AMERICAN RETIREMENT ASSOCIATION
Working for America's Retirement
4245 North Fairfax Drive | Suite 750 | Arlington, VA 22203 • P. 703.516.9300 • F. 703.516.9308

July 11, 2017

Internal Revenue Service
Attn: Kyle Brown
Division Counsel
Tax Exempt & Governmental Entities
CC:TEGEDC
999 North Capitol Street NE
Washington, DC 20002

Re: Comments on PATH Act changes and requests for Guidance

Dear Mr. Brown:

The American Retirement Association ("ARA") is submitting this letter in response to a request from the IRS during our meetings on June 13, 2016, and June 12, 2017, for a list of comments on additional guidance needed with respect to the Protecting Americans from Tax Hikes (PATH) Act that was enacted on December 18, 2015. ARA appreciates the opportunity to provide input on additional guidance needed.

ARA is a national organization of more than 20,000 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. The 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 ASPPA College of Pension Actuaries ("ACOPA"). ARA members are diverse but united in a common dedication to America's private retirement system.

ARA believes that it is critical for the IRS to provide guidance in the areas outlined below to assist employers in performing various transactions.

PART 1 - SUMMARY TRANSFERS/MERGERS

Below are questions that have arisen regarding transfers/mergers of 401(a) plans and 403(b) plans for churches. Some of these questions may be basic and self-explanatory; however, we are listing everything we have been asked in order to make sure these plans are set up correctly, both operationally and administratively. We have listed these questions with proposed answers:

Q1: A 401(a) plan with a plan number #001 merges all assets pursuant to section 414(z) to a 403(b) plan. Will the plan number on the 403(b) plan be #001 or #002?
A1: #002.

Q2: Does IRC § 414(z) apply to an electing church plan?
A2: Based on wording in 414(z), we are not totally sure if this was the intent or not.

Q3: If the answer to Q2 is yes, then if the employer is an electing church plan, and therefore subject to ERISA, will the transfer of assets be reported on the Form 5500 as would be the case in a merger of any other employer when two plans of the same type are merged into one?
A3: Yes. The Form 5500 of the transferor plan would file a final form indicating the Plan that the assets are being transferred to; and the transferee plan would report on their 5500 for that year the amounts being transferred into the Plan. The Transferee Plan would then recordkeep the sources of the monies going forward.

Q4: Is there a requirement to report this transaction on a Form 1099-R?
A4: No. Presently these types of transfers are not reported on a Form 1099-R.

Q5: Assuming the transfer is being made from a 401(a) plan into a 403(b) plan, will the employer after the merger then become subject to the new 403(b) remedial amendment period and no longer be subject to the remedial amendment period for qualified plans?
A5: Yes.

Q6: If the 401(k) plan is a safe harbor plan, can the merger into a 403(b) occur mid-year and not be in violation of the rules on mid-year amendments to safe harbor plans? Does the new plan need to also be a safe harbor plan? Would the answer be any different if the merger is reversed – 403(b) into 401(k)?
A6: We believe this should be an acceptable mid-year change and the surviving plan would not need to be a safe harbor plan.

Q7: May monies contributed to the 403(b) plan after the 414(z) transfer (*i.e.*, contributions for participants made after the effective date of the 403(b) transfer), be subject to a vesting schedule?
A7: Yes

Q8: If an employer is participating in a multiple employer 401(a) plan of a denominational pension board such that the participating employer does not have authority over what might be considered "maintenance" of the plan, *e.g.*, keeping the plan updated for law changes, adding discretionary provisions, etc., can that employer transfer the portion of the assets in the multiple employer church plan to a separate 403(b) plan to be maintained by the individual church-related employer?
A8: Yes.

Q9: Are there any substantive differences between a transfer and a merger under 414(z)?
A9: No, for non-electing Church plans, a transfer is simply a transfer of a portion of the plan assets and a merger is a transfer of all plan assets. For electing Church plans and Non-QCCOs nondiscrimination testing would be handled differently for a transfer vs. a merger. If two plans are merged, they need to be tested as a single plan. If there is a transfer, the two plans maintain their independence for compliance testing.

Q10: IRC § 414(z)(4)(A) seems to clearly include non-QCCOs. Is this a correct interpretation?

A10: Yes.

Q11: When a 403(b) Plan is being transferred under current law, the 403(b) plan receiving the transfer (the transferee plan) must have at least as stringent distribution provisions with respect to the transferred money sources. For example, if the plan is a 403(b)(7) plan, then the deferrals cannot be distributed prior to age 59½; or the prior plan had no in-service permitted distributions, then such restrictions are carried forward to the new 403(b) plan. Under 414(z), the transfer is potentially occurring between 2 different plan types; will the distributable events be 'picked up' from the new plan, or carried over from the prior plan? Is there a difference if the event is separation from service? For example, employee works for University #1. She transfers her assets from another plan that she had at University #2 into University #1's plan. She is terminated from University #2. Are the assets that are transferred available for distribution immediately since she was terminated from service with respect to those monies? Or are they subject to the distributable event restrictions in the new Plan?

A11: Even though the merger/transfer can be done between two different plan types, sources of monies will generally be 'mapped over' to the new plan, i.e. elective deferrals to elective deferrals; employer contributions to employer contributions. If the transferor plan is the 403(b) plan then the "as least as restrictive rules" will generally apply. If the participant has separated from service, then the sources of monies will continue to be mapped over to the new transferee plan without the special restrictive rule that currently applies to 403(b) transfers.

Q12: Will any rules promulgated under 414(z) have retroactive impact on transfers occurring prior the issuance of regulations?

A12: No, the 414(z) transfer provisions were effective upon the effective date of the PATH Act and can be acted upon immediately using a good faith interpretation of the new Code section. Any guidance issued will be prospective and indicate that any transfer made under 414(z) prior to the issuance of the guidance will not be impacted by the guidance provided the transfer was made using a reasonable good faith standard.

Q13: How does Revenue Procedure 2007-71 apply when completing a 414(z) transfer? Revenue Procedure 2007-71 permits employers to exclude from their 'plan' certain pre-2005 contracts (and, under certain circumstance, certain pre-2009 contracts). For purposes of a 414(z) transfer, can the employer use Revenue Procedure 2007-71 to exclude old contracts for 414(z) transfer/merger purposes? If the plan is an "electing church plan" is the answer different?

A13: When completing a 414(z) transfer or merger, Revenue Procedure 2007-71 can be used to exclude from consideration those contracts that are specifically carved out under the revenue procedure For electing church plans, the Department of Labor would need to comment.

Q14: The language in 414(z)(2) indicates that the accrued benefit is transferred or merged pursuant to 414(z) must be 100% vested after the transfer or merger. If, however, the transfer or merger is between same plan types (401(a) to 401(a) or 403(b) to 403(b)), the instructions under Form 5310-A as well as the Treasury Regulations § 1.414(l)-1, indicate that a merger of two defined contribution plans can be made without immediately vesting the assets being merged. We believe that this new interpretation stems from two sources. First the current statute for 403(b) plans did not anticipate vesting being used at all under a 403(b) plan, and second, for a non-electing church plan, the pre-ERISA rules would apply to the merger of assets and require 100% vesting upon the merger.

A14: We believe both of these results warrant a closer look, which may require a legislative change, but certainly need to be revisited based on the recent history of the 403(b) plans and the frequent inclusion of vesting schedules. The pre-approved plan language would also need to be amended to include some guidance on the 414(z) transfers if they are in fact to be viewed differently that the current transfer language included in the same plan language.

PART 2 – SIMPLE IRAs AND ROLLOVERS

ARA is requesting guidance as soon as possible regarding the new rollovers that are permitted to be made to a SIMPLE IRA Plan. We understand, after speaking to the IRS in early 2016, that some organizations have already amended the IRS Model SIMPLE IRA Form they use to permit this type of incoming rollover contribution. The Prototype SIMPLE LRMs and submission materials have been updated to reflect this opportunity, along with an increase in the user fee. The user fee for submitting a Prototype SIMPLE IRA was increased in February of 2016 without the opportunity for financial institutions to amend their plans to include this change until recently. Some members did contact the IRS in January 2016 to request information on the change in fees for SIMPLE IRAs, especially since the identical adopter language and fees were removed. No responses were provided during the time that the reduced fee could have been availed of.

A few questions on the operation of these plans still remain, and are outlined below with proposed answers:

Q1: Can a financial institution accept the new rollovers into their SIMPLE IRA plan without amending the document?

A1: No. The SIMPLE IRA plan can be: (a) the Model SIMPLE (5304-SIMPLE or the 5305-SIMPLE); (b) a Prototype SIMPLE IRA; (c) or another SIMPLE IRA plan that satisfies the rules of § 408(p). Therefore an employer or the financial institution can modify the Model Form to accept these rollovers and satisfy (c) above. If the employer has adopted a Prototype SIMPLE plan in the past then they should at least for the interim, adopt the Model Form with language changes or submit an amended Prototype SIMPLE IRA plan to the IRS.

Q2: What other SIMPLE IRA documentation needs to be updated?

A2: The disclosure documents that are contained in the SIMPLE IRA Plan and in the SIMPLE IRA custodial agreement (Form 5305-SA and Form 5305-S) would need to be updated to reflect the new permitted rollovers.

Any administrative forms, such as a rollover certification, if used, should be reviewed and updated to reflect the new rule.

Q3: Is a financial institution required to accept such rollovers?
A3: No. Some institutions are not making any changes to their prototype plan or to the IRS Model Forms in order to accept these rollovers.

* * *

Thank you for the opportunity to discuss this important clarification. These comments and recommendations are submitted on behalf of, and were prepared by, the National Tax-deferred Savings Association Government Affairs Committee, chaired by Susan D. Diehl, CPC, QPA, ERPA. If you have any questions concerning the matters discussed herein, please contact Craig Hoffman, ARA General Counsel and Director of Regulatory Affairs at (703) 516-9300.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/
Craig P. Hoffman, Esq., APM
General Counsel
American Retirement Association

s/
Robert Richter, Esq., APM
President
American Retirement Association

/s/
Scott Hayes
President-Elect
American Retirement Association

/s/
Susan D. Diehl, CPC, QPA, ERPA
Chair, NTSA GAC
American Retirement Association