AMERICAN RETIREMENT ASSOCIATION

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Working for America's Retirement

December 16, 2024

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2024-77)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Submitted via Regulations.gov

RE: Notice 2024-77, Guidance Under Sections 414(aa) and 402(c)(12) of the Internal Revenue Code with Respect to Inadvertent Benefit Overpayments

The American Retirement Association (ARA) is writing in response to the request for comments in Internal Revenue Service Notice 2024-77 (the "Notice"), which provides guidance with respect to inadvertent benefit overpayments. ARA thanks the Internal Revenue Service (IRS or the "Service") 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 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 the IRS for the guidance to date on certain provisions enacted by the SECURE 2.0 Act of 2022 ("SECURE 2.0"). ARA recommends that the Service modify the guidance provided in the Notice to avoid burdens on plan administrators and taxpayers who are not responsible for an overpayment and to align with the rules provided under section 206(h)(1)(C) of the Employee Retirement Income Security Act (ERISA).

Discussion

ARA appreciates the Notice's definition of "inadvertent benefit overpayment", but believes the Notice is unnecessarily and inappropriately restrictive with respect to distributions made to certain plan participants. Specifically, Q&A-1 of the Notice provides that an overpayment made to a disqualified person as defined in IRC §4975(e)(2) or an owner-employee as defined in Code section 401(c) may not be treated as an "inadvertent benefit overpayment" for purposes of IRC §§414(aa) and 402(c)(12). This restriction is not included in the SECURE 2.0 provision, and therefore is not a mandated part of the Service's guidance.

While the Service's rationale is not stated in the Notice, we believe the Service likely included this restriction to ensure that individuals who have authority over the plan do not benefit from operational violations and do not have incentive to permit or overlook the possibility of overpayments from the plan. While ARA agrees that protecting plans against this potential is appropriate, ARA believes that treating overpayments to all disqualified persons and owner-employees without regard to their culpability or role with respect to the plan unnecessarily impacts individuals who have no influence or involvement in any aspect of the operation or management of an applicable plan and is inconsistent with IRC §§414(aa) and 402(c)(12).

For example, an owner-employee (under IRC §401(c)) of a large partnership will frequently have no role in, or authority over, the operation of the organization's retirement plan. Similarly, many corporate officers (under IRC §4975) of larger organizations do not have any involvement or authority with regard to the operation of the company's retirement plans. Payments to these types of owner-employees and disqualified persons who exercised no authority or control with respect to the plan are clearly inadvertent overpayments and therefore the provisions of IRC §§414(aa) and 402(c)(12) should apply. Treating these inadvertent payments as excluded from the relief afforded by IRC §§414(aa) and 402(c)(12) penalizes taxpayers who have no culpability, is inconsistent with the plain meaning of the statute, and will impose a significant burden on plan administrators, who, prior to taking action on an overpayment, will now have to ensure that all complex facets of Code sections 4975(e)(2) and 401(c)(3) have been considered (likely through the employment of legal counsel, thereby increasing the cost of administration).

ARA recommends the Service publish future guidance eliminating the Notice's restriction on payment to owner-employees and disqualified persons and instead apply the restriction only to responsible individuals. "Responsible individuals" should be only those persons whose actions resulted in the payment being made. This would ensure that an employee responsible for the operation or management of the plan who receives an overpayment as a direct result of actions taken by that person would not benefit from the overpayment, even if it were inadvertent (regardless of whether the individual is an owner-employee or disqualified person). ARA notes that any action taken intentionally or at the direction of an owner-employee would already not be eligible for relief because the action is not inadvertent and therefore would not qualify for relief. This more tailored approach would continue to protect against the possibility of individuals benefiting from their own actions, but would treat taxpayers more consistently and alleviate the burden on plan administrators.

In addition, this tailored definition would more closely align the Service's treatment of overpayments with the ERISA overpayment rules that were enacted in the same section of SECURE 2.0. More precisely, section 206(h)(1)(C) of ERISA, as added by section 301(a) of SECURE 2.0, provides relief for inadvertent benefit overpayments unless that payment was made to a fiduciary whose breach resulted in such overpayment and, even then, the relief would apply if the plan had and followed established prudent procedures to prevent and minimize overpayment of benefits. This is clear evidence of the scope of payments that SECURE 2.0 §301 was intended to cover. Aligning the Service's guidance under IRC §§ 414(aa) and 402(c)(12) with the accompanying ERISA provision will create symmetry between ERISA and the Code that will simplify plan administration and, in accordance with the intent of SECURE 2.0, ensure only responsible individuals are denied the relief for inadvertent overpayments.

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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,

/s/
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American Retirement Association

/s/
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