

June 3, 2022

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2022-21)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: Notice 2022-21, Recommendations on Items to be Included on the 2022-2023 Priority Guidance Plan

The American Retirement Association (“ARA”) is writing in response to Internal Revenue Service Notice 2022-21 (“Notice”) to provide input on the Retirement Benefits items (and relative priority of such items) to be included on the 2022-2023 Priority Guidance Plan. ARA thanks 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 saving 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.

ARA believes that every item on the Priority Guidance Plan is important to provide clarity and guidance to sponsors of retirement plans and the professionals who assist them. We also recognize that the IRS and the Department of the Treasury have limited resources and that pending guidance projects must be prioritized as a practical matter. We listed the items below in order of priority, beginning with the guidance projects that are most important or immediate to ARA members. We believe that guidance for each of the items listed below –

- Will resolve significant issues relevant to many retirement plan sponsors and practitioners (not just a small group);
- Will improve economic efficiency by reducing the complexity and burdens on the plan sponsor; and
- Will promote sound tax administration by helping plan sponsors and practitioners to maintain retirement plans.

ARA recommends that the Retirement Benefits items detailed below be included on the 2022-2023 Priority Guidance Plan, in the following order of priority:

I. Guidance on SECURE Act Provisions

ARA thanks the IRS for the guidance issued in Notices 2020-68, 2020-80, 2020-86, and Revenue Ruling 2020-23 on certain provisions enacted by the Setting Every Community Up for Retirement Enhancement

(SECURE) Act. **ARA recommends** that the IRS issue additional guidance on the SECURE Act in the following order of priority:

- Coverage of long-term part-time employees, which impacts current plan design, administration, and cost, as detailed in ARA's May 21, 2021 letter.¹
- Other issues related to the vesting and eligibility of long-term part-time employees. Specific recommendations are detailed in ARA's November 2, 2020 letter.²
- Relief for closed pension plans under 401(o) and 401(a)(26).
- Model plan language required under the SECURE Act for pooled employer plans (PEPs).
- Treatment of §403(b) plans as not money purchase plans (and, thus, may satisfy the profit-sharing exemption from §205 of ERISA), as detailed in ARA's February 3, 2021 letter.³
- Eligibility of §403(b) plans to be part of a "Group of Plans."
- Safe harbor plan notice requirements. Specific recommendations are detailed in ARA's February 5, 2021 letter.⁴

II. W-4P and W-4R Reporting

ARA recommends the IRS revise its requirements and provide guidance regarding Forms W-4P and W-4R and provide an additional delay. Specific recommendations are provided in ARA's joint letter with other industry organizations dated April 26, 2021.⁵ Additional recommendations will be provided in a separate letter.

III. Cash Balance Testing Issues

ARA recommends the IRS provide guidance on projecting the interest crediting rate for cash balance plans that use a variable interest crediting rate based on market type returns. ARA provided a comment letter on July 24, 2017,⁶ with specific recommendations for the guidance.

IV. Employee Plans Compliance Resolution System (EPCRS)

ARA thanks the IRS for its commitment to and continuous improvement of EPCRS. The ability to correct errors on a voluntary basis enhances compliance and encourages employers to sponsor retirement programs for their employees. ARA specifically thanks the IRS for its expansion of the Self Correction Program, practical new overpayment corrections, increase in de minimis overpayment threshold, and extension of the temporary correction options for missed deferrals in Revenue Procedure 2021-30. ARA also thanks the IRS for its May 23, 2022 Employee Plans News release that provided guidance on the impact of a missed preapproved plan restatement, including guidance on such plan's eligibility for self-correction.

¹ <https://araadvocacy.org/wp-content/uploads/2021/05/ARA-Advocacy-2021-Comment-Letter-2021-05-21-ARA-Requests-Long-Term-Part-Time-Employee-Rule-Guidance.pdf>

² <https://araadvocacy.org/wp-content/uploads/2020/11/20.11.02-ARA-Comment-Letter-to-IRS-Long-term-part-time-employee-rules.pdf>

³ <https://araadvocacy.org/wp-content/uploads/2021/02/21.02.03-ARA-Comment-Letter-to-IRS-Notice-2020-80.pdf>

⁴ <https://araadvocacy.org/wp-content/uploads/2021/05/ARA-Advocacy-2021-Comment-Letter-2021-02-05.pdf>

⁵ <https://araadvocacy.org/wp-content/uploads/2021/05/ARA-Advocacy-2021-Comment-Letter-2021-04-26-ARA-Asks-Treasury-to-Improve-Form-W-4P-and-W-4R.pdf>

⁶ <https://araadvocacy.org/wp-content/uploads/2021/05/ARA-Advocacy-2021-Comment-Letter-2017-07-24-ACOPA-Comments-on-Cash-Balance-Plans-Interest-Crediting-Rates.pdf>

In the spirit of continuous improvement, **ARA recommends** that the IRS make certain modifications to EPCRS, including:

- Making permanent the temporary correction options for missed deferrals that expires on December 31, 2023; and
- Clarifying the favorable letter requirement to reflect the May 23, 2022 Employee Plans News release that a preapproved plan's determination letter from a prior cycle is treated as a favorable determination letter or, alternatively, eliminating the requirement for a plan to have a favorable letter in order to qualify for the Self Correction Program.

In addition, specific recommendations on other potential improvements to EPCRS are detailed in ARA's November 9, 2020⁷, and October 14, 2021⁸ letters.

V. Determination Letter Program

ARA thanks the IRS for its expansion of the determination letter program for merged plans and for the window for cash balance plans. **ARA recommends** that the IRS continue to address issues related to the changes to the determination letter program for individually designed plans, including a window for individually designed 403(b) plans and pooled employer plans, as detailed in ARA's December 14, 2021 letter.⁹

VI. Reduce Regulatory Burdens through Electronic Disclosures

ARA recommends that the IRS issue guidance specifying which Code-required notices may be combined with the annual notice of availability under the Department of Labor's new safe harbor for electronic disclosure to participants.¹⁰ This will support innovation and reduce administrative burdens on the retirement plan system.

VII. Governmental Plans

ARA notes that this item was included in the 2021-2022 Priority Guidance Plan (as item A.12 under Retirement Benefits), and recommends that the IRS publish long-awaited guidance on the definition of a governmental plan under Code Section 414(d).

VIII. Missing Participants and Uncashed Checks

ARA recommends that the IRS provide additional guidance and assistance to plan sponsors regarding how to address these participants. Coordinating with other agencies to provide clear guidance to sponsors of ongoing plans on how to address these issues (that generally include small account balances and unresponsive participants) would significantly reduce burdens for most retirement plan sponsors and practitioners and will promote operational compliance. Specific recommendations are detailed in the PSCA's June 25, 2018 letter to the IRS and Department of Labor.¹¹

⁷ <https://araadvocacy.org/wp-content/uploads/2020/11/20.11.09-ARA-Comment-Letter-to-IRS-Employee-plan-compliance-resolution-system.pdf>

⁸ <https://araadvocacy.org/wp-content/uploads/2021/10/21.10.14-ARA-Comment-Letter-to-IRS-Rev-Proc-2021-30-EPCRS-Improvements.pdf>

⁹ <https://araadvocacy.org/wp-content/uploads/2022/01/21.12.14-ARA-Comment-Letter-to-IRS-Individually-Designed-Plan-Determination-Letter-Program.pdf>

¹⁰ 29 CFR 2520.104b-31(i)(4)

¹¹ <https://araadvocacy.org/wp-content/uploads/2020/03/18.06.25-PSCA-Comment-Letter-to-DOL-and-Treasury-Recommendations-for-Missing-Participant-Guidance.pdf>

IX. Merger and Acquisition Issues

ARA recommends that the IRS address issues that result from mergers and acquisitions impacting 401(k) and 403(b) plans (including the treatment of safe harbor plans¹²), the determination of highly compensated employees, and the determination of years of service credit.

X. Church Plan Issues

ARA recommends providing guidance related to church plans. ARA notes this item was included in the 2019-2020 Priority Guidance Plan (as item A.12 under Retirement Benefits) but was not included in either the 2020-2021 Plan or the 2021-2022 Plan. The ARA recommends that the IRS add this item back into the 2022-2023 Priority Guidance Plan as guidance on this matter is important to the industry, particularly related to 403(b) plan issues and, in light of the PATH Act changes in 2015, this should also include guidance on the mergers and transfers between 401(a) plans and 403(b) plans.

XI. Guidance Regarding the Aggregation Rules for Affiliated Service Groups under § 414(m)

ARA notes that this item was included in the 2019-2020 Priority Guidance Plan (as item A.13 under Retirement Benefits) but was not included in either the 2020-2021 Plan or the 2021-2022 Plan. The ARA recommends that the IRS add this item back into the 2022-2023 Priority Guidance Plan as guidance on this matter is important to the industry. ARA specifically recommends that the IRS:

- Provide guidance on the determination of affiliated service groups and management groups.
- Provide guidance on the impact of overlapping controlled groups and affiliated service groups.
- Provide a method to obtain a ruling on affiliated service group status, either by reopening the determination letter process or permitting private letter rulings.

This guidance is particularly important because these provisions impact the compliance, not only of retirement plans, but also of health plans under the Affordable Care Act. The proposed regulations, published in 1983, are extremely out of date and updated guidance is needed.

Issuance of this guidance will significantly reduce issues relevant to many retirement plan sponsors and practitioners and will promote sound tax administration in both the retirement plan and health plan contexts.

XII. High 25 Nondiscrimination

ARA recommends that the IRS provide guidance under the High 25 rule,¹³ particularly where the plan covers only highly compensated employees, to coordinate the use of certain terms under the High 25 rule with terms used in Code Section 430 and to review the restrictions under the High 25 rule in light of the Code Section 436 benefit restrictions.

XIII. Traditional and Roth IRA Regulations

ARA notes that regulations applicable to traditional and Roth IRAs have been on the Priority Guidance Plan for a few years. At the same time, changes to IRS forms in this area have generated changes in the reporting by financial institutions that are material to a number of issues: among other things, valuation of IRA assets rolled into qualified plans and, in turn, the amount that is required to be distributed to satisfy

¹² <https://araadvocacy.org/wp-content/uploads/2020/03/17.06.08-ARA-Comment-Letter-to-IRS-Mid-Year-Changes-to-Safe-Harbor-Plans-FINAL.pdf>

¹³ See Treas. Reg. §1.401(a)(4)-5(b)(3)(ii).

required minimum distribution amounts in some cases. It is our understanding that these rules are also being considered as a change in the new regulations. ARA believes reflecting the changes outlined in the applicable tax form instructions in regulations would provide consistency for payors. ARA welcomes the opportunity to comment on regulations.

XIV. Final Regulations for Nonqualified Deferred Compensation Plans under Sections 409A and 457

Final regulations for nonqualified deferred compensation plans under Sections 409A and 457 were included in the 2020-2021 Priority Guidance Plan (Items B.4 and B.6). ARA appreciates the issuance of the proposed regulations but believes that promulgation of final regulations is particularly important due to potential tax and penalty implications.

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 kmayo@usaretirement.org or (704) 342-5307. Thank you for your time and consideration.

Sincerely,

/s/

Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/

Kelsey Mayo, Esq.
Director, Regulatory Policy
American Retirement Association

cc:

Ms. Rachel Levy
Division Counsel/Associate Chief Counsel
Tax Exempt and Government Entities
Internal Revenue Service

Mr. Louis J. Leslie
Senior Technical Advisor
Employees Plans
Internal Revenue Service

Ms. Laura Warshawsky
Deputy Associate Chief Counsel
Tax Exempt and Government Entities
Internal Revenue Service

Mr. Daniel Dragoo
Director, Employee Plans Rulings
& Agreements
Internal Revenue Service

Mr. Eric Slack
Director, Employee Plans
Internal Revenue Service

Ms. Carol Weiser
Benefits Tax Counsel
Office of Tax Policy
U.S. Department of the Treasury

Mr. William Evans
Attorney-Advisor
Benefits Tax Counsel
U.S. Department of the Treasury