

June 9, 2023

Internal Revenue Service  
Attn: CC:PA:LPD:PR (Notice 2023-36)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

**SUBMITTED VIA  
REGULATIONS.GOV**

RE: Notice 2023-36, Recommendations on Items to be Included on the 2023-2024 Priority Guidance Plan

The American Retirement Association (“ARA”) is writing in response to Internal Revenue Service Notice 2023-36 (“Notice”) to provide input on the Retirement Benefits items (and relative priority of such items) to be included on the 2023-2024 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 2023-2024 Priority Guidance Plan, in the following order of priority:

## **I. Immediate Guidance Needed on SECURE Act and SECURE 2.0 Act Provisions**

ARA thanks the IRS for the guidance to date on certain provisions enacted by the Setting Every Community Up for Retirement Enhancement (SECURE) Act and the SECURE 2.0 Act. **ARA recommends** that the IRS

issue guidance on the following SECURE Act and SECURE 2.0 Act items as soon as possible, in the following order of priority:

- Guidance reflecting that the amendments to §416 in SECURE 2.0 change the conclusions reached in Rev. Rul. 2004-13. In particular that following SECURE 2.0, a safe harbor plan will not lose the top heavy exemption under §416(g)(4)(H) solely because participants are permitted to defer to the Plan (but not receive safe harbor contributions) prior to attaining age 21 and/or one year of service (i.e., prior to the date that they would be entitled to receive top heavy minimum contributions).
- Application of the long-term part-time employee rules, including availability of class exclusions, application of the 500 hour vesting rule, and impact on §403(b) universal availability exclusions. Certain recommendations are detailed in ARA's November 2, 2020 letter.<sup>1</sup>
- Confirmation that catch-up contributions under §414(v) are permitted for years beginning on and after January 1, 2024.
- Confirmation that an employer may offer age-50 catch-up contributions without also offering the new age 60-63 catch-up contributions.
- Roth catch-up contributions, particularly how contributions that must be reclassified as Roth catch-up contributions following the end of a plan year are reported to participants.
- Roth treatment of employer contributions, including election, vesting, tax withholding, and tax reporting requirements.

## **II. Additional Guidance on SECURE Act and SECURE 2.0 Act Provisions**

**ARA recommends** that the IRS issue also guidance on the following SECURE Act and the SECURE 2.0 Act provisions, listed in order of priority:

- Application of automatic enrollment requirements, including the meaning of “established” before enactment of the SECURE 2.0 Act, how merger and spinoff activity is treated under the mandate, and how an employer is determined to “normally employ” 10 or fewer employees.
- Anti-abuse measures that plan sponsors are permitted or required to employ in connection with pension-linked emergency savings account contributions that are matched by the employer. Specific recommendations will be provided separately.
- Qualified Student Loan Payments, including guidance on the deadline an employer may establish for certification that a qualified student loan payment was made, the form of the certification, and application of ADP testing.
- Finalize the March 28, 2022 Notice of Proposed Rulemaking regarding the exception to the application of the “unified plan rule” for multiple employer plans (MEPs) (specific comments to which are detailed in ARA's May 27, 2022 letter),<sup>2</sup> and model plan language required under the SECURE Act for pooled employer plans (PEPs).
- Relief for closed pension plans under §§ 401(o) and 401(a)(26).
- Retroactive plan amendments under SECURE 2.0 §316, in particular whether this section is applicable for amendments that are made effective for plan years beginning after December 31, 2023 (in which case a retroactive amendment for a calendar-year plan could first be adopted for the 2024 plan year), or whether this section is applicable for amendments adopted during plan years

<sup>1</sup> <https://araadvocacy.org/wp-content/uploads/2020/11/20.11.02-ARA-Comment-Letter-to-IRS-Long-term-part-time-employee-rules.pdf>

<sup>2</sup> <https://araadvocacy.org/wp-content/uploads/2022/06/22.05.27-ARA-Comment-Letter-to-IRS-Proposed-Rule-for-MEP-Unified-Plan-Rule.pdf>

beginning after December 31, 2023 (in which case a retroactive amendment for a calendar-year plan could be adopted for the 2023 plan year).

- Treatment of §403(b) plans as not being money purchase plans (and, thus, may satisfy the profit-sharing exemption from §205 of ERISA), as detailed in ARA's February 3, 2021 letter.<sup>3</sup>
- Plan notice requirements, including guidance on combining required disclosures under SECURE 2.0 § 341, and safe harbor recommendations detailed in ARA's February 5, 2021 letter.<sup>4</sup>
- Reduced requirements for plan notices for unenrolled participants under §414(bb).
- Interim guidance regarding changes to required minimum distributions (RMDs) under SECURE 2.0 (and other guidance in connection with the February 24, 2022 Notice of Proposed Rulemaking regarding RMDs, as detailed in ARA's May 25, 2022 letter).<sup>5</sup>

### III. 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 interim guidance in Notice 2023-43 regarding the expansion of EPCRS under SECURE 2.0 § 305 for "eligible inadvertent failures" and providing relief to plan sponsors who completed self-corrections prior to Notice 2023-43 using a good faith, reasonable interpretation of SECURE 2.0 § 305.

In the spirit of continuous improvement, **ARA recommends** that the IRS make certain modifications to EPCRS, including reflecting the automatic contribution failure corrections under SECURE 2.0 § 350. Specific recommendations on other potential improvements to EPCRS are detailed in ARA's November 9, 2020<sup>6</sup>, and October 14, 2021<sup>7</sup> letters. ARA will also provide comments on Notice 2023-43 and recommendations for other conforming changes due to SECURE 2.0 in a separate letter.

### IV. Reduce Regulatory Burdens through Electronic Disclosures

**ARA recommends** that the IRS issue guidance on electronic disclosures as follows:

- Confirming that following Department of Labor safe harbor rules on electronic disclosure satisfy the requirement of Treasury Regulation §1.401(a)-21 that the disclosure is made in a manner that reasonably demonstrates that the recipient can access the notice in the electronic medium used.
- 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.<sup>8</sup>

This will support innovation and reduce administrative burdens on the retirement plan system.

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

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

<sup>5</sup> <https://araadvocacy.org/wp-content/uploads/2022/06/22.05.25-ARA-Comment-Letter-to-IRS-Proposed-Rule-for-RMDs.pdf>

<sup>6</sup> <https://araadvocacy.org/wp-content/uploads/2020/11/20.11.09-ARA-Comment-Letter-to-IRS-Employee-plan-compliance-resolution-system.pdf>

<sup>7</sup> <https://araadvocacy.org/wp-content/uploads/2021/10/21.10.14-ARA-Comment-Letter-to-IRS-Rev-Proc-2021-30-EPCRS-Improvements.pdf>

<sup>8</sup> 29 CFR 2520.104b-31(i)(4)

## V. W-4P and W-4R Reporting

ARA thanks the IRS for the updated Forms W-4P and W-4R, and the guidance issued in Publications 15-A and 15-T. **ARA recommends** the IRS further revise its requirements, provide additional 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.<sup>9</sup> Additional recommendations will be provided in a separate letter.

## VI. Determination Letter Program

ARA thanks the IRS for its expansion of the determination letter program for §403(b) plans and its continued evaluation of other targeted areas in which determination letters would enhance compliance. **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 pooled employer plans, as detailed in ARA's December 14, 2021 letter.<sup>10</sup>

## VII. Governmental Plans

ARA notes that this item was included in the 2022-2023 Priority Guidance Plan (as item A.12 under Retirement Benefits); **ARA recommends** that the IRS publish long-awaited guidance on the definition of a governmental plan under §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.<sup>11</sup>

## 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 plans<sup>12</sup>), the determination of highly compensated employees, and the determination of years of service credit.

## X. Church Plan Issues

ARA thanks the IRS for including church plans in the 2022-2023 Priority Guidance Plan. ARA notes this item was more broadly included in the 2019-2020 Priority Guidance Plan (as item A.12 under Retirement Benefits). **ARA recommends** that the IRS focus on §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.

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<sup>9</sup> <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>

<sup>10</sup> <https://araadvocacy.org/wp-content/uploads/2022/01/21.12.14-ARA-Comment-Letter-to-IRS-Individually-Designed-Plan-Determination-Letter-Program.pdf>

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

<sup>12</sup> <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>

## **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 any Guidance Plan since. The **ARA recommends** that the IRS add this item back into the 2023-2024 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,<sup>13</sup> 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 §430, and to review the restrictions under the High 25 rule in light of the §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 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 §§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,

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

please contact Kelsey N.H. Mayo, Director of Regulatory Policy, at [kmayo@usaretirement.org](mailto:kmayo@usaretirement.org) or (704) 342-5307. Thank you for your time and consideration.

Sincerely,

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