AMERICAN RETIREMENT ASSOCIATION

4401 N. Fairfax Drive | Suite 600 | Arlington, VA 22203
P 703.516.9300 | F 703.516.9308 | info@usaretirement.org | usaretirement.org

Working for America's Retirement

October 24, 2023

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2023-62)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

SUBMITTED VIA REGULATIONS.GOV

RE: Notice 2023-62, Guidance on Section 603 of the SECURE 2.0 Act of 2022 with Respect to Catch-Up Contributions

The American Retirement Association ("ARA") is writing in response to Internal Revenue Service Notice 2023-62 (the "Notice") to provide comments on section 603 of the SECURE 2.0 Act of 2022[1] ("SECURE 2.0") with respect to catch-up contributions. ARA thanks the Internal Revenue Service ("IRS" or the "Service") for the opportunity to provide input on these matters.

ARA is extremely grateful to the Service for granting the two-year transition period announced in the Notice. The delay was needed due to the extensive changes required for plan sponsors and service providers to comply with section 603 of SECURE 2.0.

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.

Summary

ARA understands that the Service intends to release additional guidance with respect to section 603 of SECURE 2.0. ***ARA recommends*** that such future guidance:

- Confirm that plans are permitted to implement the provisions of section 414(v)(7) of the Internal Revenue Code ("Code") before 2026.
- Confirm that individuals who do not receive wages for the purposes of the Federal Insurance Contributions Act ("FICA") are not subject to section 414(v)(7) of the Code.
- Permit plan administrators to treat a participant's election to make catch-up contributions on a pre-tax basis as an election by the participant to make catch-up contributions that are designated Roth contributions and, as part of this permissive allowance, clarify there are not attendant notification requirements.
- Clarify that Roth contributions made earlier in a year may be recharacterized as catch-up contributions for purposes of satisfying section 414(v)(7) of the Code.

[1] Division T of the Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 3559 (2022)

- Clarify that pre-tax contributions may be recharacterized as Roth contributions after year-end and provide guidance on how such contributions should be reported to the participant.
- Confirm how the FICA wage threshold articulated in section 414(v)(7) of the Code applies to individuals who receive FICA wages from more than one employer in a controlled group or affiliated service group.
- Permit plans which do not provide for Roth contributions to be treated as satisfying the requirements of sections 414(v)(4) and 414(v)(7)(A) of the Code if they permit participants who are not subject to section 414(v)(7) of the Code—other than highly compensated employees—to continue making catch-up contributions.
- Permit plans to require that all catch-up contributions be made to the plan as designated Roth contributions.
- Update the Employee Plans Compliance Resolution System ("EPCRS") to include guidance on plan corrections involving the tax treatment of catch-up contributions.

Discussion

With regard to the implementation of section 603 of SECURE, ARA recommends the Service issue guidance on the following items to future promote compliance and proper administration of retirement plans.

1. Implementation of Section 414(v)(7) of the Code Before 2026

The Notice provides that the first two taxable years beginning after December 31, 2023, will be regarded as an administrative transition period with respect to the requirement under section 414(v)(7)(A) of the Code that catch-up contributions made on behalf of certain eligible participants be designed as Roth contributions. Some plans may already be at a point where the provision will be implemented in 2024. For the avoidance of doubt, ***ARA recommends*** that future guidance confirm that plans are permitted to implement section 414(v)(7) of the Code during this administrative transition period before 2026.

2. Individuals Who Do Not Receive FICA Wages

The Notice provides that the Service expects to issue guidance clarifying that section 414(v)(7)(A) of the Code would not apply in the case of an eligible participant who does not have wages as defined in section 3121(a) (that is, as wages for purposes of FICA) for the preceding calendar year from the employer sponsoring the plan. ARA agrees that this is the most reasonable interpretation of the statute and therefore, ***ARA recommends*** that the Service adopt the clarification described in the Notice when issuing future guidance.

3. Participant Elections and Notice Requirements

The Notice provides that the Service expects to issue guidance providing that, in the case of an eligible participant who is subject to section 414(v)(7)(A) of the Code, the plan administrator and the employer would be permitted to treat an election by the participant to make catch-up contributions on a pre-tax basis as an election by the participant to make catch-up contributions that are designated Roth contributions. ARA supports this position because it will facilitate proper administration without unduly burdening plan participants and plan administrators by requiring new elections. To the extent that a plan sponsor is permitted to require all catch-up contributions be made on a Roth basis (or specify that the default treatment of catch-up contributions is that they be designated Roth contributions), we recommend that the same rule apply. Therefore, ***ARA recommends*** that the Service, in future guidance, clarify that plan administrators may treat an election by the participant to make pre-tax elections as an election by the participant to make catch-up contributions that are designated Roth contributions.

In addition, the Service should clarify that there are no separate notice requirements that are attendant to this provision. Plan administrators have questioned whether (1) a plan administrator must provide notice of the potential Roth treatment at the time of the election, (2) the employer is required to notify or otherwise obtain a participant's consent to the treatment at the time the change to Roth treatment is made.

The material provisions of the plan generally must be communicated to participants in a variety of notices and disclosures. The addition of new disclosure requirements related to the Roth requirement would be burdensome on both participants and plan administrators. ARA believes the current notice and disclosure requirements are sufficient to provide participants with the necessary information. Therefore, ***ARA recommends*** that future guidance clarify that no additional notice is required at the time of the election nor at the time the change to Roth treatment is made.

Finally, plan administrators have questioned whether the plan must apply the same treatment of the elections uniformly to all participants in the plan or whether the administrator may apply different defaults to elections of different groups of participants (on a nondiscriminatory basis). ***ARA recommends*** that the Service provide as much flexibility as possible and therefore the Service should clarify that the plan administrator is not required to apply the same treatment to the elections of all participants as long as the plan otherwise meets nondiscrimination principles under the Code.

4. Treatment of Roth Contributions as Catch-Up Contributions

Plan administrators have questioned whether Roth contributions that are made before an applicable plan limit is reached may be used to satisfy 414(v)(7) of the Code or whether the contributions made after the limit is reached must be made on Roth basis.

For example, a 401(k) plan participant elects to contribute $2,250 per month to the plan (50% pre-tax and 50% designated Roth) in 2026. Assuming the §402(g) limit is $22,500 for that year, after ten months the participant would have made a total of $22,500 in 401(k) contributions, so any contributions after this date would be in excess of the §402(g) limit. Does this participant have to make all future contributions during the plan year as designated Roth contributions? Or may the designated Roth contributions already made be treated as catch-up contributions for purposes of satisfying 414(v)(7) of the Code?

Under Treasury Regulations section 1.414(v)-1(b)(2)(i) and (c)(3), catch-up contributions are not determined under the end of a plan year (by determining whether such elective deferrals exceed an applicable limit). As such, when a Roth contribution is made should not affect whether it can be used to satisfy 414(v)(7) of the Code. Therefore, ***ARA recommends*** the Service clarify that all designated Roth contributions of a participant may be used to satisfy 414(v)(7), regardless of when they are made during the plan year.

5. Recharacterization of Contributions and Reporting

There are a number of instances when a contribution is initially a "regular" elective deferral, but is later determined to be a catch-up contribution. For example, the plan administrator may determine after the end of the year that the participant deferred to more than one qualified plan during the year. In addition, Treasury Regulation Section 1.414(v)-1(d)(2)(iii) generally requires 401(k) plans that fail ADP testing to recharacterize excess contributions made by catch-up eligible highly compensated employees (HCEs) as catch-up contributions (up to the applicable limit under 414(v)) after the end of the plan year. It is not clear whether the new Roth requirement under 414(v)(7) impacts the ability to recharacterize excess contributions and, if not, how those amounts should be reported to the participant.

ARA recommends that future guidance confirm that plans may still recharacterize elective deferrals as catch-up contributions, even if that requires the that a pre-tax contribution be recharacterized as a designated Roth catch-up contribution. ARA recommends further that the Service provide that elective deferrals made as designated Roth contributions are the first amounts to be recharacterized and, to the extent such amounts are not sufficient, then pre-tax elective deferrals will be recharacterized as designated Roth Contributions.

ARA further recommends that future guidance address tax issues associated with a pre-tax elective deferral that is recharacterized as a designated Roth contribution including: (1) that the plan may report the recharacterized amount as income to the participant in the year the contribution was made or in the year of recharacterization (and the participant will treat the amount as taxable for the year in which it is reported), (2) the amount may be reported using a Form 1099-R or Form W-2, and (3) the employer will not be penalized for under-withholding of income tax on the recharacterized amount. ARA believes this treatment will provide maximum flexibility for plan administrators and ensure that taxable amounts are timely and accurately reported. We further note that this recommendation is consistent with the correction of taxation of contributions described on the Service's 401(k) Plan Fix-It website.

6. Threshold for Participants Paid by Related Employers

Section 414(v)(7)(A) of the Code specifies that the Roth catch-up contribution requirement applies to participants "whose wages (as defined in section 3121(a)) for the preceding calendar year from *the employer sponsoring the plan* exceed $145,000" (emphasis added). The Notice provides that the Service expects to issue guidance providing that a participant's wages for the preceding calendar year from one participating employer in a multiple employer plan would not be aggregated with the wages from another participating employer for purposes of determining whether the participant's wages for that year exceed the threshold articulated in section 414(v)(7)(A) of the Code ($145,000, as adjusted).

ARA agrees with this proposed guidance, but ***ARA recommends*** the future guidance clarify how the limit applies to employers in the same controlled group or affiliated service group, regardless of whether the plan is a single-employer plan or a multiple-employer plan (and the impact, if any, on the wages counted toward the threshold if the related employer is not a participating employer in the plan).

7. Plans Which Do Not Provide for Roth Contributions

The Notice asks for comments on whether the Service should permit plans to eliminate catch-up contributions for employees earning over the section 414(v)(7)(A) dollar limit. ARA appreciates the Service's interest in permitting flexible plan designs to meet the diverse needs and administrative capabilities of plan sponsors, but believes this proposal should be modified because it may permit unintended discrimination.

As the Service noted, section 414(v)(7) of the Code doesn't apply to self-employed individuals because they do not have FICA wages. As such, the proposal in the Notice would permit a partnership or sole-proprietor to prohibit employees making above the 414(v)(7)(A) threshold (including those individuals under the HCE threshold) from making catch-up contributions while retaining the right to make catch-up contributions for themselves. ARA believes this outcome is inconsistent with the universal availability principle that applies to catch-up contributions.

In the interest of promoting flexibility in plan design options, while also maintaining nondiscriminatory standards and overall compliance, ***ARA recommends*** that future guidance permit plans which do not provide Roth contributions to be treated as satisfying the requirements of sections 414(v)(4) and 414(v)(7)(A) of the Code if it permits participants who are not subject to section 414(v)(7) of the Code, other than HCEs as defined under section 414(q) of the Code, to continue making catch-up contributions.

8. Permit Plans to Require All Catch-Up Contributions Be Roth Contributions

As the Service is aware, it is difficult for payroll providers and plan administrators to adjust the tax treatment of contributions based upon the FICA wage threshold in 414(v)(7)(A). To ease the administrative burden of implementation, ***ARA recommends*** the Service issue future guidance that permits plans to require that all catch-up contributions be designated as Roth contributions—regardless of the eligible participant's wages.

Some plan administrators question whether this design is permitted because they believe section 402A of the Code requires the participant to have the ability to make a contribution on a pre-tax basis in order for an amount to be a designated Roth contribution. However, ARA believes the Notice resolves this question in favor of permitting mandatory Roth treatment because the Notice makes it clear that individuals over the 414(v)(7)(A) threshold can make catch-ups as designated Roth contributions even though they cannot make such contributions on a pre-tax basis (without any correction to the Code provisions). Therefore, plans should be permitted to require Roth treatment in other cases as well. Further, this plan design would be consistent with section 414(v)'s universal availability principles because all participants would be permitted to make the same election with respect to catch-up contributions.

9. Update EPCRS to Include Guidance on Plan Corrections Involving the Tax Treatment of Catch-Up Contributions.

For consistency in application and the avoidance of doubt, ***ARA recommends*** that the Service update EPCRS to include guidance on plan corrections involving the tax treatment of catch-up contributions. Specifically, it would be helpful if such guidance: (1) expressly permits plan sponsors to recharacterize pre-tax contributions as Roth contributions and Roth contributions as catch-up contributions under certain circumstances (as detailed in Item #3, above) and (2) permits—but does not require—employers to give participants an election to receive a refund of plan contribution amounts that cannot be made on a pre-tax basis. This second prong is reasonable because if an error involving Roth catch-up contributions were to continue for several years, the tax burden associated with recharacterization of the amounts that accumulated over several years could create a hardship on the participant (potentially without a corresponding distribution right and/or the imposition of a 10% additional tax on early withdrawal).

ARA believes each of these suggestions for future guidance regarding section 603 of SECURE 2.0 will promote sound tax administration by clarifying administration, promoting flexibility in plan design while preventing discrimination, and improving economic efficiency by reducing the complexity and burdens of the plan sponsor.

****

These comments are submitted on behalf of ARA. 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

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

Mr. Eric Slack
Director, Employee Plans
Internal Revenue Service

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

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

Ms. Helen Morrison
Deputy 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