AMERICAN RETIREMENT ASSOCIATION

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Working for America's Retirement

February 12, 2020

Ms. Carol Weiser
Benefits Tax Counsel
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW, Room 3044
Washington, DC 20220
Submitted via email

Re: Guidance Issues related to the Setting Every Community Up for Retirement (SECURE) Act

The American Retirement Association ("ARA") is writing to inform you of certain issues related to the SECURE Act[1] on which guidance is requested. We hope this will be helpful as the Department of the Treasury ("Treasury") and Internal Revenue Service ("IRS") consider which provisions of the SECURE Act should have the highest priority for written guidance. ARA is happy to discuss or meet on any of the issues listed below.

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the American Society of Enrolled Actuaries ("ASEA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has more than 26,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Because most of the provisions in the SECURE Act are effective in 2020, and IRS and Treasury will no doubt be working on guidance throughout 2020 and beyond, we ask that any guidance issued accommodate interim reasonable good-faith interpretations of the law.

The following summarizes the highest priority areas for which guidance under the SECURE Act is requested:

- **Section 101:** Multiple Employer Plans; Pooled Employer Plans. This provision applies to plan years beginning after December 31, 2020. There are three proposed regulations issued by Treasury and IRS that are not yet finalized which are impacted by the SECURE Act, including the proposed regulations on the unified plan rule exception for defined contribution multiple employer plans published in July 2019. Will the IRS finalize the

[1] Public Law No. 116-94, Division O, signed into law on December 20, 2019.

proposed regulations with the unified plan rule exception as proposed, or will new regulations address the SECURE Act multiple employer plan provisions that do away with the “one bad apple” rule in conjunction with potential regulations issued by the Department of Labor?

- **Section 103:** Rules relating to election of safe harbor 401(k) status. These changes raise some uncertainty on three provisions in the current final regulations. First, it is not clear how the elimination of the safe harbor notice for nonelective 401(k) safe harbor plans impacts the current regulatory requirements that in order to either eliminate or add a safe harbor in the middle of the plan year, certain information must be included in the safe harbor notice and/or follow-up notices provided. Second, under current regulations a plan must be using the current year testing method in order to add a safe harbor provision to the plan during the year. It is not clear how this requirement would apply in light of the statutory change permitting a plan to add a safe harbor provision up to 12 months after the end of the plan year. Third, under current regulations under IRC section 401(m), a plan that uses safe harbor nonelective contributions, complies with the limitations on matching contributions, and complies with the notice requirement (as cross-referenced from the current regulations under IRC section 401(k)), satisfies the ACP safe harbor provisions of IRC section 401(m)(11). It is not clear how this ACP safe harbor for matching contributions made to a nonelective 401(k) safe harbor plan is impacted by the elimination of the safe harbor notice for nonelective 401(k) safe harbor plans.

- **Section 110:** Treatment of custodial accounts on termination of section 403(b) plans. Section 110 requires the Secretary of the Treasury to issue guidance on certain section 403(b) plan issues not later than six months after the date of enactment of the SECURE Act. This guidance is to be retroactively effective for taxable years beginning after December 31, 2008. Guidance would be helpful in cases where employers no longer in existence due to dissolution “stopped” the plan without a method of termination, or in cases where employers may have later adopted section 401(k) plans but are unable to terminate their section 403(b) plans without further guidance. Since this guidance is required to be retroactively effective, including methods that permit past actions to be grandfathered in a reasonable manner would be helpful.

- **Section 111:** Clarification of retirement income account rules relating to church-controlled organizations. This provision is retroactively effective for all years, and guidance on how this provision applies to past years would be helpful. The major impact of this provision will be to permit all churches and affiliated church organizations (both Qualified Church Controlled Organizations or QCCOs, and Non-qualified Church Controlled Organizations or NonQCCOs) to be covered under a church plan under section 403(b)(9). Additional guidance would also be helpful to clarify whether pre-approved section 403(b)(9) plans may be modified with an interim amendment (until the 2nd Remedial Amendment Period for 403(b) plans is underway) to permit the adoption by QCCOs and NonQCCOs without losing reliance on the pre-approved plan.

- **Section 112:** Qualified cash or deferred arrangements must allow long-term part-time employees working more than 500 but less than 1,000 hours per year to participate. A key issue on this provision is whether these employees must always be eligible to participate in the plan or whether they can be excluded from a plan if they fit into an excluded classification. To illustrate, consider the example of a law firm that has a plan that excludes nonpartner attorneys. Must nonpartner attorneys who satisfy the long-term employee thresholds be included in the deferral feature even though they are part of the excluded class? May a plan exclude employees of a related employer that has not adopted the plan? It is not clear whether long-term part-time employees fitting in one of these classifications can be excluded from the plan. A separate question has arisen with respect to the rule that requires long-term part-time employees who become participants in a plan to receive one year of vesting credit for each 12-month period in which they have at least 500 hours of service. Under new section 401(k)(15)(B)(iv), this vesting rule using 500 hours of service continues to apply when the employee become a full-time employee, which would appear to create the need for two separate tracking systems for vesting service for regular full-time employees and full-time employees who were formerly long-term part-time employees. Clarification of how the vesting rules operate for employees who move back and forth between part-time and full-time status would be helpful.

- **Section 113:** Penalty-free withdrawals from retirement plans for individuals in case of birth of child or adoption. This provision raises several concerns for plan sponsors and practitioners. The most immediate concern is clarification that this is an optional plan provision and that plans are not required to alter their current distribution provisions or processes for birth or adoption distributions. Other issues associated with this provision also need to be addressed, such as updated IRC section 402(f) notices, rules regarding the operation of repayments (is it mandatory to have a repayment provision?; can there be a limit on repayments?; how are repayments handled for tax purposes?), and documentation requirements to show that an individual qualifies for a birth or adoption distribution.

- **Section 114:** Increase in age for required beginning date for mandatory distributions. We are aware that other organizations have provided comments on payments made in 2020 which have been communicated as being required minimum distributions due for 2020 but which are eligible rollover distributions under the SECURE Act changes. Transition relief would very important for reporting and communications purposes which should also include an additional reason for a late rollover under Rev. Proc. 2016-47. In addition, we have previously pointed out an issue related to section 114(a) of the SECURE Act which changes age 70 ½ to age 72 in IRC section 401(a)(9)(C)(i)(I) but does not change age 70 ½ to age 72 in section 401(a)(9)(C)(iii). This appears to require a technical correction[2], unless Treasury and IRS find sufficient statutory authority to clarify in regulations. Clearly, the intent was to begin actuarial adjustments at age 70 ½, not at age 72, at least for non-owners: the Joint Committee on Taxation report on the Ways and Means markup of the SECURE Act (JCX-13-19, page 50) is clear that the present law requirement to actuarially adjust benefits beginning at age 70 ½ "is not changed." It appears that this could also mean that 5% owners would not get an actuarial adjustment at all. Thus, it is not clear how the actuarial adjustment will work for either non-5% owners or 5% owners, especially for retirements between the ages of 70 ½ and 72. Clarification would be helpful if a legislative technical correction is not forthcoming.

Clarification is also needed for the special exception for certain annuity contracts where a binding annuity contract was in place on the date of enactment but the contract also permits the insurance company to unilaterally amend the contract to comply with tax laws. Would this require an amendment to the new distribution rules if the participant, for example, elected a 20-year period certain annuity before December 20, 2019?

In addition, guidance on the required distribution rules in Section 401 of the SECURE Act would be helpful. Although there several effective dates for different types of plans or agreements, these provisions are generally effective for employees who die after December 31, 2019. One question has arisen as to how to apply the rules to a child under the age of majority, an age which can differ from state to state. Existing regulations under section 1.401(a)(9)-6 Q&A-15 allow a child to be treated "as having not reached the age of majority if the child has not completed a specified course of education and is under the age of 26." Will the age 26 rule in these existing regulations also be applied to the new SECURE Act rule regarding children under the age of majority being "eligible designated beneficiaries"?

- **Section 201:** Plans adopted by due date for filing employer's tax return. This provision applies to plans adopted for taxable years beginning after December 31, 2019. There are several issues where guidance would be helpful. For example, is this provision impacted by IRC section 412(d)(2), allowing plan sponsors to make retroactive amendments within 2½ months after the end of the plan year for funding purposes? Also, special rules appear to be warranted for Form 5500 filing purposes since otherwise a Form 5500 could be due before a plan is actually adopted (e.g., if an employer were to establish a plan in October for the prior year).

  In addition, we note that section 104 of Bipartisan American Miners Act of 2019 was enacted as part of Division M of the Further Consolidated Appropriations Act of 2020. This section is effective for plan years beginning after December 31, 2019. After the Pension Protection Act change to allow in-service distributions at age 62, regulations allowed plan sponsors to use an age 62 normal retirement age. Will a similar change be

[2] The portion of IRC section 401(a)(9)(C)(iii) that is problematic is the phrase "to whom clause (i)(II) applies", which impacts the actuarial adjustment for both non-owners and 5% owners.

made under SECURE Act regulations? If plan sponsors reduce the normal retirement age to 59 ½ effective for 2020, will that age automatically be reasonably representative of the retirement age of the industry involved as under the current final regulations?

We also would like to note three other issues with section 104 of the American Miners Act. First, it appears a technical correction is needed as there is no mirror ERISA provision to the change made to IRC section 401(a)(36) by the SECURE Act. Thus, section 3 of ERISA still only allows in-service distributions at age 62, not age 59 ½ as under the Internal Revenue Code. Second, clarification is requested that the new in-service distribution rules as related to governmental section 457(b) plans is an optional amendment for plan sponsors. Lastly, we note that section 601 of the SECURE Act provides relief for "any amendment made by <u>this Act</u> or pursuant to any regulation issued by the Secretary of the Treasury or the Secretary of Labor (or a delegate of either such Secretary) under <u>this Act</u>" (emphasis added). Since the Bipartisan American Miners Act is different from the SECURE Act, it appears that section 104 of the Miners Act would not receive the benefit of the remedial amendment period under section 601 of the SECURE Act. However, if Treasury and IRS have sufficient regulatory authority, we request that a remedial amendment period apply for section 104 of the American Miners Act that mirrors section 601 of the SECURE Act.

Thank you for your consideration of these comments. If you would like additional details on any of the above topics, please let us know and we would be happy to follow up. Please contact Martin L. Pippins, MSPA, Director of Regulatory Policy (mpippins@usaretirement.org; 703.516.9300), if you have any comments or questions regarding the matters discussed above.

Sincerely,

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