified Employee Pension (SEP) plan. This provision would be effective for taxable years beginning after date of enactment.

Other plan changes

The SECURE 2.0 Act includes a number of changes to the retirement plan rules that are intended to ease administrative burdens for plan sponsors, provide additional flexibility and other relief for plan participants, and facilitate the inclusion of certain types of annuity and insurance products within a retirement plan.

Plan administration provisions: Proposed changes intended to simplify plan administration and other rules related to retirement accounts would, among other things:

- Provide that, in the case of certain overpayments from defined benefit and defined contribution plans, a plan will not lose its qualified status (or be deemed in violation of the requirements of sections 401 and 403) merely because it fails to obtain repayment on account of any inadvertent benefit overpayment made by the plan, or the plan sponsor amends the plan in a certain manner to adjust for prior inadvertent benefit overpayments. The provision also includes rules that allow the plan to pursue recovery of overpayments, and provides guidelines for doing so, including the amount that can be collected periodically during the recovery. This provision would be effective on the date of enactment. Special rules are provided for recoveries that were initiated prior to enactment but continue after enactment.
- Modify the family attribution rules that apply in determining whether two or more employers are to be aggregated for purposes of applying the qualification rules, by providing that the family attribution rules will be applied without regard to any community property laws (effective for plan years beginning on or after December 31, 2023).
- Allow discretionary amendments that increase participants' benefits for the previous plan year to be adopted by the due date of the employer's tax return rather than the last day of the plan year in which the amendment would take effect (effective for plan years beginning after December 31, 2023). Under the current view of the IRS, an amendment of this type generally would have to be adopted no later than the end of the plan year in which it is effective.
- Permit a surviving spouse of a deceased employee to elect to be treated as the employee for purposes of the required minimum distribution rules under an employer plan (effective for calendar years beginning after December 31, 2023).
- Eliminate the pre-death minimum distribution requirement for Roth accounts in employer plans to make the distribution rules under those plans consistent with those in effect for Roth IRAs (effective for taxable years beginning after December 31, 2023). As a result of this change, Roth accounts inside qualified plans would no longer be subject to lifetime required minimum distribution requirements, similar to the rule that applies to Roth IRAs.
- Modify the Employee Plans Compliance Resolution System (EPCRS) to expand the program to IRAs and expand the opportunities for retirement plan sponsors to self-correct. The expanded self-correction rule would allow plan sponsors to correct any eligible non-egregious failure prior to the IRS's discovery of an uncorrected failure upon examination. Under the current procedure, the ability to self-correct at any time prior to IRS examination is limited to "insignificant" failures, and significant failures must be self-corrected within three years. The provision authorizes the IRS to issue guidance on correction methods that must be used. The provision also would expand EPCRS to allow IRAs with certain issues to use the program to correct those failures.
- Require the Treasury Department to simplify and standardize the rollover process by issuing sample forms for direct rollovers that may be used by both the incoming and outgoing retirement plan or IRA. Treasury would be required to issue the sample forms by January 1, 2025.
- Reduce certain paperwork for plan sponsors by (1) eliminating a current-law requirement that employers provide certain ERISA and Internal Revenue Code notices to employees who have opted not to enroll in a workplace retirement plan (effective for plan years beginning after December 31, 2022) and (2) directing the Treasury Department and the Labor Department to issue regulations (within two years of enactment) permitting defined contribution plans to consolidate certain required plan notices.

- Allow plans to increase the dollar amount that triggers a mandatory distribution upon termination of employment. Under current law, if a participant's benefit is $5,000 or less, the plan can distribute that amount upon termination of employment, without obtaining the participant's consent. The SECURE 2.0 Act would increase the $5,000 amount to $7,000, effective for distributions made after December 31, 2023.

Participant-focused provisions: Among the rule changes affecting the taxation of plan participants are provisions that would:

- Reduce the excise tax—from 50 percent to 25 percent—that generally applies to the shortfall when an individual's distributions during the year from a qualified retirement plan are less than the amount determined under the required minimum distribution rules. The excise tax would be reduced further, to 10 percent, for individuals who correct the shortfall within a specified correction period and submit a return reflecting the excise tax. This provision would be effective for taxable years beginning after the date of enactment.
- Clarify that if an individual has multiple IRAs and engages in a prohibited transaction with one of those accounts, only the IRA with respect to which the prohibited transaction occurred will be disqualified (effective for taxable years beginning after the date of enactment).
- Clarify that the substantially equal periodic payment exception to the 10 percent additional tax on early withdrawals from a retirement account applies in the case of a rollover of the account, an exchange of an annuity providing the payments, or an annuity that satisfies the required minimum distribution rules (effective for transfers, rollovers, exchanges after December 31, 2023, and for annuity transfers on or after the date of enactment).

Insurance and annuity provisions within retirement plans: To help ensure that retirees have access to a life-long income stream, the SECURE 2.0 Act proposes to simplify current rules related to certain annuity and insurance products offered within a qualified retirement plan.

- **Life annuities:** The bill would amend the required minimum distribution rules to permit commercial annuities within a defined contribution plan to offer features such as guaranteed annual payment increases of up to 5 percent per year, lump-sum return of premium death benefits, lump-sum payments that reduce the annuity period, and dividends or similar distributions determined in an actuarially reasonable manner. This provision would be effective as of the date of enactment.
- **QLACs:** A qualified longevity annuity product (QLAC) is a fixed annuity provided under a defined contribution plan that begins payments towards the end of an individual's life expectancy and meets certain other requirements—including that premiums cannot exceed a certain dollar amount ($125,000 in 2022) or 25 percent of the participant's account balance. This provision would modify current regulations governing QLACs to (1) eliminate the requirement that premiums for QLACs be limited to 25 percent of an individual's account balance, (2) increase the dollar amount of the premium limitation to $200,000 and index it for inflation, (3) clarify the treatment of QLACs purchased with joint survivor and annuity benefits for an individual and his or her spouse, and (4) ensure that the regulation does not preclude a contract from offering a provision that allows an employee to rescind the purchase of a

contract within up to 90 days from the date of purchase (the "short free look period"). This provision generally would be effective with respect to contracts purchased or received in an exchange on or after the date of enactment. The changes with respect to joint and survivor annuities and the "short free look period" would be effective with respect to contracts purchased or received in an exchange on or after July 2, 2014.

- **Eliminating penalty on partial annuitization:** Under current law, if a tax-preferred retirement account also holds an annuity, the account must be bifurcated between the portion of the account holding the annuity and the rest of the account for purposes of applying the required minimum distribution rules. This treatment may result in higher minimum distributions than would have been required if the account did not hold an annuity. This provision would permit the account owner to elect to aggregate distributions from both portions of the account for purposes of determining minimum distributions. This provision would be effective after the date of enactment.
- **Insurance-dedicated exchange-traded funds:** The bill would direct the Treasury Department to revise the regulations on diversification requirements for variable annuity contracts under section 817 to allow exchange-traded funds to be held in the segregated account of a variable insurance contract. The provision would be effective for segregated asset account investments made on or after the date that is seven years after the date of enactment.

Changes to ESOP rules

The SECURE 2.0 Act includes some significant provisions related to employee stock ownership plans (ESOPs).

Deferral of tax for certain sales of employer stock to ESOPs sponsored by an S corporation: Under current law (section 1042), an individual owner of stock in a nonpublicly traded C corporation that sponsors an ESOP may elect to defer the recognition of gain from the sale of such stock to the ESOP if the seller reinvests the sales proceeds into qualified replacement property, such as stock or other securities issued by a US operating corporation. After the sale, the ESOP must own at least 30 percent of the employer corporation's stock.

This provision would expand the gain deferral provisions of section 1042 with a 10 percent limit on the deferral to sales of employer stock to S corporation ESOPs. It would apply to sales after December 31, 2027.

Certain securities treated as publicly traded in case of ESOPs: This provision would update certain ESOP rules related to whether a security is a "publicly traded employer security" and "readily tradeable on an established securities market." Specifically, it would allow certain non-exchange traded securities to qualify as "publicly traded employer securities" so long as the security is subject to priced quotations by at least four dealers on a Securities and Exchange Commission-regulated interdealer quotation system, is not a penny stock and is not issued by a shell company, and has a public float of at least 10 percent of outstanding shares. For securities issued by domestic corporations, the issuer must publish annual audited financial statements.

Securities issued by foreign corporations would be subject to additional depository and reporting requirements. The updated definitions in this provision would allow highly regulated companies with liquid securities that are quoted on non-exchange markets to treat their stock as "public" for ESOP purposes, thus making it easier for these companies to offer ESOPs to their US employees. The provision would be effective for plan years beginning after December 31, 2027.

Section 403(b) plan provisions

The SECURE 2.0 Act includes enhancements to the rules governing section 403(b) plans that would permit 403(b) custodial accounts to participate in group trusts with other tax-preferred savings plans and IRAs, effective for amounts invested after the date of enactment.

The legislation also would broaden the availability of section 403(b) defined contribution plans by permitting 403(b) sponsors to participate in a multiple employer plan (MEP) arrangement. These MEP 403(b) arrangements generally would follow the provisions governing other MEP defined contribution plans laid out in 2019's SECURE Act—including relief from the "one bad apple" rule, so that violations by one plan sponsor participating in a MEP would not affect the tax-qualified status of other plans participating in the arrangement. The provision would be effective for plan years beginning after December 31, 2022.

Emergency access to retirement savings

The SECURE 2.0 Act includes several provisions that would provide penalty-free access to retirement funds for individuals facing federally declared disasters, domestic abuse, terminal illness, and other unforeseen emergencies. Distributions would be includable in income but would not be subject to the additional 10 percent tax for early withdrawals. Maximum distribution amounts would vary based on the nature of the emergency. In many cases, distributions could be recontributed to the retirement account subject to certain conditions. Various effective dates would apply.

Revenue provisions

As already noted, the proposed retirement security enhancements in the SECURE 2.0 Act would be offset chiefly through provisions that would expand after-tax "Roth" treatment of certain retirement account contributions, as well as a new restriction on certain conservation easement arrangements.

'Rothification' and other plan-related provisions: The Roth-related revenue provisions would:

- Require a section 401(a) qualified plan, section 403(b) plan, or governmental section 457(b) plan that permits an eligible participant to make catch-up contributions to treat those contributions as after-tax Roth contributions. This provision would not apply to employees with compensation of $145,000 or less (indexed) or to SIMPLE IRA or SEP plans. It would be effective for taxable years beginning after December 31, 2023.
- Permit SEPs and SIMPLE IRAs to be designated as Roth IRAs, with contributions made with after-tax income and distributions excludable from gross income. Roth treatment of a SEP or SIMPLE IRA would be subject to an employee's election. The contribution limit for Roth IRAs generally would be increased by the contributions made on the individual's behalf to the SIMPLE IRA or SEP for the taxable year,

subject to certain limits. This provision would be effective for taxable years beginning after December 31, 2022.

- Allow participants in a section 401(a) qualified plan, a section 403(b) plan, or a governmental 457(b) plan to designate employer matching contributions and non-elective contributions as Roth contributions. An employer matching contribution that is a designated Roth contribution would not be excludable from gross income. In order for this rule to apply, the employee would have to be fully vested in the matching or non-elective contribution under the plan. This provision would be effective for contributions made after the date of enactment.

Other plan-related offsets would conform the hardship-withdrawal rules for section 403(b) to those in effect for 401(k) plans (effective for plan years beginning after December 31, 2023), and extend through 2032 a provision otherwise scheduled to expire at the end of 2025 that permits an employer to transfer certain excess pension assets of a defined benefit plan to a retiree medical account or life insurance account within the plan to fund retiree health benefits and group term life insurance benefits (effective for transfers after the date of enactment).

Conservation easement restrictions: The legislation also would curb certain conservation easement arrangements that some regard as abusive by denying a tax deduction for conservation contributions made by certain passthrough entities if the amount of the contribution is more than 2.5 times the sum of each owner's relevant basis in the passthrough entity. Exceptions would apply if the contribution meets a three-year holding period test, substantially all of the contributing partnership is owned by members of a family, or the contribution relates to the preservation of a certified historic structure. A new reporting requirement would apply to contribution for the preservation of a certified historic structure.

This provision also would permit taxpayers to correct certain defects in an easement deed (excluding easements involved in abusive transactions) and would make certain changes to statute-of-limitations and penalty provisions.

The provision would be generally effective for contributions made after the date of enactment. (Some previous congressional proposals to limit deductions for conservation easements would have taken effect retroactively.)

IRS delays stricter reporting requirement for third-party payment processors

Lawmakers were unsuccessful in efforts to include a provision in the omnibus measure that would delay the implementation of a stricter reporting threshold for third-party payment processors that was enacted in the American Rescue Plan Act of 2021. However, the Internal Revenue Service announced December 23 that it will provide administrative relief and, as a result, third-party settlement organizations will not be required to report tax year 2022 transactions on a Form 1099-K to the IRS or the payee for the lower, $600 threshold amount.

As part of the announcement, the IRS also released guidance (Notice 2023-10) outlining that calendar year 2022 will be a transition period for implementing the lower reporting threshold.

URL: https://www.irs.gov/pub/irs-drop/n-2023-10.pdf

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