

February 3, 2021

Internal Revenue Service  
Attn: CC:PA:LPD:PR (Notice 2020-80), Room 5203  
Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

## RE: Notice 2020-80: Section 110 of SECURE Act— Comments Invited

The American Retirement Association (“ARA”) is writing in response to Internal Revenue Service Notice 2020-80, regarding comments on the application of section 205 of ERISA in connection with a distribution of an individual custodial account in-kind under section 110 of the SECURE Act (Public Law 116-94) for a § 403(b) plan participant. ARA thanks the Internal Revenue Service (“IRS” or “Service”) and the Department of the Treasury for the opportunity to provide input on these important matters, and for providing explanations under Rev. Rul. 2020-23 issued in conjunction with Notice 2020-80.

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 nearly 28,000 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.

Notice 2020-80 requested comments specifically on the application of ERISA § 205 annuity and spousal rights provisions in connection with a distribution in-kind of an individual custodial account (ICA) under section 110 of the SECURE Act, including any administrative or other burdens that may arise and potential methods or rules that could minimize or eliminate those burdens. The following outlines some concerns identified by ARA, starting with money purchase pension plans, which are subject to the qualified joint and survivor spousal protections of section 417 of the Internal Revenue Code (the “Code”), with a focus on the history and background relating to these protections within § 403(b) plans and the current practices implementing the protections.

### History and Background

The Service requests information on certain issues stemming from the application of ERISA § 205. As stated in Notice 2020-80, plans that are not defined benefit plans or money purchase plans may be exempt from ERISA § 205 if certain requirements are met.

Thus, we think the first question for the Service to address is whether a § 403(b) Plan is ever treated as a money purchase plan. In the past, it was a practice for some § 403(b) plan sponsors to specifically identify the percentage of compensation that would be used to determine the employer

nonelective contribution. This created a debate as to whether this practice made the § 403(b) plan a money purchase pension plan. More recently, the alternative has been to instead make contributions on a discretionary basis to mirror a profit-sharing plan allocation.

Unlike a defined contribution plan, which in accordance with section 401(a)(27) of the Code must designate its intent to be a money purchase pension plan or a profit-sharing plan, no such designation requirement exists for a § 403(b) plan. All § 403(b) plan sponsors/employers (other than non-electing churches) were required to restate their plan as of June 30, 2020. The IRS Listing of Required Modifications (LRMs) did not refer to Profit-sharing or Money Purchase as the terms related to prototype or volume submitter plan documents. Therefore, a pre-approved § 403(b) plan document would designate the plan as either a money purchase pension plan or a profit-sharing plan only if the language was specifically added by the document provider.

The preamble to the § 403(b) income tax regulations issued in 2007<sup>1</sup> states that the distribution of employer contributions may be made at a stated event:

“The stated event rule is substantially the same as the rule applicable to qualified defined contribution plans that are not money purchase pension plans (under §1.401-1(b)(1)(ii)), so that a plan is permitted to provide for a distribution upon completion of a fixed number of years (such as five years of participation), the attainment of a stated age, or upon the occurrence of some other identified event (such as the occurrence of a financial need, including a need to buy a home).”

This seems to indicate that at least some of the money purchase pension plan rules do not apply to a § 403(b) plan. **ARA recommends** the Service clarify that § 403(b) plans cannot be money purchase plans. And thus, all § 403(b) plans may qualify for the profit-sharing exemption from ERISA § 205 (despite the fact that the plan’s underlying investment vehicles may incorporate any or all of the rules, such as qualified joint and survivor annuity rules, qualified pre-retirement survivor annuity rules, and spousal consent requirements).

## Discussion of Current Practices

### Ongoing Plans:

Non-ERISA Plans – Because there is no requirement to apply ERISA § 205 to a non-ERISA plan, unless state law specifically requires otherwise, most providers will not require spousal consent or the annuity requirements. We are aware that some providers do write these rules into their underlying custodial/annuity contracts, which will need to be addressed.

ERISA Plans – ERISA plans would be subject to the annuity and spousal rights of ERISA § 205 if they are defined benefit plans or defined contribution plans subject to minimum funding standards (such as money purchase pension plans). There has been a long-standing question surrounding whether a § 403(b) plan structured similarly to a money purchase pension plan can contain safe harbor profit-sharing provisions and thereby be exempt from ERISA § 205. As noted above, **ARA recommends** the IRS clarify a § 403(b) plan is never treated as a money purchase pension plan. Thus, in accordance with Section 1.401(a)-20 Q&A-3(d) of the Income Tax regulations (which treats § 403(b) contracts and custodial accounts as § 401(a) plans) defined contribution § 403(b) plans may comply with the profit-sharing exception.

While ARA believes most providers that handle ERISA-covered § 403(b) plans currently comply with the spousal consent and annuity provisions of the Code and ERISA, and some provide for the profit-

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<sup>1</sup> 72 FR 41127.

sharing safe harbor as a part of their § 403(b) plan document. Clarifying that § 403(b) plans can qualify for the profit-sharing exemption under ERISA § 205 will permit a terminating plan to be amended to remove annuity options provided that a lump sum distribution option remains.

Terminated Plans:

Plans may be amended to remove certain options provided a lump sum distribution option remains. We believe this process can also be applied to terminated plans. **ARA recommends** the Service clarify this is permissible. Because many § 403(b) plans refer to the underlying investment provider for the optional forms of benefits, we believe that an amendment to the custodial agreement and/or annuity contract is appropriate to remove the annuity form of benefit, leaving the lump sum option upon termination. Clearly permitting such amendments would be especially helpful in cases where the participant is missing, and an in-kind distribution of the contract/custodial agreement would be required within one year of termination (under Rev. Rul. 2020-23).

Operationally, we believe that the contract/agreement can be amended when it is distributed in-kind at termination to remove the annuity distribution language in the contract/agreement. The participant can act on the in-kind contract/agreement in the future by electing a full distribution, or a rollover to another plan. In this situation, the spousal rights would no longer be applicable.

If you have any questions regarding the matters discussed herein, please contact Kelsey Mayo at [KMayo@USAREtirement.org](mailto:KMayo@USAREtirement.org). Thank you for your time and consideration.

Sincerely,

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