

**MEMO# 33127**

February 23, 2021

# **ICI Submits Letter to IRS Regarding Application of Certain ERISA Requirements to Terminating 403(b) Plans**

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February 23, 2021 TO: ICI Members  
Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: ICI Submits Letter to IRS Regarding Application of Certain ERISA Requirements to Terminating 403(b) Plans

ICI submitted the attached letter to the Internal Revenue Service (IRS), responding to its request for comments in Notice 2020-80<sup>[1]</sup> regarding application of the annuity and spousal rights provisions of section 205 of the Employee Retirement Income Security Act of 1974 (ERISA). More specifically, Notice 2020-80 focuses on the application of ERISA section 205 in connection with the distribution of an individual custodial account (ICA) “in kind” from a terminating section 403(b) plan that is subject to ERISA.

## **Background**

The IRS issued Notice 2020-80 in conjunction with Revenue Ruling 2020-23, which provided guidance (as directed by the SECURE Act)<sup>[2]</sup> on the tax consequences of an in-kind distribution of a 403(b)(7) custodial account from a terminating 403(b) plan. The guidance in that ruling covers only situations where the underlying plan is not subject to ERISA annuity and spousal rights.

The Notice explains that issues remain regarding the application of ERISA section 205 in connection with a distribution of an ICA in kind for a 403(b) plan with at least one participant to whom section 205 applies,<sup>[3]</sup> including if (i) a participant cannot be reached, (ii) a participant does not elect to waive the QJSA and QPSA form of benefit, or (iii) a married participant elects to waive the QJSA and QPSA form of benefit but the participant’s spouse does not consent to the waiver. Among other things, the Notice asks for views regarding the administrability of alternative points in time for when rights under ERISA section 205 might be required to be protected, for example, at the time of the plan termination (i.e., by obtaining the participant’s waiver and the spouse’s consent to a distribution in kind of an ICA), or later, at the time payments are made from the ICA.

## ICI Comments

Our letter explains that, where ERISA section 205 protections apply to a 403(b) plan funded through custodial accounts, practical realities will often necessitate that applicable consent requirements be satisfied with the involvement of the plan administrator before the plan termination is completed and the plan no longer exists. Because section 403(b)(7) custodial accounts do not hold annuities as investments, any notion that the QJSA and QPSA requirements must be incorporated into the terms of the distributed ICAs would be unworkable for many custodial account providers. Therefore, our letter urges the IRS to permit plans to obtain any required consents at the time of the plan termination (i.e., when the in-kind distribution occurs).

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### [Attachment](#)

#### endnotes

[1] See ICI Memorandum No. 32905, dated November 9, 2020. Available here: [https://www.ici.org/my\\_ici/memorandum/memo32905](https://www.ici.org/my_ici/memorandum/memo32905).

[2] See section 110 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act). For a summary of the SECURE Act, see ICI Memorandum No. 32118, dated December 20, 2019. Available here: [https://www.ici.org/my\\_ici/memorandum/memo32118](https://www.ici.org/my_ici/memorandum/memo32118).

[3] Section 205 of ERISA generally requires distributions in the form of either a qualified joint and survivor annuity (QJSA) or a qualified preretirement survivor annuity (QPSA), unless the plan is not a defined benefit plan or money purchase pension plan and under the plan: (i) a full death benefit is provided to the surviving spouse, (ii) no participant election of a distribution in the form of a life annuity is made (and a life annuity is not the normal form of benefit), and (iii) no part of the distribution is the result of a transfer from a defined benefit plan or a money purchase pension plan. Section 205(c) of ERISA provides that a participant may elect to waive the QJSA or QPSA form of benefit, but spousal consent is needed for a waiver by a married participant.