

# What's New That Affects You?



# NTSA

National Tax-Deferred Savings Association

*Part of the American Retirement Association*

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# Agenda for Today

We will focus on the following topics today, most of which are new, some not so new, but still critical to your overall understanding in the 403(b) and 457(b) arena

- New Hardship Rules and the Various Effective Dates
- Rollover of Offset Loans
- Recharacterizations of Conversions
- Reporting of Traditional IRA Escheatment
- Restatement of 403(b) Plans – **14 Months to Go!**
- The “OIAI” Rule and Guidance
- Miscellaneous Updates

# Poll Question #1

What types of plans do you service?

- A. 403(b) only
- B. 403(b) and 457(b) only
- C. 403(b), 457(b), and 401(k)
- D. None of the above! (you are probably on the wrong webcast!)

# Poll Question #2

Who are you?

- A. An advisor
- B. A TPA
- C. A consulting firm
- D. Other

# New Hardship Rules

- All of the changes under the Bipartisan Budget Act and the recently issued proposed **401(k) regulations** affect all 401(k) plans, but unfortunately not all changes can be used in 403(b) plans
- Some of the changes are mandatory and some are optional
- Amendments will need to be made to the plans
- Let's go through each change and which plans are affected by the change

# Poll Question #3

How many employers have hardship under their plans that you service?

- A. 100 percent
- B. 75 percent
- C. 50 percent
- D. I have no idea

# Six-Month Suspension Repealed

- Applicability: applies to all 401(k)s and 403(b)s
- Optional for 2019; mandatory beginning in 2020
- The plan may also stop any six-month suspension that crosses over into 2019
  - Example: a participant receives a hardship distribution on November 15, 2018. The six-month suspension applies. On January 1, 2019, the six-month suspension is removed and the participant may begin to defer again.
- Plan may need an amendment; hardship policy must be amended

# 165(h) Casualty Deduction

- Applicability: applies to all 401(k)s and 403(b)s
  - TCIA 2017 amended the definition of a casualty deduction to include only those casualties that were caused by a federally declared disaster!
  - Financial hardships referred this section of the law
  - Example: if your house burns down in the wildfires you are covered; if house burns down not in CA, you are not covered!
- Retroactively amended to January 1, 2018
- If the TPA, vendor, or employer amended their hardship policy to reflect the change in 2018, they will need to amend it again
- This was not a surprise, ARA had notified the IRS in May that this was a problem and we believed an inadvertent change

# New Reason: FEMA-Declared Disaster

- Applicability: applies to all 401(k)s and 403(b)s
- Retroactively amended to distributions made on or after January 1, 2018
- This makes applying for a hardship easier
- No need to wait for separate presidential declaration or IRS intervention
- Hardship policy should be amended to reflect the new reason
- Plan may need to be amended, check wording in plan

# Loan Before Hardship

- Applicability: applies to all 401(k)s and 403(b)s
- Retroactively amended to distributions made on or after January 1,2018
- Optional change
- If employer wishes to remove the loan requirement, then hardship policy should be amended to reflect
- Plan may need to be amended, check wording in plan

# Amounts Available for Hardship

*Now things get dicey!*

- Applicability: applies to all 401(k)s and some 403(b)s (see below)
- Optional change for distributions made on or after January 1, 2019
- The breakdown:
  - Earnings on elective deferrals: only applies to 401(k) plans
  - Earnings on QMACs, QNECs, and safe-harbor contributions: applies to 401(k) plans and only 403(b)s invested in annuities
  - Principal amount of QMACs, QNECs, or safe-harbor contributions: applies to 401(k) plans and only 403(b)s invested in annuities
- Hardship policy needs to be amended. Plan may need to be amended, check wording in plan.

# Amendments

- For mandatory changes:
  - Review hardship policies, plan document, and custodial and annuity contracts
- For optional changes:
  - Decide if the employer will be given a choice
  - If changes are made, review hardship policies, plan document, and custodial and annuity contracts
- Deadline will be determined ultimately by the final regulations
- Governmental plans will have two years longer than nongovernmental plans
- Keep in mind that ARA has drafted technical corrections for 403(b)s for the items that do not apply currently

# Poll Question #4

How many employers that you service have started asking questions on these changes?

- A. 100 percent
- B. 75 percent%
- C. 50 percent
- D. I don't know

# Rollover of Offset Loans

- TCJA of 2018 extended the rollover period for loan offset distributions (typically at termination of employment or plan termination) to the due date including extensions of the tax return for the year of distribution
- *Effective for plan loan offset amounts that are treated as distributed in taxable years beginning after December 31, 2017*
- If rolled over to an IRA, new Code “PO” for 5498 box 13c; Box 2 is the rollover amount

# Rollover of Offset Loans

- Form 1099R, has new Code “M” for loan offset distribution; Code MB if it is being distributed from a designated Roth account
- Review loan policies and marketing materials
- New IRS 402(f) notice: changed to reflect the new rollover rule
- Reporting will be a challenge, especially if the monies are distributed from a designated Roth source
- In some cases there will be separate form 1099Rs; in others you may combine the reporting

# Repeal of Conversion Recharacterizations

- Effective for taxable years beginning after December 31, 2017
- No recharacterizations from any “conversions” after 2017
- Recharacterizations of current-year IRA contributions still permitted
- Recharacterizations of conversions made in 2017 were permitted through October 15, 2018!
- This change will also affect the fair market value (FMV) for RMDs:
  - Prior to 2018, recharacterizations from conversions were added back to the FMV to calculate RMDs
  - Review marketing material, worksheets, etc. to delete this provision

# Escheatment Reporting for Traditional IRAs

- Clarification (Revenue Ruling 2018-17) deals specifically with traditional IRAs, which are of course not subject to ERISA
- When assets are escheated to the state from an IRA, two questions typically arise:
  - Is a 1099-R issued for the distribution?
  - Does voluntary withholding apply to the distribution?
- AND THE ANSWER TO EACH ONE IS YES!
- Effective for taxable years beginning after December 31, 2017
- Optional reporting for 2018; mandatory beginning January 1, 2019
- Important to note that this only applies to traditional IRAs as of 2019!

# Escheatment Reporting for Traditional IRAs

Becky has had a traditional IRA with the ABC Financial Organization, as custodian of the IRA for over ten years.

Becky's mail from ABC has been returned for over three years. The state requires that five years after attainment of age 65, if there is no activity and the participant cannot be located, the assets in the IRA escheat are sent to the state's unclaimed property fund. The amount in the IRA is \$1,000.

The IRA custodian is now wondering if they should apply the ten-percent voluntary withholding on the distribution of \$1,000.

# Escheatment Reporting for Traditional IRAs

IRS explains the reporting and withholding requirements as follows:

- *Reporting:* Yes, the Form 1099-R should be issued to Becky (it will probably be returned); and also a form 1099-R should be sent to the IRS reporting the distribution
- *Withholding:* The rules on IRA withholding are clear that the ten-percent withholding applies unless the taxpayer waives it. In this scenario, the participant is missing and cannot waive the withholding. Therefore it applies.

# Escheatment Reporting for Traditional IRAs

The transaction will be reported on the 1099-R as follows:

- Box 1 (gross amount) \$1,000
- Box 2a (taxable amount) \$1,000
- Box 4 (10% tax withholding) \$ 100
- Box 7 (Reason Code) Code 7

Transitional relief – January 1, 2019

Extension requested from industry, no IRS reply as of yet

# 14 Months Left and Counting...

The RAP period for 403(b) plans ends on March 31, 2020 ... time is ticking away ...

Remember:

- Employers must have had a valid plan document for 2009
- Employers must restate back to 2010 and include all changes that were made from 2010 through the date of restatement (use the plan's recap page for this)



# Poll Question #5

Why are your employers restating their 403(b) plans?

- A. To maintain reliance on the form of plan
- B. To protect the assets from being taxed before distributions occur
- C. To audit-proof the employer in the event of an audit
- D. All of the above

# 14 Months Left and Counting...

Remember (continued):

- It will not be unusual for employers to have operationally used provisions that are not permitted, for example:
  - 90-day entry date provision for elective deferrals
  - Exclusion of “part-time” employees
- DO NOT assume that whatever their old plan says is what they have actually done in operation
- This is true whether it is ERISA, non-ERISA 501(c)(3), or a K-12 employer



# 14 Months Left and Counting...

Remember (continued):

- Employer can't find any documents. Begin and document under the paperclip rule for 2009.



# And the 'Clean Up' Continues...

During the restatement period – it will also be a good idea to review:

- Procedures for universal availability
- Employee handbooks
- Post-Employment contributions
- Overall administration
- Union contracts
- Review with employer the administrative appendix to make sure all functions are being handled! This will also answer questions of who is doing what for the employer.



# And the 'Clean Up' Continues...

And don't forget: the deadline of March 31, 2020 is also for custodial agreements and annuity contracts to be updated to:

- Reflect current law
- Be written to go with the new pre-approved plans
- Cannot be written to supersede plan document provisions
- Must be sent to all participants once updated (uses the IRA rules for updates)

# Restatement Nightmares: You Are Not Alone!

For those reaching out and talking to employers and explaining the provisions under the new IRS approved 403(b) plan restatement requirements...here are some true stories!



- “But we have always excluded the part-timers”
- “I thought we didn’t need a plan document in the past”
- “Our vendor provides us with a custodial agreement, isn’t that the plan document?”

# Restatement Nightmares: You Are Not Alone!

- “Our plans states that we can exclude anyone under the age of 21 and/or those who work less than one year”
- “Our plan says that we can move the assets to any other investments when we switch approved vendors”
- “Our plan says...(fill in the blank)”
- “We didn’t think we needed to file Form 5500s until after 2020”
- Or better yet: “What’s a Form 5500?”



# The OIAI Rule and Guidance

- OIAI refers to the “once in always in” eligibility provision for elective deferrals
- IRS provided guidance in Notice 2018-95
- Provides a relief period for employers from 2009 through 2019 -- not the end of the remedial amendment period!

# Poll Question #6

OIAI refers to:

- A. Once the employee is eligible, they are always eligible for all contributions under the plan
- B. Once the employee is eligible, they are always eligible to make elective deferrals for all future years
- C. Doesn't apply to 403(b) plans

# The OIAI Rule and Guidance

- Guidance is in three parts:
  - First-year requirement: is the employee expected to work 1,000 hours in his or her first year?
  - Preceding-year requirement: did the employee work 1,000 hours in the preceding year?
  - OIAI exclusion
- The “year-by-year” approach is highlighted in the notice with other questions left unanswered...such as rehires

# The OIAI Rule and Guidance

## Example #1:

- Ava is hired July 1, 2016 for a position that requires her to work 15 hours per week. Since she is expected to work less than 1,000 hours per year, she was not offered the 403(b) plan for 2016.
- Ava is a workaholic and in 2017 the employer realizes that Ava actually worked over 1,000 hours in 2016. The employer now treats Ava as eligible for 2017.
- In 2017 Ava works only 900 hours and is therefore not eligible for 2018.
- As you can see we would have a “look-back year” type of determination

# The OIAI Rule and Guidance

## Example #2: Apply OIAI Rule

Since Ava was eligible to defer in 2017, Ava will be eligible for all future years regardless of the number of hours she works for all years going forward

# The OIAI Rule and Guidance

- Keep in mind that the OIAI rule is now in force for the 2019 year
- Fresh start in 2019
- 2018 used for look-back purposes
- Question: If the employer has another failure in not providing the exclusion correctly as laid out above, can correction be made through EPCRS?

# The OIAI Rule and Guidance

Good news: it depends!

- Pre-approved plans will not need an amendment
  - During the restatement process, the employer should highlight what they did on the recap page
  - May require another conversation with employers who have already restated...
- Custom plans will need multiple amendments to incorporate this rule
  - Another problem for those that are not planning to adopt an IRS pre-approved 403(b) plan



# Miscellaneous Updates

- IRS Updates 402(f) notice
- Church plan 401(a) documents will become available in next DC restatement
- Will there be legislation in 2019?



# IRS Fiscal Year 2019 Program Letter

IRS shares where they are heading in 2019

Focus for retirement plans:

- Distributions: verify that plans are following correct distribution processes and procedures and that participants are receiving correct distribution amounts
- Form 5500: contact employers sponsoring plans that did not file one or more required returns
- 403(b)/457 plans: examine 403(b) plans for universal availability, excessive contributions, and proper use of catch-up contributions
- 457(b) plans for excessive contributions and proper use of the special three-year catch-up contribution rule

# IRS Fiscal Year 2019 Program Letter

Focus for retirement plans (continued)

- Small plans with large assets: determine whether smaller plans with trusts holding large assets have taken deductions on tax return, exceeding 404 limitations
- SEP plans: determine whether accounts violated maximum participant rules, failed to meet statutory and matched employer contribution requirements, and/or failed top-heavy requirements

# IRS Fiscal Year 2019 Program Letter

## Focus for retirement plans (continued)

- Referrals: continue to pursue referrals received from internal and external sources that allege possible noncompliance by a retirement plan
- Claims: continue to address requests for refunds or credits of overpayments of amounts already assessed and paid. These claims can include tax, penalties, and interest; or they can also be a request for an adjustment of tax paid or credit not previously reported or allowed.

[https://www.irs.gov/pub/irs-tege/fy2019\\_program\\_letter\\_final.pdf](https://www.irs.gov/pub/irs-tege/fy2019_program_letter_final.pdf)

# VCP Fees Effective January 2, 2018 Continue to Cause Problems for Small Employers

Assets in the plan as reported on the most recent Form 5500	Compliance fee
\$0 - \$500,000	\$1,500
Over \$500,000 to \$10,000,000	\$3,000
Over \$10,000,000	\$3,500

- SEP and SIMPLE-IRAs were \$250
- Small 401a and 403b under 20 employees were \$500
- All reduced fees are now gone except for orphan plans and group submissions

# EPCRS

- Published September 28, 2018 and effective January 1, 2019 new Rev Proc 2018-52
- New VCP submission procedure including the required use of the [www.pay.gov](http://www.pay.gov) website beginning April 1, 2019
  - ✓ You will get a receipt that is your proof of the submission
- VCP filing is done electronically as well:
  - ✓ Cannot be larger than 15MB, all PDFs
  - ✓ Fax all other documents that could not go through via PDFs to 855-203-6996
  - ✓ Complete and sign form 8950 through pay.gov
- Between January 1 and March 31, 2019 employers may file with paper or online, but only for submissions that have a postmark of March 31, 2019
- Must include a valid 2848 for a POA
- Still working on possible additions to SCP

# RMDs and Missing Participants

## *New way to issue guidance...*

- New IRS Field Directive issued to IRS auditors
- Tells auditors not to challenge an employer QP or 403(b) for failure to commence RMDs to a missing participant or beneficiary, but only if the following steps were taken by the plan:

# RMDs and Missing Participants

- Searched plan and related plan, sponsor, and publicly available records or directories for alternative contact information
- Used one of these search methods:
  - Commercial locator service
  - Credit reporting agency
  - Proprietary internet search tool for locating individuals; and
- Attempted contact via U. S. Postal Service certified mail to the last known mailing address and through appropriate means for any address or contact information (including email addresses and telephone numbers)

# RMDs and Missing Participants

- Comment letter sent to IRS by ARA and ICI on the incorrect statements regarding 403(b)s using the QP rules for RMDs
- 403(b)s are “*similar*” to IRAs with respect to RMDs, but they also have special rules:
  - Aggregation rules apply
  - Bi-furcated account for pre-1987 RMDs (custodian must track)

# Current Trends: SLR Contribution

- IRS issued a favorable PLR for a 401(k) plan permitting Student Loan Repayments (SLR) contributed as a nonelective contributions to the plan
- Here's how it works: once an employee enrolls in the plan, as they make their student loan payments, the employer makes a corresponding SLR contribution to the plan
- The employee was required to pay at least two percent of their compensation to the loan program, and then they received a five-percent contribution to the 401(k) plan
- These employees could still defer to the plan but would not be eligible for the match contribution

# Questions?

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