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Working for America's Retirement

May 25, 2022

Internal Revenue Service
Attn: CC:PA:LPD:PR (REG-105954-20)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Submitted via Regulations.gov

Re: **Proposed Regulations Regarding Required Minimum Distributions (RIN 1545-BP82)**

The American Retirement Association ("ARA") is writing in response to the request for comments in the Notice of Proposed Rulemaking regarding required minimum distributions ("RMDs"), published in the Federal Register on February 24, 2022, and referenced above (the "Proposed Rule"). ARA thanks the Department of the Treasury ("Treasury") and the Internal Revenue Service (IRS or "Service") for the opportunity to provide input on these matters.

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 savings plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has over 30,000 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.

Summary

ARA recommends that the Service:

- Delay the effective date of the regulation to a date at least eighteen (18) months after publication of the final rule;
- Clarify what is meant by "employment with the employer maintaining the plan" for purposes of distributions during an employee's lifetime;
- Not require RMDs during the ten-year period, regardless of whether death occurs before the required beginning date;
- Adopt a uniform rule concerning treatment of an individual as having predeceased an employee in a simultaneous death situation;
- Extend the options permitted for increased annuity payments in connection with insurance company annuity contracts to annuity payments made directly by defined benefit pension plans;
- Provide flexibility regarding when the plan administrator may accept a see-through trust (or a list of beneficiaries) during the employee's lifetime; and
- Retain the current rules for RMDs made from section 403(b) plans.

Discussion

I. Delay the effective date of the regulation to a date at least eighteen (18) months from publication of the final rule.

ARA recommends that the Service provide that the regulation, once final, will not take effect until the first day of the plan year that begins at least eighteen (18) months after the date of publication of the final regulations. Nearly all plan sponsors rely on service providers to monitor and calculate RMDs. These service providers will need to process the final regulations and then program their recordkeeping systems to account for the final regulations. Our recordkeeping members regularly report that a period of 18 months is the minimum amount of time necessary to build out system updates. Providing adequate time to ensure proper implementation will promote tax compliance and sound administration.

II. Clarify "employment with the employer maintaining the plan" for purposes of distributions during an employee's lifetime

Proposed Regulation §1.409(a)(9)-2(b) defines the required beginning date (RBD) for an employee other than a 5% owner to mean the April 1 of the calendar year following the later of the calendar year in which the employee attains age 72 (70½ if born before July 1, 1949) or retires from employment with the employer maintaining the plan. Other than the change in age from 70½ to 72, this is the same definition of RBD in the existing regulations. While not a new definition, the evolving workforce and structure of plans have created additional questions regarding how the definition applies and plan sponsors would benefit from additional guidance.

ARA recommends that the Service add the following specific examples to the regulation to clarify how "employment with the employer maintaining the plan" applies in two common situations.

- *Reemployment.* Employee M's date of birth is August 1, 1949. M is an employee of Employer A and is a participant in A's profit sharing plan. M is not a 5% owner of A. M separates from employment with A on May 1, 2022. M returns to employment with A on March 1, 2023. Does M have a required beginning date of April 1, 2023?

  ARA suggests that M does not have a required beginning date of April 1, 2023, because M was not retired from employment with the employer maintain the plan on the date that would otherwise have been the required beginning date.

- *Multiple Employer Plans*. Plan X is a multiple employer plan in which Employer B and Employer C are participating employers. Employee N's date of birth is August 1, 1949. N is an employee of Employer B, and is a participant in plan X. On May 1, 2022, N separates from employment with B and immediately commences employment with Employer C. Employees of B and C are not considered employed by a single employer under sections 414(b), (c), or (m). N is not a 5% owner of B, C, or any other employer participating in plan X. As of April 1, 2023, N remains employed with C. Does N have a required beginning date of April 1, 2023?

  ARA suggests that N does not have a required beginning date of April 1, 2023. Treasury regulations currently require plan X to treat Employer B and Employer C as a single employer for severance of employment and service crediting purposes, including those of §410(a) and §411 (for instance, there is no break in the service in the above scenario). Therefore, for consistency with other rules applicable to multiple employer plans, the participant should not be considered to have a severance of employment from the employer maintaining the plan while N is employed by an employer who is participating in Plan X.

III. Do not require RMDs during the ten-year period regardless of whether death occurs before the RBD or on or after the RBD.

ARA recommends that the Service apply the ten-year rule consistently regardless of whether death occurs before the RBD or on or after the RBD.

Section 401(a)(9)(H), as amended by the SECURE Act, Public Law 116-94, provides that the ten-year rule applies regardless of whether a participant's death occurs before or after the RBD. This provision is open to multiple reasonable interpretations. The various iterations of Publication 590-B reflect these multiple interpretations of the statute. Publication 590-B was revised no fewer than four times[1] to reflect the SECURE Act. Two of these revisions indicated that RMDs were *not* required to be made during the ten-year period, regardless of whether death occurred before the RBD, and two of the revisions suggested distributions were required if death occurred on or after RBD.

The Proposed Rule provides that if death occurs before the RBD then full distribution must be taken by the end of the ten-year period with no RMDs required during that ten-year period, but if death occurs on or after the RBD then full distribution must be taken by the end of the ten-year period *and* RMDs must be taken during that ten-year period, calculated based on the life expectancy rule. While ARA understands the above interpretation, based on the natural reading of the statue and the related Committee Report,[2] ARA believes Congress intended this provision to apply the same, single rule regardless of when the participant's death occurs. Therefore, **ARA recommends** the position in the final rule be revised to not require distributions during the ten-year period regardless of whether death occurred before RBD.

In addition, ARA members report that RMDs generally were not made during the ten-year period in 2021 and were not scheduled to be made in 2022, based on a reasonable interpretation of the statute and Publication 590-B. If the final regulation retains the rule as proposed, it will be unclear whether penalties and excise taxes for missed RMDs apply for years prior to the effective date of the final regulation and whether RMDs for those years must be caught up.

ARA strongly believes that imposing excise taxes or penalties in this situation would be inappropriate as taxpayers were operating under a good faith interpretation of the statute. If the final regulation adopts the Proposed Rule's position that distributions are required during the ten-year period in some instances, then **ARA recommends** the Service clarify that RMDs during the ten-year period are not required for calendar years prior to the first calendar year that begins after the effective date of the final regulation, so that no excise taxes or penalties are owed. **ARA further recommends** the IRS provide guidance on whether individuals who did not take RMDs prior to the effective date of the final regulation are required to take an additional "catch-up" RMD in the year after the regulations become effective.

IV. Provide a uniform rule concerning the treatment of an individual as having predeceased an employee in a simultaneous death situation.

ARA recommends the IRS adopt standard default determinations on which plan sponsors can rely regarding simultaneous death situations. Currently the Proposed Rule indicates the plan sponsor would have to determine whether a beneficiary predeceased the participant (or another beneficiary) according to State law. This would require a plan sponsor and/or its service providers to research applicable States' laws to determine the designated beneficiary. This imposes a significant burden

[1] Revised first in March of 2021 with inferences to the 10 year rule and distributions for the first 9 years. An updated Publication 590-B was issued in May of 2021 Publication 590-B, which did not mention the 9 years of distribution (page 11) In February 2022 another version was issued that referred to the 9 years of distributions. And finally on 4/28/22 another version was posted that does not require distributions during the initial 9 years of the 10 year period - 2021 Publication 590-B (irs.gov).
[2] Report of the House Ways and Means Committee on HR 1994 (published May 16, 2019).

on plan sponsors, particularly small plan sponsors and their service providers, and it imposes uncertainty in beneficiary determinations, which will delay ultimate distributions. Similar to the uniform rule adopted for "minors", **ARA recommends** providing a consistent rule on which plan sponsors can rely. A uniform rule will promote plan and tax code compliance and ensure distributions can be timely made to beneficiaries. This recommendation is consistent with the suggestion made in the Department of Labor 2010 ERISA Advisory Meeting on Beneficiaries[3], where it suggested providing defaults for plan sponsors and service providers to use in lieu of conducting legal research of individual State laws.

V. Extend the features permitted for insurance company annuity contracts to annuity payments made directly by defined benefit pension plans.

ARA recommends the IRS permit the same features in all annuity payments, not just from insurance company annuity contracts. Generally, RMD payments from a defined benefit pension plan are required to be non-increasing. However, the Proposed Rule allows certain accelerations or increases in payment streams when those payments are provided by an annuity contract that the plan has purchased from an insurance company. The same options should be available when annuity payments are made directly from a plan's trust. In other words, if it is permissible to modify payment streams when made under a commercial annuity contract, it should also be permitted when RMDs are paid directly from a plan's trust.

VI. Provide additional flexibility for when a see-through trust (or a list of beneficiaries) must be provided to the plan administrator during the employee's lifetime.

ARA recommends revising the Proposed Rule to provide additional flexibility regarding when a see-through trust (or a list of beneficiaries) must be provided to the plan administrator during the employee's lifetime. The Proposed Rule requires that the trust (or list) be provided before the first day of the distribution calendar year, and if changes are made to the trust, then changes must be provided within a reasonable period of time. While this rule ensures the plan administrator has sufficient time to determine the RMD, plan administrators may wish to provide additional flexibility to participants.[4] ARA recommends the provision be revised to provide that the trust or a list of beneficiaries must be provided by the deadline set by the administrator, which can be no earlier than the last day of the calendar year prior to the distribution calendar year. This will provide the administrative convenience of obtaining information before the distribution year, but permit reasonable flexibility to aid in administration.

VII. Permit use of Special Needs Trusts

ARA recommends that the regulations under section 1.401(a)(9)-4 be amended to include the availability of the creation of a third-party Special Needs Trust (SNT) as a Designated Beneficiary whereby any remainder beneficiaries will be disregarded when determining the applicable distribution period for a disabled Eligible Designated Beneficiary (EDB). The result should be that the disabled EDB will retain: (1) the ability to receive lifetime payouts; and (2) maintain public benefits.

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[3] See "Current Challenges and Best Practices Concerning Beneficiary Designations in Retirement and Life Insurance Plans" by Advisory Council on Employee Welfare and Pension Benefit Plans, December 2012, at https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2012-current-challenges-and-best-practices-concerning-beneficiary-designations-in-retirement-and-life-insurance-plans.pdf

[4] For example, where a spouse the sole beneficiary and is more than 10 years younger than the participant, the Joint and Last Survivor Table is used instead of the Unified Table. Therefore, the plan will need to determine whether the spouse is the sole beneficiary. If a trust is designated as a beneficiary when the participant is age 30, the plan administrator may not immediately ensure it has a copy of the trust or list of beneficiaries and the participant may not think to provide the plan administrators with updates years (even decades) before required minimum distributions must be made. Thus the deadline to provide the trust or list easily could be missed for the first distribution calendar year, and the plan administrator may want to accept the trust documentation in the year of the distribution.

Remove the reference to individual retirement accounts from the special rules related to eligible rollover distributions that include property.

VIII. Retain the current rules for RMDs made from §403(b) plans.

The Service specifically requested comments regarding whether the rules for RMDs from §403(b) plans should be similar to the RMD rules for qualified plans. **ARA recommends** that the IRS retain the current rules for RMDs made from §403(b) plans.

ARA agrees that having a single set of RMD rules that apply to both qualified plans and §403(b) plans would simplify plan administration, reduce errors, promote overall compliance, and reduce service provider training costs. However, ARA does not believe the §401(a) RMD rules should be applied to §403(b) plans.

Many §403(b) plans have individual annuity contracts and individual custodial agreements (together referred to as “contracts”). These contracts are between the investment company and the participant; the plan sponsor is not a party to these contracts. As a result, a plan sponsor or plan administrator cannot force distributions from these contracts.[5] The participant may have multiple individual contracts within the same plan, and the plan administrator has no ability to pick and choose the contracts from which RMDs will be made. In addition, other RMD rules for §403(b) plans, such as the age 75 RMD rule for §403(b) plans with pre-1987 accounts, would add further administrative complexity. Thus, imposing RMD rules on §403(b) plans that are more like the RMD rules for qualified plans is impractical and likely to be administratively burdensome.

In addition, all §403(b) annuity contracts would need to be submitted to states for approval of any such change. The change would require insurance companies to seek the approval of 50 state insurance commissioners to unilaterally amend those insurance contracts. It is not clear whether all states would approve such a unilateral amendment, which could result in insurance companies maintaining different versions of the contracts on a state-by-state basis, which would add significant burdens and complexity and could negatively impact participants.

Finally, regardless of the nature of a §403(b) plan’s underlying investment vehicles, if the plan sponsor of a non-ERISA §403(b) plan (under the DOL safe harbor) is required to exercise discretion in making distributions, this might cause the plan to become subject to ERISA.

For the foregoing reasons, **ARA recommends** that IRS retain the current RMD rules for §403(b) plans unless and until the issues raised in the discussion above are addressed.

By contrast, the IRS could adopt the same rule for §401(a) and §403(b) plans by applying the aggregation rule that currently applies to §403(b) plans to §401(a) plans—giving participants the flexibility to choose the plan from which their RMD is received. ARA has concerns regarding whether such a rule would promote overall tax compliance and would invite a discussion with IRS regarding this rule if it is contemplated.

[5] The IRS identified this prohibition in the recent termination guidance published in Revenue Ruling 2020-23 for distributing “in-kind” and for the cash-out rule, which does not apply to section 403(b) plans. This inability to force distributions from individual contracts affects all section 403(b) plans, regardless of size. Even where the plan sponsor has moved its plan to a single vendor, there often are a number of “deselected vendors” with contracts under that same section 403(b) plan.

These comments are submitted on behalf of ARA and were prepared by ASPPA's IRS Subcommittee, Claire P. Rowland, Esq., QPA, QKA, Chair. If you have any questions regarding the matters discussed herein, please contact Kelsey N.H. Mayo, Director of Regulatory Policy, at (704) 342-5307. Thank you for your time and consideration.

Sincerely,

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