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Working for America's Retirement

February 20, 2024

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2024-2)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

SUBMITTED VIA REGULATIONS.GOV

RE: Notice 2024-2: Miscellaneous Changes Under the SECURE 2.0 Act of 2022

The American Retirement Association (ARA) is writing in response to the request for comments in Notice 2024-2 (the "Notice"), which provides guidance on miscellaneous changes under the SECURE 2.0 Act of 2022 ("SECURE 2.0"). ARA thanks the Internal Revenue Service ("IRS" or "Service") and the Department of the Treasury ("Treasury") for the opportunity to provide input on these matters.

The ARA is a national organization of more than 35,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA) and the American Society of Enrolled Actuaries (ASEA). ARA's membership is diverse but united in a common dedication to America's employer-based retirement plan system.

Summary

ARA recommends that the Service clarify a number of issues related to the SECURE 2.0 provisions addressed in the Notice. In particular, ARA recommends the Service provide the following guidance, generally listed in order of relative priority:

- With respect to the SECURE 2.0 §101 mandate to include an eligible automatic enrollment arrangement (EACA):
    - Provide guidance on certain unanswered questions regarding the application of this provision as soon as possible, and not less than 180 days prior to the effective date of the EACA mandate, or provide a nonenforcement transition period if guidance cannot be issued 180 days prior to the effective date.
    - Clarify an employer falling under the new business exception satisfies the requirement if the plan includes an EACA no later than the first plan year that begins on or after the third anniversary of the employer's inception.
    - Provide an objective rule for purposes of determining when an employer is considered to employ more than 10 employees, such as a monthly averaging approach over the employer's tax year, similar to that used for purposes of the employer-mandate under the Patient Protection and Affordable Care Act (PPACA).
    - Confirm that the mandatory EACA applies only for employees who are enrolled in the plan on or after the plan becomes subject to the mandate.

    - Clarify that a trustee-directed pooled balance forward plan design remains an available plan design and plans that do not provide for directed investments by participants are not required to offer a Qualified Default Investment Alternative (QDIA).
    - Extend the period by which a plan must be merged with an acquired plan in order to maintain grandfathered status with respect to the exception from the EACA mandate.
    - Clarify that employers who merge a pre-enactment plan into a multiple employer plan with a post-enactment CODA will still be treated as maintaining a pre-enactment plan.
- With regard to the de minimis financial incentives:
    - Permit de minimis financial incentives to be offered to all employees who make deferral elections, regardless of whether they have a deferral election already in effect.
    - Provide that the $250 limit on de minimis financial incentives is subject to adjustment in subsequent years to reflect cost-of-living increases.
- With regard to the conversion of a SIMPLE IRA to a safe harbor 401(k) plan, confirm that the correction mechanisms currently provided for under the Treasury Regulations with respect to excess deferrals under IRC §402(g) will apply in the event of excess deferrals under IRC §408(p)(11)(B).
- Clarify that the deadline to amend non-governmental tax-exempt 457(b) plans is also extended to December 31, 2026.
- Confirm that Roth employer contributions are treated the same as designated Roth contributions and not as Roth conversions for purposes of the recapture of the 72(t) additional tax.
- Confirm that an eligible employer may claim an IRC §45AA credit (of the applicable amount) with regard to a military spouse if such spouse is not an HCE during the first year but subsequently becomes an HCE for one or both of the two succeeding taxable years during the 3-year credit period.
- When EPCRS is updated, clarify that the six-month deadline for correction of matching contributions announced in the Notice applies only to the automatic enrollment correction.

Discussion

1. EACA Mandate

Section 101 of SECURE 2.0 added a new section 414A to the Internal Revenue Code. IRC §414A generally requires that any qualified cash or deferred arrangement (CODA), or any annuity contract purchased under a plan, that is newly established on or after December 29, 2022, must satisfy certain mandatory automatic enrollment requirements for plan years that begin after December 31, 2024 (the “EACA mandate”). However, IRC §414A provides an exemption from these requirements for employers who have existed fewer than three years and for employers who regularly employ fewer than 10 employees.

While the Notice provides important and welcomed clarification on certain aspects of the IRC §414A requirement, it left significant questions unanswered—particularly information necessary for an employer to accurately determine whether its plan is subject to the EACA mandate and guidance on how to comply with the mandate when an employer maintains a plan before the arrangement becomes subject to the mandate. This guidance is essential and ARA stresses the need for the Service to issue guidance as quickly as possible.

As the Service is aware, plan sponsors rely heavily on their service providers to implement systems and processes to comply with the myriad of tax code requirements that apply to retirement plans. The Service’s interpretation of the issues noted in this section will require significant implementation time and resources from industry service providers. Among other tasks, the providers' systems may need to be reprogrammed to accommodate any special rules related to IRC §414A that do not conform with the automatic enrollment arrangements currently in effect. These industry service providers are already significantly taxed with the burden of implementing the overwhelming number of SECURE-related and SECURE 2.0-related compliance requirements. Moreover, the automatic enrollment requirements, in many cases, require coordination with the plan sponsor's payroll provider, which provides another element of complexity in the plan sponsor's effort to comply with the requirement. Because of the complexity of compliance, ARA strongly recommends that the Service (1) issue guidance that, to the maximum extent possible, allows plan sponsors to leverage the automatic enrollment designs currently in use in the industry (as discussed below), (2) provide guidance immediately to afford service providers and plan sponsors the maximum amount of time to comply, and (3) provide transition relief if guidance cannot be issued at least 180 days in advance of the statutory effective date.

a. Automatic-Enrollment Following Third Anniversary of Employer's Existence

IRC §414A(c)(4)(A) provides that the EACA mandate does not apply to a plan maintained by an employer that has been in existence fewer than three years. IRC §414(b)(1) requires that a plan subject to the mandate include an EACA described in IRC §414(w)(3). Treas. Reg. §1.414(w)-1(b)(1) interprets §414(w)(3) to provide that an employer cannot implement an EACA in the middle of a plan year. Because the employer cannot implement the EACA with respect to its entire plan during a plan year, ARA believes the requirement should be interpreted to mean that an employer's plan is subject to the EACA mandate beginning with the first day of the plan year that occurs on or after the third anniversary of the employer's existence.

> For example, if a new employer is organized July 1, 2025, and establishes a new plan effective January 1, 2026, the plan should be required to meet the automatic enrollment requirements of IRC §414A beginning January 1, 2029 (the first day of the plan year following the employer's third anniversary on July 1, 2028).

Any other interpretation will create significant administrative complexities. Some recordkeepers, particularly for smaller employers, do not support mid-year implementation of EACAs because the EACA can be applied only to newly hired employees, which increases the plan's complexity. Further, the payroll services for these smaller employers often do not support automatic enrollment and therefore some small employers will be unable to utilize either of their professional service providers to comply with a mid-year adoption. This creates a significant burden for an employer who has just begun operations to realize that it must implement the EACA <u>before</u> the plan is actually subject to the mandate in order to comply. This is a significant burden on a small employer and undermines the intent of the statute.

Thus, resolving the conflict between IRC §§414(w)(3) and 414A(c)(4)(A) by clarifying that the EACA mandate applies to the first day of the first plan year that is on or after the third anniversary of a new employer's existence will permit small employers to utilize existing recordkeeping systems, reduce the administrative burden of complying with the mandate, and promote overall compliance with the tax code.

b. Method to Determine Number of Employees Regularly Employed

IRC §414A(c)(4)(B) provides that the EACA mandate of IRC §414A does not apply to any CODA or annuity contract earlier than the date that is one year after the close of the first taxable year with respect to which the employer maintaining the plan normally employed more than 10 employees. IRC §414A does not define when an employer is considered to "normally employ" more than 10 employees. The employment patterns of employers vary significantly, so an objectively determinable rule would facilitate overall compliance with the EACA mandate.

ARA recommends the Service utilize a monthly averaging approach similar to that used under the PPACA (but counting individuals without regard to hours worked) to determine whether an employer is considered to employ more than 10 employees during a tax year. For example, an employer would count the number of individuals employed (at any level of service) during each month and then average the employees over the 12-month period. ***ARA further recommends*** that the IRS permit an employer to count an individual who is hired or terminated during a month as a fraction of one employee (based on the period for which the individual was employed) to ensure that months in which the employer experiences turnover do not inadvertently cause an employer who does not regularly employ more than 10 employees to appear as though it does. For example, an employee who is hired on the 16th day of June would count as 0.5 of an employee in the monthly averaging calculation because the employee was employed 15 of 30 days during that month.

> For example, an employer with a seasonal workforce and only 4 year-round employees might evaluate whether it "normally employs" more than 10 employees as follows:

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Average
Count	4	4	6	6.5	12	12	12	12	5.5	4	4	4	7.166

> The employer counts the number of individuals who perform services during any month, making fractional adjustments for individuals who are not employed for the entire month, and then averages the monthly count to determine whether the employer normally employed more than 10 employees. In this example, even though the employer did employ more than 10 employees during 4 months, the employer does not normally employ more than 10 because the average for the tax year is below 10.

ARA further recommends that the Service clarify that for purposes of this small business exception to the EACA mandate, an employee does not include a sole proprietor, a partner in a partnership, an S corporation shareholder who owns at least 2 percent of the S corporation, a leased employee within the meaning of IRC §414(n), or a worker that is a qualified real estate agent or direct seller. This recommendation is consistent with the Service's guidance on counting employees under the PPACA.

c. Automatic Enrollment Requirement Applies Only to Employees Hired After Plan is Subject to Mandate

IRC §414A(b) requires that a plan subject to the mandate offer an EACA, but it is silent on whether it must be an EACA with respect to all employees eligible to defer under the plan or whether it applies only to employees who enter the plan after the plan becomes subject to the mandate.

For example, if an employer adopted a calendar year 401(k) plan on January 1, 2023, and none of the exemptions apply, the plan is required meet the EACA mandate on January 1, 2025, but it is not clear whether participants in the plan as of December 31, 2025 must be subject to the automatic enrollment provision.

ARA recommends the Service provide that the automatic enrollment need only apply to participants who enter the plan after the effective date of the plan's EACA provision in order to provide small employers with the maximum flexibility to comply with the mandate.

Further, as explained above, IRC §414(w)(3) prohibits an employer from adopting an EACA in the middle of a plan year, unless the EACA applies only to new entrants. Therefore, if the Service does not clarify that the mandate is satisfied by implementing automatic enrollment on the first day of the plan year on or after the employer's third anniversary, then the Service must provide that the EACA need only apply to new participants.

d. *Pooled, Trustee-Directed, Balance Forward Plan Designs*

IRC §414A(b)(1) requires a CODA or annuity contract that is subject to the EACA mandate to satisfy IRC §414A(b)(4), which requires amounts contributed pursuant to such arrangement, and for which no investment is elected by the participant, to be invested in accordance with the requirements of 29 CFR §2550.404c-5 (or any successor regulations). 29 CFR §2550.404c-5 provides ERISA fiduciary relief for participant-directed plans that meet certain requirements.

While the vast majority of plans do permit participant direction, plans are not required to permit participant direction of investments and, in fact, some employers opt to provide only for trustee-directed investment. This approach may arise from a paternalistic view of protecting uneducated investor-participants or from a desire to simplify plan administration by using pooled trusts with balance forward trust accounting. These permissible plan designs should not be prohibited and therefore, ***ARA recommends*** the Service clarify that a plan that does not provide for participant-directed investments will be deemed to satisfy the requirements of IRC §414A(b)(4).

e. *Clarification Regarding Post-enactment MEP*

Section A-3 of the Notice provides that merging a post-enactment CODA into a plan with a pre-enactment CODA generally causes the ongoing plan to be treated as a post-enactment CODA that is subject to the EACA requirements of IRC §414A. The Notice provides two exceptions to this rule:

1. Certain mergers in connection with an IRC §410(b)(6)(C) transaction, and

2. The merger of a single employer post-enactment CODA into a multiple employer plan (MEP) that includes a pre-enactment CODA.

In the exception for MEPs (which would also include pooled employer plans (PEPs)), the Notice provides only that an employer who maintains a post-enactment CODA and merges its CODA into a MEP with a pre-enactment CODA will result in: (1) the employer's CODA continuing to be treated as a post-enactment CODA and (2) the merger not impacting whether the CODA is treated as a pre-enactment CODA for the other participating employers.

The Notice does not address the merger of a pre-enactment CODA into a MEP that is established after December 29, 2022, and/or contains a post-enactment CODA. This lack of guidance in the Notice has provided significant concern among the providers of MEPs because it is not clear whether an employer with a pre-enactment CODS that adopts a post-enactment MEP will be labeled by the Service as a post-enactment CODA. IRC §414A(c)(2)(B) provides that the distinction between post-enactment and pre-enactment CODAs does not apply at the MEP-level, but rather applies to each participating employer in isolation, as though the participating employer was sponsoring a single employer plan. As a result, the Service should not draw any distinctions between MEPs that are established before or after December 29, 2022. An employer that merges its pre-enactment CODA into a MEP should continue to be treated as maintaining a pre-enactment CODA regardless of when the MEP was established.

Section A-3 of the Notice provides a general rule that all mergers involving a post-enactment CODA result in the ongoing plan being treated as post-enactment unless an exception applies. Because no exception is included for the situation described above, some practitioners are taking the interpretation that a merger of a pre-enactment CODA into a post-enactment MEP (or a MEP with a post-enactment CODA) results in the employer becoming subject to the EACA mandate pursuant to the general rule. Thus, the Notice lends itself to an incorrect interpretation of the law.

ARA recommends that the Service clarify that if an employer merges a single employer plan that includes a pre-enactment qualified CODA into a MEP that was established post-enactment and/or includes a post-enactment CODA, the qualified CODA with respect to the adopting employer will continue to be treated as a pre-enactment qualified CODA after the merger with the MEP.

f. Extend Merger Transition Period

As noted above, the Notice provides an exception to the general rule that any merger of a post-enactment CODA will result in the ongoing arrangement being treated as a post-enactment CODA when the merger occurs in connection with an IRC §410(b)(6)(C) transaction. To qualify for the exception, the Notice requires (1) that the pre-enactment qualified CODA is designated as the ongoing plan, and (2) the merger occurs by the end of the IRC §410(b)(6)(C) transition period.

The IRC §410(b)(6)(C) transition period ends no later than the last day of the first plan year that begins after the date of the transaction. As a result, the transition period may be as short as 12 months in length (consider, for example, a transaction that occurs on December 31, 2024; the transition period for a calendar year plan would end on December 31, 2025). A plan merger takes several months to implement—particularly when the plans are on different platforms—and some service providers require advance notice of six months or more to implement a plan merger. The plan sponsor will be required to investigate which provider can adequately perform services for the combined plan, perform a diligent search to ensure its fiduciary obligations are met, and evaluate how the plans should be combined (such as to preserve protected benefits) in a very short period of time. Currently, many employers use the entire transition period to evaluate their plans and establish an ongoing plan design. Requiring the execution of a plan merger during that same period will create a significant administrative burden.

ARA recommends that the Service extend the deadline for the employer to effect a plan merger in connection with an IRC §410(b)(6)(C) transaction. ARA specifically recommends that the Service permit an employer to effect the merger by the end of the first plan year that begins after the end of the IRC §410(b)(6)(C) transition period without losing the pre-enactment CODA status of the merged plan.

g. Application of EACA Mandate to Individual Annuity Contracts Under IRC §403(b) Plans

Many annuity contracts maintained under IRC §403(b) plans are individual annuity contracts that generally require an employee's signature under applicable state insurance law. ***ARA recommends*** that the Service issue guidance to address how a plan sponsor may implement the mandatory automatic enrollment requirements under an IRC §403(b) plan that utilizes individual annuity contracts.

As illustrated above, significant guidance is needed in order for certain plan sponsors to determine whether their plans are subject to the EACA mandate. Accordingly, ***ARA recommends*** that the Service issue guidance as soon as possible, and no less than 180 days prior to January 1, 2025 (which is the earliest day it would apply to a plan). ***ARA recommends*** further that if guidance is not issued at least 180 days prior to January 1, 2025, the Service announce a nonenforcement transition period that ends no earlier than 12 months following issuance of the guidance on applicability of the requirements to allow plan sponsors a reasonable period of time to comply.

2. De Minimis Financial Incentives for Contributing to a Plan

a. De Minimis Financial Incentives May Be Offered to All Employees

Section 113 of SECURE 2.0 permits a 401(k) or 403(b) plan sponsor to offer de minimis financial incentives to employees who elect to have the employer make contributions under the arrangement in lieu of receiving cash. Q&A D-2 of the Notice provides that a de minimis financial incentive may only be offered to an employee who does not have a deferral election in effect.

This interpretation is far too restrictive, as the statutory language itself is not so narrow. Rather, Section 113(a) of SECURE 2.0 permits de minimis financial incentives to be "provided to employees who elect to have the employer make contributions under the arrangement in lieu of receiving cash." It does not say to employees who <u>first</u> elect to have the employer make contributions under the arrangement. An election to continue making deferrals or to increase deferrals is clearly an election "to have the employer make contributions under the arrangement."

Further, this narrow interpretation largely obsoletes Section 113 of SECURE 2.0 when read in connection with the EACA mandate in Section 101 of SECURE 2.0. Because Section 101 requires automatic enrollment in the plan, nearly every employee in a post-enactment plan will have a deferral election and the employer will be prevented from providing those employees with any incentive to continue making elections or to make an election that is higher than the automatic enrollment percentage. This would eliminate an increasingly large percentage of American workers for whom this provision was intended to benefit.

The intent of this provision was to encourage participants to engage in the retirement plan and to save additional funds for retirement. The provision should be read to allow an employer to provide incentives for individuals electing to defer more than the automatic enrollment percentage, for continuing to defer to the plan, or making other affirmative elections to defer. Therefore, ***ARA recommends*** the Service revise its position in D-2 of the Notice to align with the statute and Congressional intent by permitting de minimis financial incentives to be offered to all employees who make deferral elections, regardless of whether the employee has previously made a deferral election and regardless of whether the employee has a deferral election in effect.

b. $250 Limit is Subject to Adjustment for Cost-of-Living Increases

Section D-1 of the Notice provides the extremely helpful guidance that a financial incentive will be treated as a de minimis financial incentive described in IRC §401(k)(4)(A) only if it does not exceed $250 in value. In order to remain a helpful and relevant limit, this dollar amount should change periodically to reflect cost-of-living increases. Accordingly, ***ARA recommends*** that the Service provide that the $250 limit is subject to adjustment in $50 increments in subsequent years to reflect cost-of-living increases (as applicable).

3. Correction of Excess Deferral Following Mid-Year Replacement of SIMPLE IRA Plan With Safe Harbor 401(k) Plan

IRC §408(p)(11) permits an employer to elect at any time during a year to terminate a SIMPLE IRA plan if the employer establishes and maintains a safe harbor 401(k) plan effective as of the day after the termination date of the SIMPLE IRA plan. IRC §408(p)(11)(B) provides a combined limit on the total of the salary reduction contributions under the terminated SIMPLE IRA plan and elective contributions under the safe harbor 401(k) plan for the transition year described in IRC §408(p)(11)(C) (that is, the period beginning after the termination date and ending on the last day of the calendar year during which the termination of the SIMPLE IRA plan occurs). Under this limit, the total of those contributions must not exceed the time-weighted average of the limits that apply, on a full year basis, to a SIMPLE IRA plan (after the application of the catch-up provisions of IRC §414(v)) and a 401(k) plan.

The time-weighted averaging will result in the employer needing to track and limit the employee's deferrals to the 401(k) plan on an individualized basis (taking into account each employee's deferrals to the SIMPLE IRA prior to termination). Given the administrative complexity inherent in such an individualized process, it is nearly certain that errors will occur despite the plan sponsor's diligent efforts and reasonable processes and procedures to correctly apply the aggregate limit.

The Service has provided clear guidance regarding the correction of excess deferrals that exceed the 402(g) limit. ***ARA recommends*** that the Service clarify that the correction mechanisms currently provided for under the Treasury Regulations with respect to excess deferrals under IRC §402(g) will apply in the event of excess deferrals under IRC §408(p)(11)(B).

4. Extended Deadline Applies to Tax-Exempt 457(b) Plans

Section J-1 of the Notice generally provides for an extension of the deadline to amend plans to reflect the applicable provisions of the SECURE Act, section 104 of the Miners Act, section 2202 or 2203 of the CARES Act, section 302 of the Relief Act, and SECURE 2.0 (collectively, the Acts), or any regulations thereunder. For qualified plans and 403(b) plans that are neither governmental plans and nor applicable collectively bargained plans, the Notice clearly extends the deadline for amendments to December 31, 2026. The Notice also clearly addresses the deadline for an eligible 457(b) plan that is maintained by a governmental employer. The Notice does not, however, address the amendment deadline for a non-governmental 457(b) plan. ***ARA recommends*** the Service clarify that the deadline to amend a non-governmental tax-exempt section 457(b) plan is extended to December 31, 2026 (the same deadline that applies to other non-governmental plans).

5. Roth Employer Contributions Treated as Designated Roth Contributions

Section 604 of SECURE 2.0 allows an applicable retirement plan to provide participants the ability to have certain employer contributions made to the plan on a Roth basis. Section L of the Notice provides helpful guidance on how to report these contributions. Because the Notice allows plans to report the contributions in the same way that an in-plan Roth conversion or Roth rollover would be reported, practitioners have questioned whether the employer Roth contributions are taxable to the participant in the same manner as an in-plan Roth conversion or Roth rollover.

IRC §402A(a)(2) and (a)(3) provide that the matching contribution and nonelective contribution made by an employer on a Roth basis are treated as designated Roth contributions. Therefore, it appears that such contributions should be treated the same way as designated Roth deferral contributions under IRC §402A(a)(1) for purposes of determining whether any distribution of those amounts is a qualified Roth distribution under IRC §402A(d)(2) and is not subject to the special rules for recapture of the IRC §72(t) early withdrawal tax that applies to Roth conversions. For the avoidance of doubt, and to simplify administration and provide certainty for system programming, ***ARA recommends*** the Service confirm that Roth employer contributions are treated the same as designated Roth contributions for purposes of the 5-year rule and are not subject to the recapture rules applicable to Roth conversions.

6. Military Spouse Retirement Plan Eligibility Credit

IRC §45AA provides a tax credit for eligible small employers that employ a military spouse who participates in an eligible defined contribution plan of the employer. IRC §45AA(d)(2) excludes an individual from the definition of "military spouse" if such individual is an HCE under IRC §414(q). The Notice does not provide guidance on circumstances where an individual does not meet the definition of "military spouse" for all three taxable years. ***ARA recommends*** the Service clarify that the employer in the scenario described in the Example in Q&A-C-2 of the Notice may claim an IRC §45AA credit (of the applicable amount) for any of the three years during which the military spouse participates in the plan for any period if the military spouse is not an HCE during the first year of the 3-year credit period (even if the individual subsequently becomes an HCE for one or both of the two succeeding taxable years during the 3-year credit period).

7. Clarify Six-Month Deadline to Allocate Corrective Matching Contribution

IRC §414(cc), as added by section 350(a) of SECURE 2.0, provides a safe harbor correction for employee elective deferral failures arising under automatic contribution arrangements, as long as certain requirements are satisfied. IRC §414(cc)(2)(B)(ii) requires a plan sponsor to make a corrective allocation of any additional matching contributions that an employee would have been entitled to had the missed deferral been made, and such corrective allocation must be made no later than the deadline specified by the Secretary in regulations or other guidance. Section I-4 of the Notice provides that a corrective allocation of matching contributions that is made by the last day of the sixth month following the date on which correct elective deferrals begin will be treated as having been made within a reasonable period. ***ARA recommends*** that, when EPCRS is updated, the Service clarify that this six-month deadline applies exclusively to allocations of corrective matching contributions made in connection with automatic enrollment corrections under IRC §414(cc).

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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,

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