AMERICAN RETIREMENT ASSOCIATION
Working for America's Retirement

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October 31, 2019

Ms. Cathy Jones
Acting Director, Employee Plans
Internal Revenue Service
999 N. Capitol Street, NE
Washington, DC 20002

RE: Request for Additional Guidance for the Once-In Always-In ("OIAI") Rule

Dear Ms. Jones:

The American Retirement Association ("ARA") is writing in response to Internal Revenue Service ("IRS") Notice 2018-95. We first would like to thank the Service for providing the explanations under the notice with respect to the Once-In Always-In Rule ("OIAI").

Many employers are still in the process of restating their 403(b) plans before the March 31, 2020, deadline. This process has been ongoing for the last few years because it requires the gathering of data for a nine to ten year period; employers without third party administrators are just learning now that they need to restate their plan; and affected church plans need to "unwind" their multiple employer plans into separate plans due to the "program restriction" for volume submitter plans. With respect to the OIAI rule, some employers are encountering situations that are not addressed by Notice 2018-95. We have outlined some of these OIAI situations below, along with our recommendations.

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 ASPPA College of Pension Actuaries ("ACOPA"), 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 savings plans and are dedicated to expanding on the success of employer provided plans. In addition, ARA has more than 26,000 individual members who provide consulting and administrative services to American workers, savers, and sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of American's private retirement system.

Summary

ARA requests that clarifications be added to the guidance in Notice 2018-95 to address the following:

A. How rehired employees are treated with respect to the OIAI rule, given the lack of data necessary to make a definitive determination that an employee is in fact a rehired employee.

B. Employers who interpreted the eligibility rule for 20 hours per week, or 1000 hours per year, that differ from the failures outlined in the Notice 2018-95, should be permitted to use EPCRS correction measures for any failures with respect to the OIAI rule.

C. Employers who are restating their 403(b) Plan during 2019 or 2020 prior to March 31, 2020, who did not correct the OIAI rule pursuant to Notice 2018-95 for 2019, may correct the failure under EPCRS.

D. Employers who determined eligibility on a year-by-year basis, can go back and apply the prior year rule and correct errors under EPCRS.

E. Number of years that need to be corrected. Correction of any failure under EPCRS refers to correction of "all years", however, due to the initial "fresh start" provided for under Notice 2018-95, this seems to limit the years that would need to be corrected beginning with the 2019 year.

F. For individually designed 403(b) Plans, what is the deadline for adopting the required amendment for the OIAI rule? The end of the 2019 plan year? The end of the 2020 plan year? Or the remedial amendment period deadline?

Discussion

ARA recognizes and appreciates the Service's guidance as outlined in Notice 2018-95 and believes that the additional requested clarification of the OIAI rule with respect to "rehires" will assist 403(b) plan sponsors in completing the required restatement process by the current deadline of March 31, 2020. ARA believes that under a fresh start approach, the employers sponsoring 403(b) plans will know after 2020 that certain rehires should be eligible for the plan when they are rehired, resulting in less strain on the IRS and greater compliance by such employers. ARA requests the following clarifications:

A. Clarify the treatment of a rehired employee with respect to the OIAI rule.

1. Because employers are now gathering 10 years' worth of data for the first restatement, there are numerous occasions where prior employees are re-employed. These employees need to be properly treated under Notice 2018-95.

2. If the employer is a public school or small tax-exempt organization, it is extremely difficult to know if an employee is rehired unless the new employee is specifically asked that question.

3. Public schools, as well as many small tax-exempt employers, typically merge their employee data every five or six years. Additionally, the 10-year restatement period may only contain paper records and it may not be feasible to do exhaustive research in order to determine who is a rehired employee. The only option for gathering this information may be for the employer to rely on a certification by the newly hired employee that they never worked for this employer in the past.

4. Based on statements included in a 2016 IRS webinar[1] (10/27/2016), we believe that corrections for rehired employees can be made at least through the end of the remedial amendment period.

[1] The IRS webinar that was streamed on October 27, 2016 contained specific examples on slides 34 and 35 that concluded that the OIAI rules did not apply after an employee had severed employment and was

ARA recommends a later date for a "fresh start" rule for the OIAI rule in light of these additional considerations for employers. We appreciate the fresh start approach beginning in 2019, provided in Notice 2018-95. However, there are many employers who are still gathering data and have not yet restated their plans. In addition, for employers who have gone through the process, a rehired employee may have been treated differently. As is outlined below, we believe the best option is to move the "fresh start date" to the year <u>following</u> the year of restatement, as this will (1) assist employers collecting data during this time; (2) increase the level of compliance for 403(b) plans; and (3) eliminate the need for requests for guidance on other failures of the OIAI rule (as outlined in B. through E. below).

ARA believes that if the Service accepts the recommendation above, the items requested in B. through E. will become moot and therefore, additional guidance on these issues is not needed.

B. **Clarify that a 403(b) plan that had a failure of the OIAI rule not covered by Notice 2018-95 or a failure that is found after the current fresh start date of 1/1/2019, can be corrected through EPCRS.**

1. An employer that discovers a failure of the OIAI rule after 2019, should be able to correct that failure through EPCRS.

2. If a new "fresh start" date is provided as outlined in A. above, then the question would only relate to employers who discover this type of failure after 2020. In these cases ARA believes there should be a correction available under EPCRS.

C. Employers who are restating their 403(b) Plan during 2019 or 2020 prior to March 31, 2020, who did not correct the OIAI rule pursuant to Notice 2018-95, may correct the failure under EPCRS.

1. An employer that discovers a failure of the OIAI rule after 2019, should be able to correct that failure through EPCRS.

2. If a new "fresh start" date is provided as outlined in A. above, then the question would only relate to employers who discover this type of failure after 2020. In these cases, ARA believes there should be a correction available under EPCRS.

D. Employers who determined eligibility on a year-by-year basis, can go back and apply the prior year rule and file under EPCRS.

1. An employer that discovers a failure of the OIAI rule after 2019, should be able to correct that failure through EPCRS.

2. If a new "fresh start" date is provided as outlined in A. above, then the question would only relate to employers who discover this type of failure after 2020. In these cases, ARA believes there should be a correction available under EPCRS.

E. Number of years that need to be corrected.

1. Correction of any failure under EPCRS refers to correction of "all years", however, due to the initial "fresh start" provided for under Notice 2018-95, this seems to limit the years

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subsequently rehired. Without official guidance from the IRS, this would mean that an employer that *does* include a rehired employee since they met the eligibility requirements in a prior year would actually cause the plan to fail under the conclusion in the webinar. Other than verbal comments, this is the only written material on this that we have from the IRS.

that would need to be corrected beginning with the 2019 year. Clarification on the number of the years that need to be corrected would be helpful.

2. If the Service accepts the recommendation in A. above, then corrections for the OIAI rule would apply after 2020 (the year of the restatement).

F. For Individually Designed 403(b) Plans, what is the deadline for the required amendment for the OIAI rule?

1. We believe that employers in this situation should also receive an extended compliance deadline of a fresh start date of the year following the year that the 403(b) plan is restated. Again, this will result in greater numbers of compliant 403(b) plans and will reduce the amount of guidance needed from IRS.

These comments were prepared by NTSA Subcommittee of the Government Affairs Committee. We would like to request a conference call to discuss a few of the concerns outlined above and to address any questions you might have. Of course, if you prefer, we would be happy to schedule an in-person meeting at your convenience. Please contact Martin Pippins at mpippins@usaretirement.org if you have any questions. Thank you for your time and consideration.

Sincerely,

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

/s/
Martin L. Pippins, MSPA
ACOPA Executive Director