

May 31, 2024

Internal Revenue Service  
Attn: CC:PA:LPD:PR (Notice 2024-28)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

RE: Notice 2024-28, Recommendations on Items to be Included on the 2024-2025 Priority Guidance Plan

The American Retirement Association (“ARA”) is writing in response to Internal Revenue Service Notice 2024-28 (the “Notice”) to provide input on the Retirement Benefits items (and relative priority of such items) to be included on the 2024-2025 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 35,000 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 2024-2025 Priority Guidance Plan, in the following order of priority:

## **I. Immediate Guidance Needed**

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 (“SECURE 2.0”). **ARA**

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

- Age 60-63 catch-up contributions, including guidance regarding the correct calculation of the limit for 2025 in light of the SECURE 2.0 Technical Corrections bill reflecting a drafting error in this provision and confirmation that the universal availability regulations apply separately to age-50 catch-up contributions and the new age 60-63 catch-up contributions such that an employer may offer age-50 catch-up contributions without also offering the new age 60-63 catch-up contributions.
- Application of automatic enrollment requirements, including how an employer is determined to “normally employ” 10 or fewer employees; treatment of employees hired before a plan is subject to the mandate; and application to multiple employer plans (MEPs) and pooled employer plans (PEPs) adopted after December 29, 2022. Certain recommendations are detailed in ARA’s February 20, 2024 letter.<sup>1</sup>
- Obsolescence of the holding of Situation 4 in Rev. Rul. 2004-13 due to the amendments made to IRC §416 by SECURE 2.0. In particular, that after the amendments made by SECURE 2.0, a safe harbor plan will not lose the top heavy exemption under IRC §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). Specific recommendations are detailed in ARA’s December 15, 2023 letter.<sup>2</sup>
- Finalization of rules applicable to long-term part-time employee rules under SECURE §112 and SECURE 2.0 §125, including appropriate relief from the proposed rules due to timing of the Service’s proposed regulations, clarification regarding the use of elapsed time service methods, and guidance on integration with §403(b) universal availability exclusions. Certain recommendations are detailed in ARA’s January 26, 2024 letter<sup>3</sup>, November 29, 2023 letter<sup>4</sup>, and November 2, 2020 letter.<sup>5</sup>
- Roth catch-up contributions under SECURE 2.0 §603. ARA thanks the Service for the two-year administrative transition period announced in Notice 2023-62 to comply with SECURE 2.0 §603 and encourages the issuance of guidance quickly to permit development of appropriate systems and alleviate the challenges that precipitated the need for the transition period. Specific recommendations are detailed in ARA’s October 24, 2023 letter.<sup>6</sup>

## II. 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. Knowing that IRS is required to update EPCRS to reflect the changes in SECURE 2.0, **ARA recommends** that the IRS make certain modifications to EPCRS, including reflecting the automatic contribution failure corrections under SECURE 2.0 §350. Specific comments on Notice 2023-43 and recommendations for other conforming changes to EPCRS due to SECURE 2.0 are detailed in ARA’s August 23, 2023 letter.<sup>7</sup> In addition, specific recommendations on conforming changes to EPCRS related to plan corrections involving the tax treatment of catch-up contributions are detailed in ARA’s

<sup>1</sup> <https://araadvocacy.org/wp-content/uploads/2024/02/ARA-Comment-re-Notice-2024-02-SECURE-2.0-Grab-Bag.pdf>

<sup>2</sup> <https://araadvocacy.org/wp-content/uploads/2024/01/ARA-Top-Heavy-Exemption-for-SH-Plans.pdf>

<sup>3</sup> <https://araadvocacy.org/wp-content/uploads/2024/01/ARA-Comment-on-LTPTE-Proposed-Regulation.pdf>

<sup>4</sup> <https://araadvocacy.org/wp-content/uploads/2023/11/ARA-Relief-re-LTPTE-Rules.pdf>

<sup>5</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>6</sup> <https://araadvocacy.org/wp-content/uploads/2023/10/23.10.24-ARA-Comment-Letter-to-IRS-Roth-Catch-Up.pdf>

<sup>7</sup> <https://araadvocacy.org/wp-content/uploads/2023/09/23.08.23-ARA-Comment-Letter-to-IRS-IRS-Notice-2023-43.pdf>

October 24, 2023 letter.<sup>8</sup> Specific recommendations on other potential improvements to EPCRS are detailed in ARA's November 9, 2020<sup>9</sup>, and October 14, 2021<sup>10</sup> letters.

### **III. 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 rules for electronic disclosure to participants.<sup>11</sup>

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

### **IV. Final Regulations for Nonqualified Deferred Compensation Plans under Sections 409A and 457**

*ARA recommends* that the IRS issue guidance regarding the impact of the Federal Trade Commission's Non-Compete Clause Rule on nonqualified deferred compensation plans with respect to the substantial risk of forfeiture rule. *ARA also recommends* promulgation of final regulations under §§ 409A and 457(f), particularly due to the potential tax and penalty implications.

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

ARA's recommendations for the guidance most immediately needed on SECURE Act and SECURE 2.0 provisions are detailed above. *ARA also recommends* that the IRS issue guidance on the following SECURE Act and SECURE 2.0 provisions, listed in order of priority:

- 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. Certain recommendations are detailed in ARA's January 22, 2024 letter.<sup>12</sup>
- MEPs and PEPs, including finalization of the March 28, 2022 Notice of Proposed Rulemaking regarding the exception to the application of the "unified plan rule" (specific comments to which are detailed in ARA's May 27, 2022 letter<sup>13</sup>) and issuance of model plan language required under the SECURE Act for PEPs.
- Relief for closed pension plans under IRC §§ 401(o) and 401(a)(26).
- Treatment of §403(b) plans as not being money purchase plans (and, thus, may satisfy the profit-sharing exemption from ERISA §205), as detailed in ARA's February 3, 2021 letter.<sup>14</sup>

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<sup>8</sup> <https://araadvocacy.org/wp-content/uploads/2023/10/23.10.24-ARA-Comment-Letter-to-IRS-Roth-Catch-Up.pdf>

<sup>9</sup> <https://araadvocacy.org/wp-content/uploads/2020/11/20.11.09-ARA-Comment-Letter-to-IRS-Employee-plan-compliance-resolution-system.pdf>

<sup>10</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>11</sup> 29 CFR 2520.104b-31(i)(4)

<sup>12</sup> <https://araadvocacy.org/wp-content/uploads/2024/01/ARA-Guidance-for-Student-Loan-Match-Implementation.pdf>

<sup>13</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>

<sup>14</sup> <https://araadvocacy.org/wp-content/uploads/2021/02/21.02.03-ARA-Comment-Letter-to-IRS-Notice-2020-80.pdf>

- 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>15</sup>
- Reduced requirements for plan notices for unenrolled participants under IRC §414(bb).
- Required minimum distributions (RMDs), including guidance on the spousal election to be treated as the employee under SECURE 2.0 §327 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>16</sup>
- De minimis financial incentives under SECURE 2.0 §113, including guidance that incentives may be offered to all employees and the \$250 limit is subject to cost-of-living adjustments, as detailed in ARA’s February 20, 2024 letter.<sup>17</sup>

## **VI. 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>18</sup>

## **VII. 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>19</sup>) and a window for plans to obtain a determination letter on SECURE 2.0 provisions.

## **VIII. Missing Participants and Uncashed Checks**

ARA notes that this item was included in the 2023-2024 Priority Guidance Plan (as item A.12 under Retirement Benefits); **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>20</sup>

<sup>15</sup> <https://araadvocacy.org/wp-content/uploads/2021/05/ARA-Advocacy-2021-Comment-Letter-2021-02-05.pdf>

<sup>16</sup> <https://araadvocacy.org/wp-content/uploads/2022/06/22.05.25-ARA-Comment-Letter-to-IRS-Proposed-Rule-for-RMDs.pdf>

<sup>17</sup> <https://araadvocacy.org/wp-content/uploads/2024/02/ARA-Comment-re-Notice-2024-02-SECURE-2.0-Grab-Bag.pdf>

<sup>18</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>19</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>20</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>

## **IX. Merger and Acquisition Issues**

*ARA recommends* that the IRS address issues that result from mergers and acquisitions impacting IRC §§ 401(a) and 403(b) plans (including the treatment of safe harbor plans<sup>21</sup>), the determination of highly compensated employees, and the determination of years of service credit.

## **X. Governmental Plans**

ARA notes that this item was included in the 2023-2024 Priority Guidance Plan (as item A.14 under Retirement Benefits); *ARA recommends* that the IRS publish guidance on the definition of a governmental plan under §414(d).

## **XI. Church Plan Issues**

ARA thanks the IRS for including church plans in the 2022-2023 Priority Guidance Plan and again in the 2023-2024 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.

## **XII. Guidance Regarding the Aggregation Rules for Affiliated Service Groups under IRC §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 2024-2025 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.

## **XIII. High 25 Nondiscrimination**

*ARA recommends* that the IRS provide guidance under the High 25 rule,<sup>22</sup> particularly for plans covering only highly compensated employees, to coordinate the use of certain terms under the High 25 rule with terms used in IRC §430, and to review the restrictions under the High 25 rule in light of the IRC §436 benefit restrictions.

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<sup>21</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>

<sup>22</sup> See Treas. Reg. §1.401(a)(4)-5(b)(3)(ii).

#### **XIV. 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.

#### **XV. Final Regulations Relating to Reporting Requirements under Section 6057**

ARA notes the reporting obligations under section 6057 duplicate the reporting obligations under ERISA §523. **ARA recommends** that IRS focus on reducing the duplicative reporting burdens under IRC §6057 and ERISA §523. At the same time, ARA recognizes that the sharing of IRC §6057 data with the Department of Labor for purposes of the Lost and Found Database provided for by SECURE 2.0 is in taxpayers' best interest. **ARA further recommends** that IRS provide an exception to IRC §6103 to facilitate the sharing of IRC §6057 data with the Department of Labor.

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

Sincerely,

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