



## Rewards Policy Insider 2021-19



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## IRS Issues Priority Guidance Plan

The Internal Revenue Service (IRS) on September 9 issued its 2021-2022 Priority Guidance Plan (PGP), which

identifies and prioritizes tax issues that the IRS plans to address through regulatory and sub-regulatory guidance. As usual, the PGP identifies a number of projects relating to employer-sponsored retirement and health and welfare benefits, as well executive compensation.

### Retirement Plan Projects

Of interest to defined benefit pension plan sponsors will be final minimum present value regulations under IRC § 417(e), and regulations on mortality tables used for purposes of the single-employer plan minimum funding rules. Also on the agenda are regulations and related guidance on closed defined benefit plans. Like the 417(e) regulations, the PGP indicates the regulations on closed defined benefit plans will be final versions of proposed regulations issued in 2016.

For governmental plan sponsors, the PGP lists guidance on the IRC § 414(n) definition of a governmental plan and final regulations on applying the normal retirement age rules to governmental plans as projects for the coming year. Proposed normal age rules for governmental plans were issued in 2016 as well.

In addition, the PGP provides that guidance on student loan payments, qualified retirement plans, and 403(b) plans is forthcoming. The goal of the new guidance is to make the principles laid out in Private Letter Ruling (PLR) 201833012 (May 22, 2018) more widely available. Basically, PLR 201833012 addressed student loan matching programs (SLMPs), whereby an employer effectively makes matching contributions available to employees' 401(k) plans based on their student loan repayments instead of elective contributions. The PLR clarified that the arrangement did not violate the contingent benefit rule but did not address other potential issues. A PLR can be relied upon only by the party that requested it.

### Health and Welfare Plan Projects

The PGP indicates that the IRS intends to finalize proposed regulations issued in 2019 relating to applying the ACA employer shared responsibility rules and the self-insured group health plan nondiscrimination rules to Health Reimbursement Accounts (HRAs).

IRS is also planning to issue regulations and other guidance relating to welfare benefit funds, including voluntary employee beneficiary associations (VEBAs). In particular, the guidance will be provided under IRC § 419A, which limits the ability of employers to pre-fund health and welfare benefits.

The full text of the PGP is available [here](#).

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## Agencies Propose Changes to Form 5500

On September 14, 2021, the Department of Labor (DOL), Internal Revenue Service, and Pension Benefit Guaranty Corporation (Agencies) jointly released proposed

revisions to the Form 5500 annual report that would implement certain changes necessitated by the SECURE Act of 2019, among other things. In addition to this Notice of Proposed Forms Revisions (NPFR), DOL released a Notice of Proposed Rulemaking (NPRM) that would conform DOL's reporting regulations to the proposed Form 5500 revisions.

## Overview of Retirement Plan Related Changes

In general, the NPFR would:

- Implement section 202 of the SECURE Act, which directs DOL and IRS to develop a new aggregate annual reporting option for certain groups of structurally identical defined contribution plans (referred to as a "DCG"), including by introducing new Schedule DCG to collect plan-level information for plans covered by a DCG consolidated Form 5500 filing;
- Add a new Schedule MEP to further implement section 101 of the SECURE Act, which provides for pooled employer plans (PEPs) and requires additional Form 5500 reporting by multiple employer plans (MEPs), including PEPs;
- Standardize the schedule of investments reported on Schedule H so that the information can be entered or imported for improved electronic use and transparency; and
- Add numerous questions to the Form 5500, including some with respect to information about the plan's trust and IRS compliance questions, and modify the information required for defined benefit plans.

Besides conforming DOL's regulations to the above changes, the NPRM proposes changes to the summary annual report (SAR) to reflect the new DCG arrangements and new Schedules DCG and MEP.

## Impact on Multiple Employer Welfare Arrangements (MEWAs)

Multiple employer welfare arrangements (MEWAs) that are subject to ERISA and provide group health benefits generally must file the Form 5500 and the Form M-1. Among other things, their Form 5500 filings must include identifying and other information for each employer participating in the MEWA.

MEWAs that are not subject to ERISA, but nonetheless provide group health benefits to ERISA plans, are required to file the Form M-1 but not the 5500. The Form M-1 currently does not require participating employer information.

The NPFR and NPRM would require all Form M-1 filers to provide participating employer information if the MEWA provides group health benefits. MEWAs that are also subject to the Form 5500 filing requirements would no longer have to provide participating employer information as an attachment to their 5500s.

## Proposed Effective Date

The proposed amendments would generally apply to reporting for plan years beginning on or after January 1, 2022. However, the proposed amendments implementing changes to section 103(g) of ERISA (expanding the participating

## **Reconciliation Bill Would Cap Defined Contribution Account Balances for Some, Further Limit Deductibility of Executive Compensation**

Among the revenue raisers included in the Build Back Better Act (BBBA), as approved by the House Ways and Means Committee on September 15, is a \$10 million cap on total vested balances in IRAs and defined contribution plans, plus additional changes to the IRC § 162(m) deduction limitation for compensation exceeding \$1 million.

### **\$10 Million Cap on Defined Contribution Plans and IRAs**

The \$10 million cap would be indexed for inflation and would apply to all IRA and defined contribution plans (e.g., 401(k), 403(b), 457, etc.). There would be no grandfathering of current balances. However, the cap would apply only to individuals with “adjusted taxable income” (ATI) exceeding \$450,000 for joint filers. Thus, certain individuals with very large account balances but lower income would be exempt.

Those with balances in excess of the \$10 million cap would be subject to special required minimum distribution rules to reduce the excess balance in annual increments. Plans would be required to allow distributions, even if they otherwise would not be permitted, and could rely on the employee’s certification that a distribution is required under the new rule. The 10% early withdrawal penalty would not apply to these special required minimum distributions.

### **Proposed 162(m) Changes**

Prior to the American Rescue Plan (ARP) Act, public companies generally were not permitted to deduct compensation in excess of \$1 million for any of their top five employees. ARP generally expanded this rule to the top 10 employees of public companies, effective for 2027. Under the BBBA:

- The effective date of the ARP expansion would be accelerated to 2022.
- Corporations in a parent/subsidiary controlled group would be aggregated.
- The definition of compensation would be modified to explicitly include: “performance-based compensation, post-termination compensation, and beneficiary payments” and to include indirect payments.
- Treasury would have the authority to issue guidance to prevent avoidance of the purposes of the rule, “including through the

performance of services other than as an employee or by providing compensation through a pass-through or other entity.”

## Outlook

The BBBA is currently stalled in the House as Congressional Democrats, and the White House attempts to broker a deal to move forward simultaneously on the BBBA and a bipartisan infrastructure bill. Most of the focus is on the Senate where Democrats need all 50 members of their caucus to vote in favor of whatever bill they bring to the floor. Two moderate Democrats – Senators Manchin and Sinema – are objecting to the BBBA’s \$3.5 trillion price tag, which may force the White House and more progressive Democrats to accept a smaller bill. That increases the likelihood that these and other “revenue raisers” will be retained and may even be expanded.

Look for updates in future editions of the Rewards Policy Insider as the BBBA makes its way through the legislative process.

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