AMERICAN RETIREMENT ASSOCIATION

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Working for America's Retirement

March 17, 2025

Internal Revenue Service
Attn: CC:PA:01:PR (REG 100669-24)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: Proposed Regulations Regarding Automatic Enrollment Requirements Under Section 414A (RIN 1545–BR08)

The American Retirement Association (ARA) is writing in response to the Notice of Proposed Rulemaking regarding automatic enrollment requirements under section 414A of the Internal Revenue Code ("Code") published in the Federal Register on January 14, 2025, and referenced above (the "Proposed Rule"). 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 nearly 39,000 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 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 membership is diverse but united in a common dedication to America's employer-based retirement plan system.

Summary

ARA thanks Treasury and the IRS for the guidance to date on the automatic enrollment requirements under Internal Revenue Code (IRC) §414A, including thoughtful incorporation of the comments received on Notice 2024-2. ARA recommends that the Service further clarify a number of issues related to the Proposed Rule and the automatic enrollment requirements. In particular, the ARA recommends the Service provide the following guidance:

- Amend the Proposed Rule to extend the deadline to effect a post-transaction plan merger beyond the end of the special transition period under IRC §410(b)(6)(C)(ii) for purposes of the mandatory automatic enrollment exemption;
- Confirm a trustee-directed plan satisfies the investment requirement of IRC §414A(b)(4);
- Clarify how the new business and small business exceptions apply to members of a related group of employers;
- Revise the rule for redetermining a participant's initial period to conform with the rules utilized for a qualified automatic contribution arrangement ("QACA"); and

- Clarify the automatic contribution percentage may be escalated sooner than the first day of the plan year and may be greater than 1% of compensation.

Discussion

IRC §414A provides, with certain exceptions, that an annuity contract or cash or deferred arrangement (CODA) established after December 22, 2022 (a "post-enactment arrangement"), does not meet the requirements of IRC §403(b) or 401(k), respectively, unless the plan meets the automatic enrollment requirements of §414A. The Proposed Rule provides helpful guidance on application of this requirement. ARA recommends the Service revise certain provisions and provide additional guidance on certain provisions.

I. Extend Deadline for Post-Transaction Plan Merger Exemption From Mandatory Automatic Enrollment Beyond End of Transition Period

ARA acknowledges and thanks the Service for considering the practical impact of the automatic enrollment requirements in the context of mergers and acquisitions. In particular, ARA agrees with the Proposed Rule's exception to the general rule that any merger of a post-enactment arrangement 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. However, ARA encourages the Service to reconsider the deadline by which the merger must occur to qualify for this relief.

To qualify for the exception, the Proposed Rule requires (1) the pre-enactment arrangement be designated as the ongoing plan, and (2) the merger occur 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).

ARA acknowledges the Service's rationale in choosing this deadline as it is the period of time during which a plan is afforded relief from the coverage rules for differences in the design of two plans following a transaction. However, the requirement that plans be merged within this timeframe is meaningfully different than the requirement that plans be revised to address coverage and conform the plans' benefits, rights, and features. Currently, plans may need to be amended before the expiration of the transition period, but that does not mean the plans must also be merged.

A plan merger takes several months to implement—particularly when the plans are on different recordkeeping platforms—and some service providers require advance notice of six months or more to implement a plan merger. By contrast, a revision of optional plan features generally requires notice of only a few weeks.

Further, the merger of two plans requires significantly more time than the mere alignment of two plans (which often is done simply by moving participation of employees from one plan to the other) to effect in a manner that meets the requirements of ERISA and IRC. For example, when merging two plans, the plan sponsor will be required to investigate which provider can adequately perform services for the combined plan (which may be more complicated due to protected benefits and other features), perform a diligent search to ensure its fiduciary obligations are met, and carefully evaluate how the plans are combined (such as to preserve protected benefits). A recordkeeper search alone regularly takes 4-5 months to complete. It will be incredibly burdensome to require an employer to perform all these functions in a period of only a few months (which may be all the employer has if the transaction occurs late in a plan year).

Failure to provide adequate time to effect the merger will likely result in one of two outcomes: either (1) the merger will be rushed, which may result in inadvertent errors, increasing the cost of maintaining the plan and

requiring corrective actions, or (2) the plans will not be merged, which will increase the administrative costs of maintaining the total arrangement (i.e., both plans), which costs may be passed along to participants resulting in a reduction of participant account balances. Therefore, the Service can support both compliance with the tax code and the efficiency of an employer's retirement program by extending the deadline for the merger of plans following a §410(b)(6)(C) transaction.

For these reasons ***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 the Service permit an employer to effect the merger by the end of the first plan year that ends no later than 18 months after the date of the IRC §410(b)(6)(C) transaction without losing the pre-enactment arrangement status of the merged plan.

II. QDIA Requirement Should Be Deemed Satisfied for Trustee-Directed Plans

IRC § 414A(b)(4) provides that a plan subject to the automatic enrollment requirements of §414A must provide that if a participant does not make an investment selection for the amounts automatically contributed, then the amounts will be invested in accordance with the ERISA rules for qualified default investment alternatives (QDIAs) under 29 CFR §2550.404c-5 (or any successor regulations). These QDIA rules generally provide ERISA fiduciary relief for plans permitting participant-directed investments.

While the vast majority of 401(k) and 403(b) plans that will be subject to §414A permit participant investment direction, plans are not required to do so, and, in fact, some employers opt to design their plans to provide only for trustee-directed investment of plan contributions. Because IRC §414A does not require a plan to permit participant direction, ARA believes it reasonable to conclude that the law was not intended to prohibit a plan from permitting only trustee-directed investments. Therefore, ***ARA recommends*** the Service clarify that IRC § 414A(b)(4) is deemed to be satisfied if the plan does not provide for participant-direction of the investment of amounts contributed pursuant to the covered cash or deferred arrangement.

III. Clarify Rules When the Employer Sponsoring the Plan is Aggregated With Other Employers

ARA acknowledges and thanks the Service for the Proposed Rule's clarification that an amendment to expand eligibility to include employees of an employer that is related to an employer with a pre-enactment arrangement (whether it is part of a single-employer plan or a multiple employer plan) will not cause the CODA or contract to lose its pre-enactment status. There are several other circumstances involving related employers that ARA believes should be clarified in final guidance.

IRC §414A(c)(4) provides two exceptions to the 414A automatic enrollment requirements for certain "employers": (A) employers (including any predecessor employer) that has been in existence for less than 3 years (the "new business exception") and (B) employers normally employing 10 or fewer employees (the "small business exception"). For numerous plan requirements, employers that are aggregated under IRC §414(b), (c), (m), or (o) are treated as a single employer. As a result, ARA members have questioned whether related employers are aggregated for purposes of the new business and small business exceptions. IRC §414(b), (c), and (m) provide for aggregation of employers only for certain enumerated sections of the tax code, including IRC §§401, 410, 411, 415, and 416. The automatic enrollment mandate appears only in IRC §414A—there is not a corresponding provision in any of the sections enumerated in IRC §414(b), (c), or (m). Therefore, ARA believes that related employers are not aggregated for purposes of the new business and small business exceptions.

Further, ARA believes this conclusion is consistent with the Proposed Rule's guidance on amendments expanding eligibility because IRC §414A(c)(2)'s exception for pre-enactment CODAs/contracts considered only when the §403(b) contract or the CODA *described in §401(k)* was established, without any reference to the "employer" that maintains the arrangement. The reference to §401(k) in this exception, under which

related employers are specifically treated as a single employer pursuant to IRC §414(b), (c), and (m), supports the Service's conclusion that an amendment expanding eligibility to other employees within the aggregated employer is a continuation of the same CODA. The absence of a similar reference in the new business and small business exceptions leads to a different conclusion.

To promote clarity of and compliance with the exceptions to IRC §414A, ***ARA recommends*** the Service clarify that employers that are aggregated under IRC §414(b), (c), (m), or (o), are not aggregated for purposes of the new business exception and small business exception to the IRC §414A automatic enrollment requirements.

IV. Redetermination of a Participant's Initial Period Should be Permitted Using the Same Rules Applicable to QACAs

The Proposed Rule includes provisions permitting a plan to redetermine a participant's initial period for purposes of determining the default contribution percentage under the plan (Prop. Reg. §1.414A-1(c)(3)(iv)). A participant must have had no automatic default contributions for a plan year in order to use the provision. This is consistent with the redetermination provision available to plans containing a qualified automatic contribution arrangement (QACA) set forth in Treas. Reg. §1.401(k)-3(j)(2)(iv). However, the Proposed Rule makes certain distinctions that lead to different results than would apply in a QACA that will add unwarranted administrative complexity.

The QACA redetermination rules provide that if a participant had no automatic default contributions for a plan year, then the participant can be treated as having had no such contributions for any prior year. This allows a plan to treat the employee who has not made contributions for a plan year as having a new initial period (e.g., beginning on the date of rehire in the case of renewed eligibility due to re-employment or beginning on a date set by the plan if the plan decides to re-enroll participants).

The Proposed Rule, unlike the QACA rule, makes a distinction between the reasons a participant had no automatic contributions for the plan year. If the reason was due to ineligibility (e.g., due to no longer being employed or moving to an excluded class), then the new initial period begins when the employee again becomes eligible to make contributions to the plan. If the reason is due to a participant making an affirmative election to make no contributions and the plan is re-enrolling the participant, then the initial period can begin on a date set by the plan *provided that date is later than the participant's original initial period*. Under subparagraph (c)(3)(ii)(3) of the Proposed Rule, the initial period ends on the last day of the plan year that follows the plan year that includes the date the initial period begins. This results in an inconsistency between the re-enrollment rules for QACA and §414A arrangements, as illustrated by the following example:

> Assume an employee enters a plan on January 1, 2026, and makes an affirmative election to make no contributions to the plan. The plan implements a re-enrollment on January 1, 2027.
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> Under the QACA redetermination provision, the plan may treat the participant as having a new initial period beginning on January 1, 2027 (the re-enrollment date) because the participant did not make any contribution during the plan year beginning on January 1, 2026. Thus, escalation of the initial contribution percentage for this participant would not need to occur until January 1, 2029 (the last day of the plan year that follows the plan year that includes the date the new initial period begins).
>
> Under the Proposed Rule's rules for §414A arrangements, the plan may not treat the participant as having a new initial period because the reenrollment date (January 1, 2027), is prior to end of the participant's original initial period (December 31, 2027). As a result, the participant may be re-enrolled, but the first escalation must occur by January 1, 2028.

As a result, if the Proposed Rule is finalized as written, a plan that implements re-enrollment will not be able to apply the escalation provision in the same manner to all affected participants who have not made

contributions in the prior year. This adds additional complexity to the operation of a plan, will require additional resources to update recordkeeping systems because the rule is different than the rule for QACAs, and increases the likelihood of unintentional errors when using re-enrollment, all of which may discourage the use of re-enrollment. Revision of the rule to match the existing rules for QACAs, which are widely understood and already programmed into recordkeeping systems, will avoid a chilling effect on the use of reenrollment, which can significantly contribute to better coverage and retirement outcomes for American workers.

Therefore, ***ARA recommends*** that the Service modify the rule set forth in Proposed Rule to provide that a participant's initial period may be redetermined under the same rules currently applicable to QACAs (i.e., Treas. Reg. §1.401(k)-3(j)(2)(iv)).

V. Clarify the Timing and Percentage of the Escalation of Default Elections

The Proposed Rule provides that if a participant has a default election, then for each plan year after the participant's initial period, the contribution percentage must increase by 1 percentage point, up to the applicable statutory maximum percentage (Prop. Treas. Reg. §1.414A-1(c)(3)(ii)(B)). There is confusion on how this provision is applied. Practitioners differ on (a) whether this means the increase may only be made as of the first day of a plan year and (b) on whether the increase must be 1 percentage point or may be greater than 1 percentage point.

ARA recommends the Service clarify that both the timing of the increase and the amount of the increase are minimum requirements, and, therefore a plan could provide for increases at a time earlier than the first day of the applicable plan year (such as when compensation increases take place) provided that the default percentage is at least equal to the minimum percentage applicable under §414A as of the first day of a plan year. Similarly, a plan could provide increases more than 1 percentage point, but not less, up to the maximum statutory percentage.

Permitting this flexibility would reduce administrative burdens and would increase the effectiveness of employers' automatic enrollment provisions. Administrative burdens would be reduced because the interpretation would be consistent with the rules applicable to escalations under a QACA, which employers and service providers are already familiar with and have designed systems and training to accommodate. Consistency with the QACA rules would be consistent with the apparent intent of the statute and Proposed Rule, which incorporates the same exceptions to uniform percentage requirement found in the QACA rules (e.g., uniform percentage requirement is not violated due to the default election varying based on the number of years, or portions of years, since the beginning of the initial period). This clarification would also support the effectiveness of automatic enrollment arrangements because the employer can design escalation provisions to occur at a time during the year that reduces the likelihood of a participant opting out of the escalation (such as when pay increases occur).

For these reasons, ***ARA recommends*** that Service clarify that a plan meets the escalation requirement of §414A(b)(3)(A)(ii) if, as of the first day of a plan year, the escalated percentage equal to or greater than the minimum percentage applicable to that year (and therefore a plan may apply escalation of the contribution percentage sooner, but not later, than the first day of the plan year, and the escalation may be greater, but not less, than 1 percentage point).

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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, Chief of Regulatory Affairs, at kmayo@usaretirement.org or (703) 516-9300. Thank you for your time and consideration.

Sincerely,

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