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Working for America's Retirement

American Retirement Association Statement for the Record For the Senate Finance Subcommittee on Social Security, Pensions, and Family Policy Hearing on "Investigating Challenges to American Retirement Security" December 9, 2020

The American Retirement Association (ARA) thanks Chairman Portman, Ranking Member Brown, and the other Members of the Senate Finance Subcommittee on Social Security, Pensions, and Family Policy for holding a hearing to examine the various challenges that Americans and American businesses face in ensuring all Americans are able to save for a secure retirement.

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). The 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, the ARA has nearly 30,000 individual members who provide consulting and administrative services to the sponsors of retirement plans. The ARA and its underlying affiliate organizations are diverse but united in their common dedication to the success of America's private retirement system.

On December 20, 2019, the *Setting Every Community Up for Retirement (SECURE) Act* was signed into law. The SECURE Act addresses the real challenges that small business owners face—including costs, administrative burdens, and increased liability for any mistakes in administration—when they consider providing retirement benefits for their workers. In this regard, the SECURE Act allows for unrelated employers to join a pooled employer plan, significantly increases the small business pension plan startup tax credit to $5,000 and gives business owners more flexibility to help guide their decision-making for their businesses and retirement plans.

The *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020* also provided much needed short-term relief for Americans who were suddenly facing furloughs, layoffs, or reductions in hours of pay. While it is never an easy decision to withdraw funds from a retirement account, it is sometimes necessary to ensure an individual and their family have the means to get back on their feet following an economic recession. The CARES Act ensured Americans had access to funds if impacted by the COVID pandemic.

Nevertheless, additional relief and assistance is needed for small business employers who continue to desire to provide as much retirement security for their workers as possible. This is especially true now, as the

Coronarvirus pandemic continues to ravage the country as 2021 rapidly approaches. The impact of the COVID-19 pandemic on the small business community cannot be understated, and it is feared its effects will extend well into 2021 and possibly beyond.

Thus, ARA strongly supports additional legislative relief for small business employer that will help keep their plans ongoing and able to provide a steady source of retirement security for their workers. Small businesses are doing all they can to avoid terminating the retirement plans that give so much support to their employees.

ARA proposes that plan sponsors of a 401(k) plan that have suffered a business hardship, as defined under Internal Revenue Code Section 412(c), be allowed the following three types of relief: testing relief, a funding holiday, and partial plan termination relief.

- **Testing Relief** - If a "safe harbor" 401(k) plan reduces or ceases employer contributions in 2020, the plan may maintain their safe harbor status for the remainder of the plan year. Plans that are not deemed "safe harbor" plans remain subject to top heavy testing, but ADP/ACP testing is waived for 2020. We encourage this relief to be extended into 2021 as well.

  To prevent abuse of this relief, key employees, as defined under Internal Revenue Code section 416, for the time period employer contributions cease are: (1) unable to defer contributions to the 401(k) plan; and (2) unable to receive employer contributions to non-qualified retirement plans. For a plan sponsor to utilize this relief, key employees must have been deferring contributions to the 401(k) plan on a ratable basis (i.e., front-loading contributions disqualifies eligibility for this relief).

- **Funding Holiday** - If the 401(k) plan has 500 or fewer participants, the plan sponsor may delay for one year any employer contributions that have not yet been made to satisfy their 2020 obligations. Safe harbor plans retain their status for the 2020 plan year.

- **Partial Plan Termination Relief** - The layoff of a significant number of employees could cause the plan to incur a partial plan termination, even in cases where it is expected that many employees may be rehired once the economy recovers. We propose that the current partial plan termination rules be altered to ensure such termination does not occur if the active participant count as of December 31, 2021 is 80% of the active participant count at the time the national emergency was declared.

The *Retirement Security and Savings Act of 2019*, S. 1431, introduced on May 13, 2019, provides common sense practical solutions to many of the impediments faced by small business employers interested in establishing or maintaining a retirement plan for the benefit of their employees, especially in today's environment. Small business employers will continue to need support throughout the coming years, even after the effects of the pandemic are reduced. In particular, ARA strongly supports the following elements of the Retirement Security and Savings Act of 2019:

- Encouraging employers to expand retirement plan coverage beyond current statutory requirements by allowing employers to disaggregate other excludable employees from the top-heavy test as with other nondiscrimination tests (Section 106 of the *Retirement Security and Savings Act of 2019*).

- Creating an additional automatic enrollment safe harbor with the default savings rate at a higher percentage of pay and stretching the employer matching contribution formula to encourage higher savings rates (Sections 101 and 103 of the *Retirement Security and Savings Act of 2019*).

- Expanding the Saver's Credit to make it refundable if the Credit is contributed directly to a retirement plan or Roth IRA (Section 104 of the *Retirement Security and Savings Act of 2019*).

- The creation of a student loan program that gives employees matching contributions into the 401(k) plan based on the amount an employee is paying in student loans (Section 112 of the *Retirement Security and Savings Act of 2019*).

  However, employers wanting to offer this benefit to their employees may run into a problem with a special test that applies to 401(k) plans called the average deferral percentage (ADP) test. The American Retirement Association strongly supports improving Section 112 to allow participants receiving a matching contribution for student loan repayments to be separated or disaggregated from the rest of the employee population for purposes of the ADP test. This much-needed fix would make this innovative plan design feature more attractive to large and small businesses to the benefit of more employees still paying off their student loans.

The American Retirement Association supports the following additional legislative items to be included in the next round of retirement savings policymaking.

- **Streamline long-term part-time employee compliance rules** - Section 112 of the SECURE Act required that 401(k) plans allow employees who work at least 500 hours for three consecutive years of service to become eligible to contribute. This provision is effective in 2021 and also provided that employers need not count periods of service prior to 2021 for purposes of determining eligibility to contribute. Thus, a plan would generally not need to include any long-term part-time employees until January 1, 2024.

  However, Section 112 of the SECURE Act does not explicitly exclude the counting of prior periods of service for vesting purposes. Recent IRS guidance (Notice 2020-68) to implement Section 112 of the SECURE Act stated that because of this statutory language omission, all prior service of long-term part-time employees must be considered for vesting. Although employers are not required to provide long-term part-time employees with employer contributions, some employers may want to be more generous so as to not treat them differently than full-time employees. This IRS interpretation unfairly and negatively impacts those employers wanting to be more generous.

  The American Retirement Association supports a statutory clarification to Section 112 so that the exclusion of periods of service before the 2021 plan year also applies for purpose of counting vesting service. This way, periods of service for both eligibility and vesting will be counted the same way. Before Section 112 was enacted, there was no need to maintain the service and hour records of employees not eligible to participate in the plan, so many more generous plan sponsors will have trouble complying with the recent IRS guidance.

- **Correct outdated and unfair family attribution rules** - Under the tax code, certain related businesses must be aggregated when performing retirement plan coverage and nondiscrimination tests. The aggregation rules are generally based on the degree of common ownership of the businesses. For example, if an individual owns 100% of two separate businesses, they must be aggregated for purposes of the tests.

  In determining the level of ownership in a business the tax laws have certain attribution rules whereby an individual is deemed to own stock held by other individuals or entities. The American Retirement Association seeks to address inequities in two of the stock attribution rules.

  The first inequity the proposal seeks to address is where spouses with separate businesses reside in a community property state. In a community property state, spouses are automatically considered to own half of the property acquired during the marriage, except under certain limited circumstances.

The result is that the first criteria (no direct ownership in each other's business) is not satisfied and there would be stock attribution among the spouses. This is the case even though the spouses have nothing to do with each other's businesses and creates an inequity between spouses who reside in community property states when compared to spouses who reside in separate (non-community) property states.

The second attribution rule the proposal would modify relates to the attribution of stock between parents and minor children. Under the current rules, a minor child is deemed to own the stock of his or her parents. Even if two spouses satisfy the four criteria for the spousal attribution exception above, their businesses would still be aggregated for retirement plan testing purposes if they have a minor child. The child is deemed to own the stock of each parent (this is true regardless of the marital status of the parents). Thus, if each parent owns 100% of a business and the conditions for the spousal attribution exception apply, the businesses would nevertheless need to be aggregated because the child is deemed to own 100% of two businesses.

The application of these two rules can create situations where a business owner is not able to establish a plan for her employees solely because she resides in a community property state or because she has a minor child.

- **Allow discretionary amendments to a retirement plan to be adopted up to the due date of an employer's tax return** - Section 201 of the SECURE Act permits an employer to adopt a new retirement plan by the due date of the employer's tax return for the fiscal year in which the plan is effective. Current law, however, provides that plan amendments to an existing plan must generally be adopted by the last day of the plan year in which the amendment is effective. This would preclude an employer from adding plan provisions that may be beneficial to participants.

  The American Retirement Association strongly supports allowing discretionary amendments to be adopted by the due date of the employer's tax return. This new deadline to adopt a discretionary amendment is consistent with the deadline to adopt a new plan. This would require adoption of the amendment by the due date of the employer's extended tax return due date for the year in which the amendment is effective. Any such amendment would be subject to all other applicable provisions of Subchapter D of the Internal Revenue Code, such as the prohibition on impermissibly cutting back benefits or discriminating in favor of highly compensated employees.

- **Make it easier for plan sponsors to implement beneficial plan features** - Sponsoring a qualified retirement plan for employees involves expenses ranging from the cost of initial plan design and implementation to maintenance of the plan's tax qualification. Under current law, the assets of a plan may be used to pay for reasonable costs of administering the plan. The Department of Labor (DOL) interprets this to mean that spending plan assets on plan formation and design would be impermissible and that only expenses that relate to implementation and ongoing administration of a plan and legal compliance costs can be paid from plan assets. Small employers, as a result, often forego consideration of beneficial plan changes for plan participants like an automatic enrollment feature or a retirement readiness program and other plan changes due to the cost, despite their great potential to generate increased retirement savings. The American Retirement Association strongly supports a law change to allow retirement plans to pay for certain expenses relating to optional plan features and programs that will increase retirement savings.

- **Create permanent retirement plan distribution and loan rules for victims of natural disasters** - Every year tens of thousands of Americans are victims of natural disasters from floods, tornadoes, hurricanes, forest fires, or more recently a global health pandemic. But because there are not permanent rules on the use of retirement funds by individuals impacted by these situations, victims

are dependent upon Congressional action after the occurrence of each disaster. For example, in 2005, Congress granted disaster tax relief for Hurricane Katrina victims. In 2012, however, Congress did not provide relief for victims of Hurricane Sandy. This disparate treatment is unfair and slows the general recovery process in the aftermath of a disaster.

The American Retirement Association strongly supports permanent retirement plan tax relief measures that would automatically apply once a Presidential disaster declaration is issued. Specifically, the American Retirement Association supports making permanent for victims of future disasters special retirement plan distribution and loan rules. These rules would allow disaster victims to take a retirement account distribution up to $100,000, taxed ratably over three years not subject to the normal 20% withholding and 10% additional income tax penalty. Victims would be permitted to repay these distributions back into the retirement account within three years. Victims could, if the retirement plan allows, take a loan up to the lesser of $100,000 or 100% of the vested retirement account balance. For disaster victims with existing loan balances, those repayments could be delayed for up to one year.

The American Retirement Association appreciates the Senate Finance Subcommittee's focus on the ongoing challenges that American families face in achieving a secure retirement. We thank Congress for taking a major step forward to improve the workplace based retirement system with the enactment of the SECURE Act at the end of the last year. We look forward to working with Congress as it moves forward with further improvements to the system and urge its consideration and adoption of the legislative proposals that we have described above.