DESCRIPTION OF H.R. 6757, THE "FAMILY SAVINGS ACT OF 2018"

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INTRODUCTION

The House Committee on Ways and Means has scheduled a markup on September 13, 2018, of the "Family Savings Act of 2018." This document,[1] prepared by the staff of the Joint Committee on Taxation, provides a description of the bill.

[1] This document may be cited as follows: Joint Committee on Taxation, *Description of H.R. 6757, the "Family Savings Act of 2018,"* (JCX-73-18), September 12, 2018. This document can also be found on the Joint Committee on Taxation website at www.jct.gov. All section references herein are to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

TITLE I – EXPANDING AND PRESERVING RETIREMENT SAVINGS

A. Multiple Employer Plans; Pooled Employer Plans

Present Law

Retirement savings under the Code and ERISA

Tax-favored arrangements

The Internal Revenue Code ("Code") provides two general vehicles for tax-favored retirement savings: employer-sponsored plans and individual retirement arrangements ("IRAs"). Code provisions are generally within the jurisdiction of the Secretary of the Treasury ("Secretary"), through his or her delegate, the Internal Revenue Service ("IRS").

The most common type of tax-favored employer-sponsored retirement plan is a qualified retirement plan,[2] which may be a defined contribution plan or a defined benefit plan. Under a defined contribution plan, separate individual accounts are maintained for participants, to which accumulated contributions, earnings and losses are allocated, and participants' benefits are based on the value of their accounts.[3] Defined contribution plans commonly allow participants to direct the investment of their accounts, usually by choosing among investment options offered under the plan. Under a defined benefit plan, benefits are determined under a plan formula and paid from general plan assets, rather than individual accounts.[4] Besides qualified retirement plans, certain tax-exempt employers and public schools may maintain tax-deferred annuity plans.[5]

An IRA is generally established by the individual for whom the IRA is maintained.[6] However, in some cases, an employer may establish IRAs on behalf of employees and provide

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[2] Sec. 401(a). A qualified annuity plan under section 403(a) is similar to and subject to requirements similar to those applicable to qualified retirement plans.

[3] Sec. 414(i). Defined contribution plans generally provide for contributions by employers and may include a qualified cash or deferred arrangement under a section 401(k) plan, under which employees may elect to contribute to the plan.

[4] Sec. 414(j).

[5] Sec. 403(b). Private and governmental employers that are exempt from tax under section 501(c)(3), including tax-exempt private schools, may maintain tax-deferred annuity plans. State and local governmental employers may maintain another type of tax-favored retirement plan, an eligible deferred compensation plan under section 457(b).

[6] Sections 219, 408 and 408A provide rules for IRAs. Under section 408(a)(2) and (n), only certain entities are permitted to be the trustee of an IRA. The trustee of an IRA generally must be a bank, an insured credit union, or a corporation subject to supervision and examination by the Commissioner of Banking or other officer in charge of the administration of the banking laws of the State in which it is incorporated. Alternatively, an IRA trustee may be another person who demonstrates to the satisfaction of the Secretary that the manner in which the person will administer the IRA will be consistent with the IRA requirements.

retirement contributions to the IRAs.[7] In addition, IRA treatment may apply to accounts maintained for employees under a trust created by an employer (or an employee association) for the exclusive benefit of employees or their beneficiaries, provided that the trust complies with the relevant IRA requirements and separate accounting is maintained for the interest of each employee or beneficiary (referred to herein as an "IRA trust").[8] In that case, the assets of the trust may be held in a common fund for the account of all individuals who have an interest in the trust.

ERISA

Retirement plans of private employers, including qualified retirement plans and tax-deferred annuity plans, are generally subject to requirements under the Employee Retirement Income Security Act of 1974 ("ERISA").[9] A plan covering only business owners (or business owners and their spouses) - that is, it covers no other employees - is exempt from ERISA.[10] Thus, a plan covering only self-employed individuals is exempt from ERISA. Tax-deferred annuity plans that provide solely for salary reduction contributions by employees may be exempt from ERISA.[11] IRAs are generally exempt from ERISA.

The provisions of Title I of ERISA are under the jurisdiction of the Secretary of Labor.[12] Many of the requirements under Title I of ERISA parallel Code requirements for qualified retirement plans. Under ERISA, in carrying out provisions relating to the same subject matter, the Secretary (of the Treasury) and the Secretary of Labor are required to consult with each other and develop rules, regulations, practices, and forms which, to the extent appropriate for efficient administration, are designed to reduce duplication of effort, duplication of reporting, conflicting or overlapping requirements, and the burden of compliance by plan administrators, employers, and participants and beneficiaries.[13] In addition, interpretive jurisdiction over parallel Code and

[7] Simplified employee pension ("SEP") plans under section 408(k) and SIMPLE IRA plans under section 408(p) are employer-sponsored retirement plans funded using IRAs for employees.

[8] Sec. 408(c).

[9] ERISA applies to employee welfare benefit plans, such as health plans, of private employers, as well as to employer-sponsored retirement (or pension) plans. Employer-sponsored welfare and pension plans are both referred to under ERISA as employee benefit plans. Under ERISA sec. 4(b)(1) and (2), governmental plans and church plans are generally exempt from ERISA.

[10] 29 C.F.R. 2510.3-3(b)-(c).

[11] 29 C.F.R. 2510.3-2(f).

[12] The provisions of Title I of ERISA are codified at 29 U.S.C. 1001-734. Under Title IV of ERISA, defined benefit plans of private employers are generally covered by the Pension Benefit Guaranty Corporation's pension insurance program.

[13] ERISA sec. 3004.

ERISA provisions relating to retirement plans is divided between the two Secretaries by Executive Order, referred to as the Reorganization Plan No. 4 of 1978.[14]

Multiple employer plans under the Code

In general

Qualified retirement plans, either defined contribution or defined benefit plans, are categorized as single-employer plans or multiple employer plans. A single-employer plan is a plan maintained by one employer. For this purpose, businesses and organizations that are members of a controlled group of corporations, a group under common control, or an affiliated service group are treated as one employer (referred to as "aggregation").[15]

A multiple employer plan generally is a single plan maintained by two or more unrelated employers (that is, employers that are not treated as a single employer under the aggregation rules).[16] Multiple employer plans are commonly maintained by employers in the same industry and are used also by professional employer organizations ("PEOs") to provide qualified retirement plan benefits to employees working for PEO clients.[17]

Application of Code requirements to multiple employer plans and EPCRS

Some requirements are applied to a multiple employer plan on a plan-wide basis.[18] For example, all employees covered by the plan are treated as employees of all employers participating in the plan for purposes of the exclusive benefit rule. Similarly, an employee's service with all participating employers is taken into account in applying the minimum participation and vesting requirements. In applying the limits on contributions and benefits, compensation, contributions and benefits attributable to all employers are taken into account.[19] Other requirements are applied separately, including the minimum coverage requirements, nondiscrimination requirements (both the general requirements and the special tests for section

[14] 43 Fed. Reg. 47713 (October 17, 1978).

[15] Secs. 414(b), (c), (m) and (o).

[16] Sec. 413(c). Multiple employer status does not apply if the plan is a multiemployer plan. Multiemployer plans are different from single employer plans and multiple employer plans. A multiemployer plan is defined under sec. 414(f) as a plan maintained pursuant to one or more collective bargaining agreements with two or more unrelated employers and to which the employers are required to contribute under the collective bargaining agreement(s). Multiemployer plans are also known as Taft-Hartley plans.

[17] Rev. Proc. 2003-86, 2003-2 C.B. 1211, and Rev. Proc. 2002-21, 2002-1 C.B. 911, address the application of the multiple employer plan rules to qualified defined contribution plans maintained by PEOs.

[18] Sec. 413(c).

[19] Treas. Reg. sec. 1.415(a)-1(e).

401(k) plans) and the top-heavy rules.[20] However, the qualified status of the plan as a whole is determined with respect to all employers maintaining the plan, and the failure by one employer (or by the plan itself) to satisfy an applicable qualification requirement may result in disqualification of the plan with respect to all employers (sometimes referred to as the "one bad apple" rule).[21]

Because of the complexity of the requirements for qualified retirement plans, errors in plan documents, as well as plan operation and administration, commonly occur. Under a strict application of these requirements, such an error would cause a plan to lose its tax-favored status, which would fall most heavily on plan participants because of the resulting current income inclusion of vested amounts under the plan. As a practical matter, therefore, the IRS rarely disqualifies a plan. Instead, the IRS has established the Employee Plans Compliance Resolution System ("EPCRS"), a formal program under which employers and other plan sponsors can correct compliance failures and continue to provide their employees with retirement benefits on a tax-favored basis.[22]

EPCRS has three components, providing for self-correction, voluntary correction with IRS approval, and correction on audit. The Self-Correction Program ("SCP") generally permits a plan sponsor that has established compliance practices and procedures to correct certain insignificant failures at any time (including during an audit), and certain significant failures generally within a two-year period, without payment of any fee or sanction. The Voluntary Correction Program ("VCP") permits an employer, at any time before an audit, to pay a limited fee and receive IRS approval of a correction. For a failure that is discovered on audit and corrected, the Audit Closing Agreement Program ("Audit CAP") provides for a sanction that bears a reasonable relationship to the nature, extent, and severity of the failure and that takes into account the extent to which correction occurred before audit.

Multiple employer plans are eligible for EPCRS, and certain special procedures apply.[23] A VCP request with respect to a multiple employer plan must be submitted to the IRS by the plan administrator, rather than an employer maintaining the plan, and must be made with respect to the entire plan, rather than a portion of the plan affecting any particular employer. In addition, if a failure applies to fewer than all of the employers under the plan, the plan administrator may choose to have a VCP compliance fee or audit CAP sanction calculated separately for each employer based on the participants attributable to that employer, rather than having the compliance fee calculated based on the participants of the entire plan. For example, the plan administrator may choose this option when the failure is attributable to the failure of an employer to provide the plan administrator with full and complete information.

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[20] Treas. Reg. secs. 1.413-2(a)(3)(ii)-(iii) and 1.416-1, G-2.

[21] Treas. Reg. secs. 1.413-2(a)(3)(iv) and 1.416-1, G-2.

[22] Rev. Proc. 2016-51. 2016-42 I.R.B. 465, October 17, 2016.

[23] Section 10.11 of Rev. Proc. 2016-51.

ERISA

Fiduciary and bonding requirements

Among other requirements, ERISA requires a plan to be established and maintained pursuant to a written instrument (that is, a plan document) that contains certain terms.[24] The terms of the plan must provide for one or more named fiduciaries that jointly or severally have authority to control and manage the operation and administration of the plan.[25] Among other required plan terms are a procedure for the allocation of responsibilities for the operation and administration of the plan and a procedure for amending the plan and for identifying the persons who have authority to amend the plan. Among other permitted terms, a plan may provide also that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator) and that a person who is a named fiduciary with respect to the control or management of plan assets may appoint an investment manager or managers to manage plan assets.

In general, a plan fiduciary is responsible for the investment of plan assets. However, ERISA section 404(c) provides a special rule in the case of a defined contribution plan that permits participants to direct the investment of their individual accounts.[26] Under the special rule, if various requirements are met, a participant is not deemed to be a fiduciary by reason of directing the investment of the participant's account and no person who is otherwise a fiduciary is liable for any loss, or by reason of any breach, that results from the participant's investments. Defined contribution plans that provide for participant-directed investments commonly offer a set of investment options among which participants may choose. The selection of investment options to be offered under a plan is subject to ERISA fiduciary requirements.

Under ERISA, any plan fiduciary or person that handles plan assets is required to be bonded, generally for an amount not to exceed $500,000.[27] In some cases, the maximum bond amount is $1 million, rather than $500,000.

Multiple employer plan status under ERISA

Like the Code, ERISA contains rules for multiple employer retirement plans.[28] However, a different concept of multiple employer plan applies under ERISA.

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[24] ERISA sec. 402.

[25] Fiduciary is defined in ERISA section 3(21), and named fiduciary is defined in ERISA section 402(a)(2).

[26] ERISA sec. 404(c). Under ERISA, a defined contribution plans is also referred to as an individual account plan.

[27] ERISA sec. 412.

[28] ERISA sec. 210(a).

Under ERISA, an employee benefit plan (whether a pension plan or a welfare plan) must be sponsored by an employer, by an employee organization, or by both.[29] The definition of employer is any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan, and includes a group or association of employers acting for an employer in such capacity.[30]

These definitional provisions of ERISA are interpreted as permitting a multiple employer plan to be established or maintained by a cognizable, bona fide group or association of employers, acting in the interests of its employer members to provide benefits to their employees.[31] This approach is based on the premise that the person or group that maintains the plan is tied to the employers and employees that participate in the plan by some common economic or representational interest or genuine organizational relationship unrelated to the provision of benefits. Based on the facts and circumstances, the employers that participate in the benefit program must, either directly or indirectly, exercise control over that program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program, or the plan is sponsored by one or more employers as defined in section 3(5) of ERISA.[32] However, an employer association does not exist where several unrelated employers merely execute participation agreements or similar documents as a means to fund benefits, in the absence of any genuine organizational relationship between the employers. In that case, each participating employer establishes and maintains a separate employee benefit plan for the benefit of its own employees, rather than a multiple employer plan.

Form 5500 reporting

Under the Code, an employer maintaining a qualified retirement plan generally is required to file an annual return containing information required under regulations with respect to the qualification, financial condition, and operation of the plan.[33] ERISA requires the plan administrator of certain pension and welfare benefit plans to file annual reports disclosing certain

[29] ERISA sec. 3(1) and (2).

[30] ERISA sec. 3(5).

[31] See, for example, Department of Labor Advisory Opinions 2012-04A, 2003-17A, 2001-04A, and 1994-07A, and other authorities cited therein.

[32] See, for example, Department of Labor Advisory Opinion 2017-02AC.

[33] Sec. 6058. In addition, under section 6059, the plan administrator of a defined benefit plan subject to the minimum funding requirements is required to file an annual actuarial report. Under Code section 414(g) and ERISA section 3(16), plan administrator generally means the person specifically so designated by the terms of the plan document. In the absence of a designation, the plan administrator generally is (1) in the case of a plan maintained by a single employer, the employer, (2) in the case of a plan maintained by an employee organization, the employee organization, or (3) in the case of a plan maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties that maintain the plan. Under ERISA, the party described in (1), (2) or (3) is referred to as the "plan sponsor."

information to the Department of Labor ("DOL").[34] These filing requirements are met by filing a completed Form 5500, Annual Return/Report of Employee Benefit Plan. Forms 5500 are filed with DOL, and information from Forms 5500 is shared with the IRS.[35] In the case of a multiple employer plan, the annual report must include a list of participating employers and a good faith estimate of the percentage of total contributions made by the participating employers during the plan year. Certain small plans, that is, plans covering fewer than 100 participants, are eligible for simplified reporting requirements, which are met by filing Form 5500-SF, Short Form Annual Return/Report of Small Employee Benefit Plan.[36]

Description of Proposal

In general

The proposal amends the Code rules relating to multiple employer plans to provide relief from the "one bad apple" rule for certain plans (referred to herein as "covered multiple employer plans"). A covered multiple employer plan is a multiple employer qualified defined contribution plan[37] or a plan that consists of IRAs (referred to herein as an "IRA plan"), including under an IRA trust,[38] that either (1) is maintained by employers which have a common interest other than having adopted the plan, or (2) in the case of a plan not described in (1), has a pooled plan provider (referred to herein as a "pooled provider plan"), and which meets certain other requirements as described below.

The proposal outlines various requirements that apply to a pooled provider plan under the Code. It also outlines various requirements that apply under ERISA to a qualified defined contribution plan that is established or maintained for the purpose of providing benefits to the employees of two or more employers and that meets certain requirements to be a "pooled employer plan," and provides that a pooled employer plan is treated for purposes of ERISA as a single plan that is a multiple employer plan.[39]

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[34] ERISA secs. 103 and 104. Under ERISA section 4065, the plan administrator of certain defined benefit plans must provide information to the PBGC.

[35] Information is shared also with the PBGC, as applicable. Form 5500 filings are also publicly released in accordance with section 6104(b) and Treas. Reg. sec. 301.6104(b)-1 and ERISA secs. 104(a)(1) and 106(a).

[36] ERISA sec. 104(b).

[37] To which section 413(c) applies.

[38] Under the proposal, in applying the exclusive benefit requirement under section 408(c) to an IRA plan with an IRA trust covering employees of unrelated employers, all employees covered by the plan are treated as employees of all employers participating in the plan.

[39] With respect to plans described under proposed section 413(e)(1)(A), other than providing relief from the "one bad apple" rule if certain requirements are met and adding certain reporting requirements, the proposal generally does not change present law and related guidance applicable to such multiple employer plans under the Code or ERISA.

Tax-favored status under the Code

In general

The proposal provides relief from disqualification (or other loss of tax-favored status) of the entire plan merely because one or more participating employers fail to take actions required with respect to the plan (that is, relief from the "one bad apple" rule).

Such relief under the proposal does not apply to a plan unless the terms of the plan provide that, in the case of any employer in the plan failing to take required actions (referred to herein as a "noncompliant employer")—

- plan assets attributable to employees of the noncompliant employer (or beneficiaries of such employees) will be transferred to a plan maintained only by that employer (or its successor), to a tax-favored retirement plan for each individual whose account is transferred,[40] or to any other arrangement that the Secretary determines is appropriate, unless the Secretary determines it is in the best interests of the employees of the noncompliant employer (and beneficiaries of such employees) to retain the assets in the plan, and
- the noncompliant employer (and not the plan with respect to which the failure occurred or any other employer in the plan) is, except to the extent provided by the Secretary, liable for any plan liabilities attributable to employees of the noncompliant employer (or beneficiaries of such employees).

In addition, in the case of a pooled provider plan, if the pooled plan provider does not perform substantially all the administrative duties required of the provider (as described below) for any plan year, the Secretary may provide that the determination as to whether the plan meets the Code requirements for tax-favored treatment will be made in the same manner as would be made without regard to the relief under the proposal.

Pooled plan provider

Under the proposal, "pooled plan provider" with respect to a plan means a person that—

- is designated by the terms of the plan as a named fiduciary under ERISA,[41] as the plan administrator, and as the person responsible to perform all administrative duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan) that are reasonably necessary to ensure that the plan meets the Code requirements for tax-favored treatment and the requirements of ERISA and to ensure that each employer in the plan takes actions as the Secretary or the pooled plan provider determines necessary for the plan to meet Code and ERISA

[40] For this purpose, a tax-favored retirement plan means an eligible retirement plan as defined in section 402(c)(8)(B), that is, an IRA, a qualified retirement plan, a tax-deferred annuity plan under section 403(b), or an eligible deferred compensation plan of a State or local governmental employer under section 457(b).

[41] Within the meaning of ERISA section 402(a)(2).

requirements, including providing to the pooled plan provider any disclosures or other information that the Secretary may require or that the pooled plan provider otherwise determines are necessary to administer the plan or to allow the plan to meet Code and ERISA requirements,

- registers with the Secretary as a pooled plan provider and provides any other information that the Secretary may require, before beginning operations as a pooled plan provider,
- acknowledges in writing its status as a named fiduciary under ERISA and as the plan administrator, and
- is responsible for ensuring that all persons who handle plan assets or are plan fiduciaries are bonded in accordance with ERISA requirements.

The proposal specifies that the Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of the proposal.

In addition, the proposal provides that in determining whether a person meets the requirements to be a pooled plan provider with respect to any plan, all persons who perform services for the plan and who are treated as a single employer[42] are treated as one person.

Plan sponsor

The proposal also provides that, except with respect to the administrative duties (as a named fiduciary, as the plan administrator, and as the person responsible for the performance of all administrative duties) for which the pooled plan provider is responsible as described above, each employer in a plan which has a pooled plan provider will be treated as the plan sponsor with respect to the portion of the plan attributable to that employer's employees (or beneficiaries of such employees).

Guidance

The proposal directs the Secretary to issue guidance that the Secretary determines appropriate to carry out the proposal, including guidance (1) to identify the administrative duties and other actions required to be performed by a pooled plan provider, (2) that describes the procedures to be taken to terminate a plan that fails to meet the requirements to be a covered multiple employer plan, including the proper treatment of, and actions needed to be taken by, any employer in the plan and plan assets and liabilities attributable to employees of that employer (or beneficiaries of such employees), and (3) to identify appropriate cases in which corrective action will apply with respect to noncompliant employers. For purposes of (3), the Secretary is to take into account whether the failure of an employer or pooled plan provider to provide any disclosures or other information, or to take any other action, necessary to administer a plan or to

[42] Under subsection (b), (c), (m), or (o) of section 414.

allow a plan to meet the Code requirements for tax-favored treatment, has continued over a period of time that demonstrates a lack of commitment to compliance.

The proposal also directs the Secretary to publish model plan language that meets the Code and ERISA requirements under the proposal and that may be adopted in order to be treated as a pooled employer plan under ERISA.

Pooled employer plans under ERISA

In general

As described above, under the proposal, a pooled employer plan is treated for purposes of ERISA as a single plan that is a multiple employer plan. A "pooled employer plan" is defined as a plan (1) that is an individual account plan established or maintained for the purpose of providing benefits to the employees of two or more employers, (2) that is a qualified retirement plan or an IRA plan, and (3) the terms of which meet the requirements described below. A pooled employer plan does not include a plan maintained by employers which have a common interest other than having adopted the plan.

In order for a plan to be a pooled employer plan, the plan terms must—

- designate a pooled plan provider and provide that the pooled plan provider is a named fiduciary of the plan,
- designate one or more trustees (other than an employer in the plan)[43] to be responsible for collecting contributions to, and holding the assets of, the plan, and require the trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic,
- provide that each employer in the plan retains fiduciary responsibility for the selection and monitoring, in accordance with ERISA fiduciary requirements, of the person designated as the pooled plan provider and any other person who is also designated as a named fiduciary of the plan, and, to the extent not otherwise delegated to another fiduciary by the pooled plan provider (and subject to the ERISA rules relating to self-directed investments), the investment and management of the portion of the plan's assets attributable to the employees of that employer (or beneficiaries of such employees) in the plan,
- provide that employers in the plan, and participants and beneficiaries, are not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation, receipt of distributions, or otherwise transferring assets of the plan in accordance with applicable rules for plan mergers and transfers,
- require the pooled plan provider to provide to employers in the plan any disclosures or other information that the Secretary of Labor may require, including any disclosures or other information to facilitate the selection or any monitoring of the

[43] Any trustee must meet the requirements under the Code to be an IRA trustee.

pooled plan provider by employers in the plan, and require each employer in the plan to take any actions that the Secretary of Labor or pooled plan provider determines are necessary to administer the plan or to allow for the plan to meet the ERISA and Code requirements applicable to the plan, including providing any disclosures or other information that the Secretary of Labor may require or that the pooled plan provider otherwise determines are necessary to administer the plan or to allow the plan to meet such ERISA and Code requirements, and

- provide that any disclosure or other information required to be provided as described above may be provided in electronic form and will be designed to ensure only reasonable costs are imposed on pooled plan providers and employers in the plan.

In the case of a fiduciary of a pooled employer plan or a person handling assets of a pooled employer plan, the maximum bond amount under ERISA is $1 million.

The term "pooled employer plan" does not include a multiemployer plan. Such term also does not include a plan established before the date of enactment of the Family Savings Act of 2018 unless the plan administrator elects to have the plan treated as a pooled employer plan and the plan meets the ERISA requirements applicable to a pooled employer plan established on or after such date.

Pooled plan provider

The definition of pooled plan provider for ERISA purposes is generally similar to the definition under the Code portion of the proposal, described above.[44] The ERISA definition requires a person to register as a pooled plan provider with the Secretary of Labor and provide any other information that the Secretary of Labor may require, before beginning operations as a pooled plan provider.

The proposal specifies that the Secretary of Labor may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of the proposal.

Plan sponsor

The proposal also provides that except with respect to the administrative duties (as a named fiduciary, as the plan administrator, and as the person responsible for the performance of all administrative duties) for which the pooled plan provider is responsible as described above, each employer in a pooled employer plan will be treated as the plan sponsor with respect to the portion of the plan attributable to that employer's employees (or beneficiaries of such employees).

[44] In determining whether a person meets the requirements to be a pooled plan provider with respect to a plan, all persons who perform services for the plan and who are treated as a single employer under subsection (b), (c), (m), or (o) of section 414 are treated as one person.

Guidance

The proposal directs the Secretary of Labor to issue guidance that such Secretary determines appropriate to carry out the proposal, including guidance (1) to identify the administrative duties and other actions required to be performed by a pooled plan provider, and (2) that requires, in appropriate cases of a noncompliant employer, plan assets attributable to employees of the noncompliant employer (or beneficiaries of such employees) to be transferred to a plan maintained only by that employer (or its successor), to a tax-favored retirement plan for each individual whose account is transferred, or to any other arrangement that the Secretary of Labor determines in the guidance is appropriate,[45] and the noncompliant employer (and not the plan with respect to which the failure occurred or any other employer in the plan) to be liable for any plan liabilities attributable to employees of the noncompliant employer (or beneficiaries of such employees), except to the extent provided in the guidance. For purposes of (2), the Secretary of Labor is to take into account whether the failure of an employer or pooled plan provider to provide any disclosures or other information, or to take any other action, necessary to administer a plan or to allow a plan to meet the requirements of ERISA and the Code requirements for tax-favored treatment, has continued over a period of time that demonstrates a lack of commitment to compliance.

Form 5500 reporting

Under the proposal, the Form 5500 filing for a multiple employer plan (including a pooled employer plan) must include a list of the employers in the plan, a good faith estimate of the percentage of total contributions made by such employers during the plan year, and the aggregate account balances attributable to each employer in the plan (determined as the sum of the account balances of the employees of each employer (and the beneficiaries of such employees)); and with respect to a pooled employer plan, the identifying information for the person designated under the terms of the plan as the pooled plan provider. In addition, the proposal adds, to the list of pension plans to which simplified reporting may be prescribed by the Secretary of Labor, a multiple employer plan that covers fewer than 1,000 participants, but only if no single employer in the plan has 100 or more participants covered by the plan.

Effective Date

The proposal applies to plan years beginning after December 31, 2019, including reporting for purposes of Forms 5500 for plan years beginning after December 31, 2019.

Nothing in the Code amendments made by the proposal is to be construed as limiting the authority of the Secretary (or the Secretary's delegate) to provide for the proper treatment of a failure to meet any Code requirement with respect to any employer (and its employees) in a multiple employer plan.

[45] The Secretary of Labor may waive the requirement to transfer assets to another plan or arrangement in appropriate circumstances if the Secretary of Labor determines it is in the best interests of the employees of the noncompliant employer (and the beneficiaries of such employees) to retain the assets in the pooled employer plan.

B. Rules Relating to Election of Safe Harbor 401(k) Status

Present Law

Section 401(k) plans

A qualified defined contribution plan may include a qualified cash or deferred arrangement, under which employees may elect to have contributions made to the plan (referred to as "elective deferrals") rather than receive the same amount as current compensation (referred to as a "section 401(k) plan").[46] The maximum annual amount of elective deferrals that can be made by an employee for a year is $18,500 (for 2018) or, if less, the employee's compensation.[47] For an employee who attains age 50 by the end of the year, the dollar limit on elective deferrals is increased by $6,000 (for 2018) (called catch-up contributions).[48] The dollar limits for elective deferrals, including catch-up contributions, are subject to indexing; after any increase, an amount that is not a multiple of $500 is rounded to the next lowest multiple of $500. An employee's elective deferrals must be fully vested (nonforfeitable to the employee). A section 401(k) plan may also provide for employer matching and nonelective contributions, which may be subject to vesting conditions. A matching contribution is conditioned on the employee making elective deferrals,[49] while a nonelective contribution is not conditioned on whether an employee has elected to make contributions to the plan.

Automatic enrollment

A section 401(k) plan must provide each eligible employee with an effective opportunity to make or change an election to make elective deferrals at least once each plan year.[50] Whether an employee has an effective opportunity is determined based on all the relevant facts and circumstances, including the adequacy of notice of the availability of the election, the period of time during which an election may be made, and any other conditions on elections.

Section 401(k) plans are generally designed so that an employee will receive cash compensation unless the employee affirmatively elects to make elective deferrals to the section 401(k) plan. Alternatively, a plan may provide that elective deferrals are made at a specified rate when an employee becomes eligible to participate unless the employee elects

[46] Elective deferrals are generally made on a pretax basis and distributions attributable to elective deferrals are includible in income. However, a section 401(k) plan is permitted to include a "qualified Roth contribution program" that permits a participant to elect to have all or a portion of the participant's elective deferrals under the plan treated as after-tax Roth contributions. Certain distributions from a designated Roth account are excluded from income, even though they include earnings not previously taxed.

[47] Sec. 402(g).

[48] Sec. 414(v).

[49] Matching contributions may also be conditioned on the employee making Roth contributions or after-tax contributions.

[50] Treas. Reg. sec. 1.401(k)-1(e)(2)(ii).

otherwise (that is, affirmatively elects not to make contributions or to make contributions at a different rate). This plan design is referred to as automatic enrollment.

Nondiscrimination test

General rule and design-based safe harbors

An annual nondiscrimination test, called the actual deferral percentage test (the "ADP" test) applies to elective deferrals under a section 401(k) plan.[51] The ADP test generally compares the average rate of deferral for highly compensated employees to the average rate of deferral for nonhighly compensated employees and requires that the average deferral rate for highly compensated employees not exceed the average rate for nonhighly compensated employees by more than certain specified amounts. If a plan fails to satisfy the ADP test for a plan year based on the deferral elections of highly compensated employees, the plan is permitted to distribute deferrals to highly compensated employees ("excess deferrals") in a sufficient amount to correct the failure. The distribution of the excess deferrals must be made by the close of the following plan year.[52]

The ADP test is deemed to be satisfied if a section 401(k) plan includes certain minimum matching or nonelective contributions under either of two plan designs ("401(k) safe harbor plan"), described below, as well as certain required rights and features and satisfies a notice requirement.[53]

Safe harbor contributions

Under one type of 401(k) safe harbor plan ("basic 401(k) safe harbor plan"), the plan either (1) satisfies a matching contribution requirement ("matching contribution basic 401(k) safe harbor plan") or (2) provides for a nonelective contribution to a defined contribution plan of at least three percent of an employee's compensation on behalf of each nonhighly compensated employee who is eligible to participate in the plan ("nonelective basic 401(k) safe harbor plan"). The matching contribution requirement under the matching contribution basic 401(k) safe harbor requires a matching contribution equal to at least 100 percent of elective contributions of the employee for contributions not in excess of three percent of compensation, and 50 percent of elective contributions for contributions that exceed three percent of compensation but do not exceed five percent, for a total matching contribution of up to four percent of compensation. The required matching contributions and the three percent nonelective contribution under the basic 401(k) safe harbor must be immediately nonforfeitable (that is, 100 percent vested) when made.

[51] Sec. 401(k)(3).

[52] Sec. 401(k)(8).

[53] Secs. 401(k)(12) and (13). If certain additional requirements are met, matching contributions under 401(k) safe harbor plan may also satisfy a nondiscrimination test applicable under section 401(m).

Another safe harbor applies for a section 401(k) plan that include automatic enrollment ("automatic enrollment 401(k) safe harbor"). Under an automatic enrollment 401(k) safe harbor, unless an employee elects otherwise, the employee is treated as electing to make elective deferrals equal to a percentage of compensation as stated in the plan, not in excess of 10 percent and at least (1) three percent of compensation for the first year the deemed election applies to the participant, (2) four percent during the second year, (3) five percent during the third year, and (4) six percent during the fourth year and thereafter.[54] Under the automatic enrollment 401(k) safe harbor, the matching contribution requirement is 100 percent of elective contributions of the employee for contributions not in excess of one percent of compensation, and 50 percent of elective contributions for contributions that exceed one percent of compensation but do not exceed six percent, for a total matching contribution of up to 3.5 percent of compensation ("matching contribution automatic enrollment 401(k) safe harbor"). The rate of nonelective contribution under the automatic enrollment 401(k) safe harbor plan is three percent, as under the basic 401(k) safe harbor ("nonelective contribution automatic enrollment 401(k) safe harbor"). However, under the automatic enrollment 401(k) safe harbors, the matching and nonelective contributions are required to become 100 percent vested only after two years of service (rather than being required to be immediately vested when made).

Safe harbor notice

The notice requirement for a 401(k) safe harbor plan is satisfied if each employee eligible to participate is given, within a reasonable period before any year, written notice of the employee's rights and obligations under the arrangement and the notice meets certain content and timing requirements ("safe harbor notice"). To meet the content requirements, a safe harbor notice must be sufficiently accurate and comprehensive to inform an employee of the employee's rights and obligations under the plan, and be written in a manner calculated to be understood by the average employee eligible to participate in the plan. A safe harbor notice must provide certain information, including the plan's safe harbor contributions, any other plan contributions, the type and amount of compensation that may be deferred under the plan, how to make cash or deferred elections, the plan's withdrawal and vesting provisions, and specified contact information. In addition, a safe harbor notice for an automatic enrollment 401(k) safe harbor must describe certain additional information items, including the deemed deferral elections under the plan if the employee does not make an affirmative election and how contributions will be invested.

Delay in adopting nonelective 401(k) safe harbor

Generally the plan provisions for the requirements that must be satisfied to be a 401(k) safe harbor plan must be adopted before the first day of the plan year and remain in effect for an entire 12-month plan year. However, in the case of a nonelective 401(k) safe harbor plan (but not the matching contribution 401(k) safe harbor), a plan may be amended after the first day of the plan year but no later than 30 days before the end of the plan year to adopt the safe harbor plan provisions including providing the 3 percent of compensation nonelective contribution. The

[54] These automatic increases in default contribution rates are required for plans using the safe harbor. Rev. Rul. 2009–30, 2009-39 I.R.B. 391, provides guidance for including automatic increases in other plans using automatic enrollment, including under a plan that includes an eligible automatic contribution arrangement.

plan must also provide a contingent and follow-up notice. The contingent notice must be provided before the beginning of the plan year and specify that the plan may be amended to include the safe harbor nonelective contribution and, if it is so amended, a follow-up notice will be provided. If the plan is amended, the follow-up notice must be provided no later than 30 days before the end of the plan year stating that the safe harbor nonelective contribution will be provided.

Description of Proposal

In general

The proposal makes certain changes to the rules for the nonelective contribution 401(k) safe harbor.

Elimination of notice requirement

The proposal eliminates the safe harbor notice requirement with respect to nonelective 401(k) safe harbor plans. However, the general rule under present law requiring a section 401(k) plan to provide each eligible employee with an effective opportunity to make or change an election to make elective deferrals at least once each plan year still applies. As described above, relevant factors used in determining if this requirement is satisfied include the adequacy of notice of the availability of the election and the period of time during which an election may be made.

Delay in adopting provisions for nonelective 401(k) safe harbor

Under the proposal, unless a plan provided at any time during the plan year that 401(k) safe harbor matching contributions applied to the plan year, a plan can be amended to become a nonelective 401(k) safe harbor plan for a plan year (that is, amended to provide the required nonelective contributions and thereby satisfy the safe harbor requirements) at any time before the 30th day before the close of the plan year.

Further, unless a plan provided at any time during the plan year that 401(k) safe harbor matching contributions applied to the plan year, the proposal allows a plan to be amended after the 30th day before the close of the plan year to become a nonelective contribution 401(k) safe harbor plan for the plan year if (1) the plan is amended to provide for a nonelective contribution of at least four percent of compensation (rather than at least three percent) for all eligible employees for that plan year and (2) the plan is amended no later than the last day for distributing excess contributions for the plan year, that is, by the close of following plan year.

Effective Date

The proposal applies to plan years beginning after December 31, 2018.

C. Certain Taxable Non-Tuition Fellowship and Stipend Payments Treated as Compensation For IRA Purposes

Present Law

There are two general types of IRAs: traditional IRAs and Roth IRAs.[55] The total amount that an individual may contribute to one or more IRAs for a year is generally limited to the lesser of: (1) a dollar amount ($5,500 for 2018); and (2) the amount of the individual's compensation that is includible in gross income for the year.[56] In the case of an individual who has attained age 50 by the end of the year, the dollar amount is increased by $1,000. For a married couple, contributions can be made up to the dollar limit for each spouse if the combined compensation of the spouses that is includible in gross income is at least equal to the contributed amount.

An individual may make contributions to a traditional IRA (up to the contribution limit) without regard to his or her adjusted gross income. An individual may deduct his or her contributions to a traditional IRA if neither the individual nor the individual's spouse is an active participant in an employer-sponsored retirement plan. If an individual or the individual's spouse is an active participant in an employer-sponsored retirement plan, the deduction is phased out for taxpayers with adjusted gross income over certain levels.[57]

Individuals with adjusted gross income below certain levels may make contributions to a Roth IRA (up to the contribution limit).[58] Contributions to a Roth IRA are not deductible. As described above, an individual's IRA contributions cannot exceed the amount of his or her compensation that is includible in gross income. Subject to the rule for spouses, described above, an individual who has no compensation income generally is not eligible to make IRA contributions, even if the individual has other income that is includible in gross income.[59]

Description of Proposal

Under the proposal, an amount that is included in gross income and paid to an individual to aid the individual in the pursuit of graduate or postdoctoral study or research is treated as compensation taken into account for IRA contribution purposes.

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[55] Secs. 408 and 408A.

[56] Sec. 219(b)(1)(A) and (5), as referenced in secs. 408(a)(1) and (b)(2)(B) and 408A(c)(2). Under section 4973, IRA contributions in excess of the applicable limit are generally subject to an excise tax of six percent per year until withdrawn.

[57] Sec. 219(g).

[58] Sec. 408A(c)(3).

[59] Under a special rule in section 219(f)(1), alimony that is includible in gross income under section 71 is treated as compensation for IRA contribution purposes.

Effective Date

This proposal is effective for taxable years beginning after December 31, 2018.

D. Repeal of Maximum Age for Traditional IRA Contributions

Present Law

Under present law, an individual may make deductible contributions to a traditional IRA up to the IRA contribution limit if neither the individual nor the individual's spouse is an active participant in an employer-sponsored retirement plan.[60] If an individual (or the individual's spouse) is an active participant in an employer-sponsored retirement plan, the deduction is phased out for taxpayers with adjusted gross income ("AGI") for the taxable year over certain indexed levels.[61] To the extent an individual cannot or does not make deductible contributions to a traditional IRA, the individual may make nondeductible contributions to a traditional IRA (without regard to AGI limits). Alternatively, subject to AGI limits, an individual may make nondeductible contributions to a Roth IRA.[62]

An individual who has attained age 70½ by the close of a year is not permitted to make contributions to a traditional IRA.[63] This restriction does not apply to contributions to a Roth IRA.[64] In addition, employees over age 70½ are not precluded from contributing to employer-sponsored plans.

Description of Proposal

The proposal repeals the prohibition on contributions to a traditional IRA by an individual who has attained age 70½.

Effective Date

The proposal applies to contributions made for taxable years beginning after December 31, 2018.

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[60] Sec. 219.

[61] Sec. 219(g).

[62] Sec. 408(o). The annual contribution limit for IRAs is coordinated so that the maximum amount that can be contributed to all of an individual's IRAs (both traditional and Roth) for a taxable year is the lesser of a certain dollar amount ($5,500 for 2018) or the individual's compensation.

[63] Sec. 219(d)(1).

[64] Sec. 408A(c)(4).

E. Qualified Employer Plans Prohibited From Making Loans Through Credit Cards and Other Similar Arrangements

Present Law

Qualified employer-sponsored retirement plans may provide loans to participants. Unless the loan satisfies certain requirements in both form and operation, the amount of a retirement plan loan is a deemed distribution from the retirement plan.[65] These requirements include the following: the amount of the loan must not exceed the lesser of 50 percent of the participant's account balance or $50,000 (generally taking into account outstanding balances of previous loans); the terms of the loan must provide for a repayment period of not more than five years[66] and provide for level amortization of loan payments (with payments not less frequently than quarterly); and the terms of the loan must be legally enforceable. Subject to the limit on the amount of loans, which precludes any additional loan that would cause the limit to be exceeded, the rules relating to loans do not limit the number of loans an employee may obtain from a plan. Some arrangements have developed under which an employee can access plan loans through the use of a credit card or similar mechanism.

Description of Proposal

Under the proposal, a plan loan that is made through the use of a credit card or similar arrangement does not meet the requirements for loan treatment and is therefore a deemed distribution.

Effective Date

The proposal applies to loans made after the date of enactment.

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[65] Sec. 72(p). Pub. L. No. 115-97 extends the period during which a qualified plan loan offset amount may be contributed to an eligible retirement plan as a rollover contribution from 60 days after the date of the offset to the due date (including extensions) for filing the Federal income tax return for the taxable year in which the plan loan offset occurs (that is, the taxable year in which the amount is treated as distributed from the plan). A qualified plan loan offset amount is a plan loan offset amount that is treated as distributed from a qualified retirement plan, a section 403(b) plan**,** or a governmental section 457(b) plan solely by reason of the termination of the plan or the failure to meet the repayment terms of the loan because of the employee's severance from employment. A loan offset amount is the amount by which an employee's account balance under the plan is reduced to repay a loan from the plan.

[66] Loans specifically for home purchases may be repaid over a longer period.

F. Portability of Lifetime Income Investments

Present Law

Distribution restrictions for accounts under employer-sponsored plans

Types of plans and contributions

Tax-favored employer-sponsored retirement plans under which individual accounts are maintained for employees include qualified defined contribution plans, tax-deferred annuity plans (referred to as "section 403(b)" plans), and eligible deferred compensation plans of State and local government employers (referred to as "governmental section 457(b)" plans).[67]

Contributions to a qualified defined contribution plan or section 403(b) plan may include some or all of the following types of contributions:

- pretax elective deferrals (that is, pretax contributions made at the election of an employee in lieu of receiving cash compensation),
- after-tax designated Roth contributions (that is, elective deferrals made on an after-tax basis to a Roth account under the plan),
- after-tax employee contributions (other than designated Roth contributions),
- pretax employer matching contributions (that is, employer contributions made as a result of an employee's elective deferrals, designated Roth contributions, or after-tax contributions), and
- pretax employer nonelective contributions (that is, employer contributions made without regard to whether an employee makes elective deferrals, designated Roth contributions, or after-tax contributions).

Contributions to a governmental section 457(b) plan generally consist of pretax elective deferrals and, if provided for under the plan, designated Roth contributions.

Restrictions on in-service distributions

The terms of an employer-sponsored retirement plan generally determine when distributions are permitted. However, in some cases, statutory restrictions on distributions may apply.

Elective deferrals under a qualified defined contribution plan are subject to statutory restrictions on distribution before severance from employment, referred to as "in-service"

[67] Secs. 401(a), 403(a), 403(b), 457(b) and (e)(1)(A).

distributions.[68] In-service distributions of elective deferrals (and related earnings) generally are permitted only after attainment of age 59½ or termination of the plan. In-service distributions of elective deferrals (but not related earnings) are also permitted in the case of hardship.[69]

Other distribution restrictions may apply to contributions under certain types of qualified defined contribution plans. A profit-sharing plan generally may allow an in-service distribution of an amount contributed to the plan only after a fixed number of years (not less than two).[70] A money purchase pension plan generally may not allow an in-service distribution before attainment of age 62 (or attainment of normal retirement age under the plan if earlier) or termination of the plan.[71]

Elective deferrals under a section 403(b) plan are subject to in-service distribution restrictions similar to those applicable to elective deferrals under a qualified defined contribution plan, and, in some cases, other contributions to a section 403(b) plan are subject to similar restrictions.[72] Deferrals under a governmental section 457(b) plan are subject to in-service distribution restrictions similar to those applicable to elective deferrals under a qualified defined contribution plan, except that in-service distributions under a governmental section 457(b) plan apply until age 70½ (rather than age 59½).[73]

Distributions and rollovers

A distribution from an employer-sponsored retirement plan is generally includible in income except for any portion attributable to after-tax contributions, which result in basis.[74] Unless an exception applies, in the case of a distribution before age 59½ from a qualified

[68] Sec. 401(k)(2)(B). Similar restrictions apply to certain other contributions, such as employer matching or nonelective contributions required under the nondiscrimination safe harbors under section 401(k).

[69] The Bipartisan Budget Act of 2018, Pub. L. No. 115-123 ("BBA"), amends certain hardship distribution rules applicable to 401(k) plans, effective for plan years beginning after December 31, 2018. One such amendment under BBA section 41114 permits earnings on elective deferrals under a section 401(k) plan, as well as qualified nonelective contributions and qualified matching contributions (and attributable earnings), to be distributed on account of hardship.

[70] Rev. Rul. 71-295, 1971-2 C.B. 184, and Treas. Reg. sec. 1.401-1(b)(1)(ii). Similar rules apply to a stock bonus plan. Treas. Reg. sec. 1.401-1(b)(1)(iii).

[71] Sec. 401(a)(36) and Treas. Reg. secs. 1.401-1(b)(1)(i) and 1.401(a)-1(b).

[72] Secs. 403(b)(7)(A)(ii) and 403(b)(11).

[73] Sec. 457(d)(1)(A).

[74] Secs. 402(a), 403(b)(1) and 457(a)(1). Under section 402A(d), a qualified distribution from a designated Roth account under an employer-sponsored plan is not includible in income.

retirement plan or a section 403(b) plan, any amount included in income is subject to an additional 10-percent tax, referred to as the "early withdrawal" tax.[75]

A distribution from an employer-sponsored retirement plan generally may be rolled over on a nontaxable basis to another such plan or to an individual retirement arrangement ("IRA"), either by a direct transfer to the recipient plan or IRA or by contributing the distribution to the recipient plan or IRA within 60 days of receiving the distribution.[76] If the distribution from an employer-sponsored retirement plan consists of property, the rollover is accomplished by a transfer or contribution of the property to the recipient plan or IRA.

Investment of accounts under employer-sponsored plans

Qualified defined contribution plans, section 403(b) plans, and governmental section 457(b) plans commonly allow employees to direct the manner in which their accounts are invested. Employees may be given a choice among specified lifetime investments, such as a choice of specified mutual funds, and, in some cases, may be able to direct the investment of their accounts in any product, instrument or investment offered in the market.

The investment options under a particular employer-sponsored retirement plan may change at times.[77] Similarly, a plan that allows employees to direct the investment of their accounts in any product, instrument or investment offered in the market may be amended to limit the investments that can be held in the plan. In these cases, employees may be required to change the investments held within their accounts.

The terms of some investments impose a charge or fee when the investment is liquidated, particularly if the investment is liquidated within a particular period after acquisition. For example, a lifetime income product, such as an annuity contract, may impose a surrender charge if the investment is discontinued.

If an employee has to liquidate an investment held in an employer-sponsored retirement plan because of a change in investment options or a limit on investments held in the plan, the employee may be subject to a charge or fee as described above. In addition, restrictions on in-service distributions may prevent the employee from preserving the investment through a rollover.

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[75] Sec. 72(t).

[76] Secs. 402(c), 402A(c)(3), 403(b)(8) and 457(e)(16).

[77] In the case of a plan subject to ERISA, a participant's exercise of control over the investment of the assets in his or her account by choosing among the investment options offered under the plan does not relieve a plan fiduciary from the duty to prudently select and monitor the investment options offered to participants. 29 C.F.R. sec. 2550.404c-1(d)(2)(iv) (2010); *Tibble v. Edison International*, No. 13-550, 135 S. Ct. 1823 (2015). The duty to monitor investment options may result in a change in the options offered.

Description of Proposal

Under the proposal, if a lifetime income investment is no longer authorized to be held as an investment option under a qualified defined contribution plan, section 403(b) plan, or governmental section 457(b) plan, except as otherwise provided in guidance, the plan does not fail to satisfy the Code requirements applicable to the plan solely by reason of allowing (1) qualified distributions of a lifetime income investment, or (2) distributions of a lifetime income investment in the form of a qualified plan distribution annuity contract. Such a distribution must be made within the 90-day period ending on the date when the lifetime income investment is no longer authorized to be held as an investment option under the plan.

For purposes of the proposal, a qualified distribution is a direct trustee-to-trustee transfer to another employer-sponsored retirement plan or IRA.[78] A lifetime income investment is an investment option designed to provide an employee with election rights (1) that are not uniformly available with respect to other investment options under the plan and (2) that are rights to a lifetime income feature available through a contract or other arrangement offered under the plan (or under another employer-sponsored retirement plan or IRA through a direct trustee-to-trustee transfer). A lifetime income feature is (1) a feature that guarantees a minimum level of income annually (or more frequently) for at least the remainder of the life of the employee or the joint lives of the employee and the employee's designated beneficiary, or (2) an annuity payable on behalf of the employee under which payments are made in substantially equal periodic payments (not less frequently than annually) over the life of the employee or the joint lives of the employee and the employee's designated beneficiary. Finally, a qualified plan distribution annuity contract is an annuity contract purchased for a participant and distributed to the participant by an employer-sponsored retirement plan or an employer-sponsored retirement plan contract.[79]

Effective Date

The proposal applies to plan years beginning after December 31, 2018.

[78] For this purpose, an employer-sponsored retirement plan or IRA means such a plan or IRA that is an eligible retirement plan under section 402(c)(8)(B).

[79] For this purpose, an employer-sponsored retirement plan contract is an annuity contract distributed from an eligible retirement plan described in section 402(c)(8)(B) other than an IRA or individual retirement annuity.

G. Treatment of Custodial Accounts on Termination of Section 403(b) Plans

Present Law

Tax-sheltered annuities (section 403(b) plans)

Section 403(b) plans are a form of tax-favored employer-sponsored plan that provide tax benefits similar to qualified retirement plans. Section 403(b) plans may be maintained only by (1) charitable tax-exempt organizations, and (2) educational institutions of State or local governments (that is, public schools, including colleges and universities). Many of the rules that apply to section 403(b) plans are similar to the rules applicable to qualified retirement plans, including section 401(k) plans. Employers may make nonelective or matching contributions to such plans on behalf of their employees, and the plan may provide for employees to make pre-tax elective deferrals, designated Roth contributions (held in designated Roth accounts)[80] or other after-tax contributions. Generally section 403(b) plans provide for contributions toward the purchase of annuity contracts or provide for contributions to be held in custodial accounts for each employee. In the case of contributions to custodial accounts under a section 403(b) plan, the amounts must be invested only in regulated investment company stock.[81] Contributions to a custodial account are not permitted to be distributed before the employee dies, attains age 59½, has a severance from employment, or, in the case of elective deferrals, encounters financial hardship.

A section 403(b) plan is permitted to contain provision for plan termination and that allow accumulated benefits to be distributed on termination.[82] In order for a plan termination to be effectuated, however, all plan assets must be distributed to participants.

Rollovers

A distribution from a section 403(b) plan that is an eligible rollover distribution may be rolled over to an eligible retirement plan (which include another 403(b) plan, a qualified retirement plan, and an IRA).[83] The rollover generally can be achieved by direct rollover (direct payment from the distributing plan to the recipient plan) or by contributing the distribution to the eligible retirement plan within 60 days of receiving the distribution ("60-day rollover").[84]

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[80] Sec. 402A.

[81] Sec. 403(b)(7).

[82] Treas. Reg. sec. 1.403(b)-10(a).

[83] Sec. 403(b)(8). Similar rules apply to distributions from qualified retirement plans and governmental section 457(b) plans.

[84] Under section 402(c)(11), any distribution to a beneficiary other than the participant's surviving spouse is only permitted to be rolled over to an IRA using a direct rollover; 60-day rollovers are not available to nonspouse beneficiaries.

Amounts that are rolled over are usually not included in gross income. Generally, a distribution of any portion of the balance to the credit of a participant is an eligible rollover distribution with exceptions, for example, certain periodic payments, required minimum distributions, and hardship distributions.[85]

Roth conversions

Distributions from section 403(b) plans may be rolled into a Roth IRA.[86] Distributions from these plans that are rolled over into a Roth IRA and that are not distributions from a designated Roth account must be included in gross income. Further, a section 403(b) plan that allows employees to make designated Roth contributions may also allow employees to elect to transfer amounts held in accounts that are not designated Roth accounts into designated Roth accounts, but the amount transferred must be included in income as though it were distributed.[87]

Approved nonbank trustees required for IRAs

An IRA can be a trust, a custodial account, or an annuity contract. The Code requires that the trustee or custodian of an IRA be a bank (which is generally subject to Federal or State supervision) or an IRS approved nonbank trustee, that an annuity contract be issued by an insurance company (which is subject to State supervision), and that an IRA trust or custodial account be created and organized in the United States.

In order for a trustee or custodian that is not a bank to be an IRA trustee or custodian, the entity must apply to the IRS for approval. Treasury Regulations list a number of factors that are taken into account in approving an applicant to be a nonbank trustee.[88] The applicant must demonstrate fiduciary ability (ability to act within accepted rules of fiduciary conduct including continuity and diversity of ownership), capacity to account (experience and competence with other activities normally associated with handling of retirement funds), and ability to satisfy other rules of fiduciary conduct which includes a net worth requirement. Because it is an objective requirement that may be difficult for some applicants to satisfy, the net worth requirement is the most significant of the requirements for nonbank trustees.

To be approved, the entity must have a net worth of at least $250,000 at the time of the application. There is a maintenance rule that varies depending on whether the trustee is an active trustee or a passive trustee and that includes minimum dollar amounts and minimum amounts as

[85] Sec. 402(c)(4). Treas. Reg. sec. 1.402(c)-1 identifies certain other payments that are not eligible for rollover, including, for example, certain corrective distributions, loans that are treated as deemed distributions under section 72(p), and dividends on employer securities as described in section 404(k).

[86] Sec. 408A(d)(3). Similar rules apply to qualified retirement plans and governmental section 457(b) plans.

[87] Sec. 402A(d)(4). Similar rules apply to qualified retirement plans and governmental section 457(b) plans.

[88] Treas. Reg. sec. 1.408-2(e).

a percentage of assets held in fiduciary accounts. A special rule is provided for nonbank trustees that are members of the Security Investor Protection Corporation ("SIPC").

Description of Proposal

Under the proposal, if an employer terminates a section 403(b) plan under which amounts are contributed to custodial accounts, and the person holding the assets of the accounts is an IRS approved nonbank trustee, then, as of the date of the termination, the custodial accounts are deemed to be IRAs. Only a custodial account under a section 403(b) plan that is a designated Roth account is treated as a Roth IRA upon termination of the section 403(b) plan.

Effective Date

The proposal applies to plan terminations occurring after December 31, 2018.

H. Clarification of Retirement Income Account Rules Relating to Church-Controlled Organizations

Present Law

Assets of a tax-sheltered annuity plan ("section 403(b)" plan), generally must be invested in annuity contracts or mutual funds.[89] However, the restrictions on investments do not apply to a retirement income account, which is a defined contribution program established or maintained by a church, or a convention or association of churches, to provide benefits under the plan to employees of a religious, charitable or similar tax-exempt organization.[90]

Certain rules prohibiting discrimination in favor of highly compensated employees, which apply to section 403(b) plans generally, do not apply to a plan maintained by a church or qualified church-controlled organization.[91] For this purpose, church means a church, a convention or association of churches, or an elementary or secondary school that is controlled, operated, or principally supported by a church or by a convention or association of churches, and includes a qualified church-controlled organization. A qualified church-controlled organization is any church-controlled tax-exempt organization other than an organization that (1) offers goods, services, or facilities for sale, other than on an incidental basis, to the general public, other than goods, services, or facilities that are sold at a nominal charge substantially less than the cost of providing the goods, services, or facilities, and (2) normally receives more than 25 percent of its support from either governmental sources, or receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in activities that are not unrelated trades or businesses, or from both. Church-controlled organizations that are not qualified church-controlled organizations are generally referred to as "nonqualified church-controlled organizations."

In recent years, a question has arisen as to whether employees of nonqualified church-controlled organizations may be covered under a section 403(b) plan that consists of a retirement income account.

Description of Proposal

The proposal clarifies that a retirement income account may cover a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation; an employee of an organization, whether a civil law corporation or

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[89] Sec. 403(b)(1)(A) and (7).

[90] Sec. 403(b)(9)(B), referring to organizations exempt from tax under section 501(c)(3). For this purpose, a church or a convention or association of churches includes an organization described in section 414(e)(3)(A), that is, an organization, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, provided that the organization is controlled by or associated with a church or a convention or association of churches.

[91] Sec. 403(b)(1)(D) and (12).

otherwise, that is exempt from tax under section 501 and is controlled by or associated with a church or a convention or association of churches; and an employee who is included in a church plan under certain circumstances after separation from the service of a church, a convention or association of churches, or an organization described above.[92]

Effective Date

The proposal applies to plan years beginning after December 31, 2008.

[92] These individuals are described in sections 414(e)(3)(B) and (E).

I. Exemption from Required Minimum Distribution Rules for Individuals with Certain Account Balances

Present law

Required minimum distributions

Employer-provided qualified retirement plans, traditional IRAs, and individual retirement annuities are subject to required minimum distribution rules. A qualified retirement plan for this purpose means a tax-qualified plan described in section 401(a) (such as a defined benefit pension plan or a section 401(k) plan), employee retirement annuities described in section 403(a), tax-sheltered annuities described in section 403(b), and a plan described in section 457(b) that is maintained by a governmental employer.[93] An employer-provided qualified retirement plan that is a defined contribution plan is a plan which provides (1) an individual account for each participant and (2) for benefits based on the amount contributed to the participant's account, and any income, expenses, gains, losses, and forfeitures of accounts of other participants which may be allocated to such participant's account.[94]

Required minimum distributions generally must begin by April 1 of the calendar year following the calendar year in which the individual (employee or IRA owner) reaches age 70½. However, in the case of an employer-provided qualified retirement plan, the required minimum distribution date for an individual who is not a 5-percent owner of the employer maintaining the plan may be delayed to April 1 of the year following the year in which the individual retires if the plan provides for this later distribution date. For all subsequent years, including the year in which the individual was paid the first required minimum distribution by April 1, the individual must take the required minimum distribution by December 31 of the year.

For IRAs and defined contributions plans, the required minimum distribution for each year generally is determined by dividing the account balance as of the end of the prior year by a distribution period,[95] generally a number in the uniform lifetime table.[96] This table is based on joint life expectancies of the individual and a hypothetical beneficiary 10 years younger than the individual. For an individual with a spouse as designated beneficiary who is more than 10 years younger (and thus the number of years in the couple's joint life expectancy is greater than the uniform life time table), the joint life expectancy of the couple is used. There are special rules in the case of annuity payments from an insurance contract.

If an individual dies on or after the individual's required beginning date, the required minimum distribution is also determined by dividing the account balance as of the end of the

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[93] The required minimum distribution rules also apply to section 457(b) plans maintained by tax-exempt employers other than governmental employers.

[94] Sec. 414(i).

[95] Treas. Reg. sec. 1.401(a)(9)-5.

[96] Treas. Reg. sec. 1.401(a)(9)-9.

prior year by a distribution period. The distribution period is equal to the remaining years of the beneficiary's life expectancy or, if there is no designated beneficiary, a distribution period equal to the remaining years of the deceased individual's single life expectancy, using the age of the deceased individual in the year of death.[97]

In the case of an individual who dies before the individual's required beginning date, there are two methods for satisfying the after death required minimum distribution rules, the life expectancy rule or the five year rule. Under the life expectancy rule, annual required minimum distributions must begin no later than December 31 of the calendar year immediately following the calendar year in which the individual died. This rule is only available if the designated beneficiary is an individual (*e.g.*, not the individual's estate or a charity). If the designated beneficiary is the individual's spouse, commencement of distributions can be delayed until December 31 of the calendar year in which the deceased individual would have attained age 70½. The required minimum distribution for each year is also determined by dividing the account balance as of the end of the prior year by a distribution period, which is determined by reference to the beneficiary's life expectancy.[98] Under the five-year rule, the individual's entire account must be distributed no later than December 31 of the calendar year containing the fifth anniversary of the individual's death.[99]

A special after-death rule applies for an IRA if the beneficiary of the IRA is the surviving spouse. The surviving spouse is permitted to choose to calculate required minimum distributions while the spouse is alive, and after the spouse's death, as though the spouse is the IRA owner, rather than a beneficiary.

Roth IRAs are not subject to the minimum distribution rules during the IRA owner's lifetime. However, Roth IRAs are subject to the post-death minimum distribution rules that apply to traditional IRAs. For Roth IRAs, the IRA owner is treated as having died before the individual's required beginning date. Thus only the life expectancy rule and the five year rule apply.

Failure to make a required minimum distribution triggers a 50-percent excise tax, payable by the individual or the individual's beneficiary. The tax is imposed during the taxable year that begins with or within the calendar year during which the distribution was required.[100] The tax may be waived if the distribution did not occur because of reasonable error and reasonable steps are taken to remedy the violation.[101]

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[97] Treas. Reg. sec. 1.401(a)(9)-5, A-5(a).

[98] Treas. Reg. sec. 1.401(a)(9)-5, A-5(b).

[99] Treas. Reg. sec. 1.401(a)(9)-3, Q&As 1, 2.

[100] Sec. 4974(a).

[101] Sec. 4974(d).

Eligible rollover distributions

With certain exceptions, distributions from an employer-provided qualified retirement plan are eligible to be rolled over tax free into another employer-provided qualified retirement plan or an IRA. This can be achieved by contributing the amount of the distribution to the other plan or IRA within 60 days of the distribution, or by a direct payment by the plan to the other plan or IRA (referred to as a "direct rollover"). Distributions that are not eligible for rollover include (i) any distribution that is one of a series of periodic payments generally for a period of 10 years or more (or, if a shorter period, certain life expectancies) and (ii) any distribution to the extent that the distribution is a required minimum distribution.[102]

For any distribution that is eligible for rollover, an employer-provided tax-qualified retirement plan must offer the distributee the right to have the distribution made in a direct rollover[103] and, before making the distribution, the plan administrator must provide the distributee with a written explanation of the direct rollover right and related tax consequences.[104] If a distributee does not choose to have the distribution made in a direct rollover, the distribution is generally subject to mandatory 20-percent income tax withholding.[105]

Description of Proposal

Under the proposal, if on the last day of any calendar year, the aggregate value of an individual's entire interest under all applicable eligible retirement plans does not exceed an applicable dollar limit in effect for that year, then the required minimum distribution requirements with respect to a distribution relating to such year shall not apply to that individual. The applicable dollar limit is $50,000 and is subject to indexing; if the dollar amount after any increase is not a multiple of $5,000, it is rounded to the next lowest multiple of $5,000. For this purpose, an applicable eligible retirement plan means a tax-qualified plan described in section 401(a) (other than a defined benefit plan), IRAs and individual retirement annuities under section 408, employee retirement annuities described in section 403(a), tax-sheltered annuities described in section 403(b), and a plan described in section 457(b) that is maintained by a governmental employer.

If the aggregate value of an individual's entire interest under all applicable eligible retirement plans does exceed the applicable dollar limit, the amount to be distributed as a required minimum distribution for that individual will not exceed an amount equal to the excess of the aggregate value of that individual's entire interest under such plans on the last day of the

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[102] Sec. 402(c)(4). Distributions that are not eligible rollover distributions also include distributions made upon hardship of the employee and any qualified disaster relief distribution (within the meaning of section 72(t)(2)(G)).

[103] Sec. 401(a)(31)

[104] Sec. 402(f).

[105] Sec. 3405(c). This mandatory withholding does not apply to a distributee that is a beneficiary other than a surviving spouse of an employee.

calendar year to which such distribution relates, over the applicable dollar limit in effect for that calendar year.

The proposal provides that in the case of an employer plan which is an applicable eligible retirement plan, the plan will not be treated as failing to meet these requirements in the case of any failure to make a required minimum distribution for a calendar year if the aggregate value of an employee's interest under all such plans of the employer on the last day of the preceding calendar year does not exceed the applicable dollar limit in effect for that year, and the employee certifies that the aggregate value of the employee's interest under all applicable retirement plans on the last day of such preceding calendar year held by the employee did not exceed the applicable dollar limit in effect for that year.

In addition, the proposal provides that not later than January 31 of each year, the plan administrator (or as applicable, the trustee of an IRA or the issuer of an individual retirement annuity) of each applicable eligible retirement plan will report to the Secretary and to each participant in each plan (or as applicable, each individual owner of an account or annuity) who has attained age 69 as of the end of the preceding calendar year (1) the name and plan number of the plan, account or annuity; (2) the name and address of the plan administrator, trustee, or issuer; (3) the name, address and taxpayer identification number of the participant or individual; and (4) the account balance of the participant or individual as of the end of the preceding calendar year.

Effective Date

The proposal is effective for distributions required to be made after the first calendar year beginning at least 120 days after the date of enactment.

J. Clarification of Treatment of Certain Retirement Plan Contributions Picked Up by Governmental Employers For New or Existing Employees

Present Law

Taxation of contributions to qualified retirement plans

Contributions to qualified retirement plans generally fall into three categories: employer contributions, employee contributions, and elective deferrals. Generally, the type or types of contributions made to a plan is determined by the terms of the plan.

Employer contributions to a qualified retirement plan are not includible in an employee's income at the time of contribution and are not wages for purposes of tax under the Federal Insurance Contributions Act ("FICA").[106]

An amount contributed to a qualified retirement plan at the election of an employee is generally treated as an employee after-tax contribution and thus is includible in income. Employee contributions are also generally wages for FICA tax purposes.

A qualified defined contribution plan may include a section 401(k) plan, under which employees may choose to make elective deferrals rather than receive the same amount as current compensation.[107] Elective deferrals are subject to certain rules. For example, elective deferrals must be fully vested and may not exceed an annual limit ($18,500 for 2018).[108] Elective deferrals are not includible in income at the time of contribution; however, they are wages for FICA tax purposes.

A distribution of benefits from a qualified retirement plan generally is includible in gross income in the year it is paid or distributed, except to the extent the amount distributed represents a return of the employee's after-tax contributions (*i.e.*, basis).

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[106] Secs. 3101-3128. FICA tax consists of two parts: (1) old age, survivor, and disability insurance ("OASDI") and (2) Medicare hospital insurance ("HI"). The OASDI tax rate is 6.2 percent for each the employee and employer (for a total rate of 12.4 percent). The OASDI tax rate applies to employee wages up to the OASDI wage base ($128,400 for calendar year 2018). The HI tax rate is 1.45 percent on each the employee and the employer (for a total rate of 2.9 percent) and applies to all wages. The employee portion of the HI tax (not the employer portion) is increased by an additional tax of 0.9 percent on wages received in excess of a threshold amount. The threshold amount is $250,000 in the case of a joint return, $125,000 in the case of a married individual filing a separate return, and $200,000 in any other case.

[107] Elective deferrals are generally made on a pretax basis and distributions attributable to elective deferrals are includible in income. However, a section 401(k) plan is permitted to include a "qualified Roth contribution program" that permits a participant to elect to have all or a portion of the participant's elective deferrals under the plan treated as after-tax Roth contributions. Certain distributions from a designated Roth account are excluded from income, even though they include earnings not previously taxed.

[108] A State or local governmental employer may not maintain a 401(k) plan unless it maintained a 401(k) plan before May 6, 1986. However, other arrangements similar to 401(k) plans are available to State and local governmental employers, such as eligible deferred compensation plans (section 457).

Special rules for State and local governmental plans

Some defined benefit pension plans require employee contributions. In many cases, governmental employees are required to participate in and contribute to a defined benefit pension plan as a condition of employment.[109] In such cases, the required employee contributions are generally withheld from employees' salaries. In some cases, a governmental plan may cover employees of different governmental entities. For example, a plan established by a State may cover employees of various State agencies or employees of the State and of local governments within the State. In such cases, the plan may provide employers with the option of paying required employee contributions on behalf of their employees, rather than withholding the required contributions from employees' salaries.

Under a special rule, in the case of a plan maintained by a State or local government, if contributions are designated as employee contributions, but the State or local governmental employer "picks up" (*i.e.*, pays) the contributions, contributions so picked up ("pick-up contributions") are treated as employer contributions.[110] As a result of being treated as employer contributions, pick-up contributions are not includible in employees' income at the time of contribution.

Legislative history indicates that the pick-up rules were intended to apply to situations in which amounts are designated as employee contributions under a State or local governmental plan, but the governmental employer pays all or a part of the employee's contribution without withholding the amount from the employee's salary. In this situation, the portion of the contribution that is "picked up" by the government was viewed as, in substance, an employer contribution for Federal tax purposes, even though designated as an employee contribution for purposes of State law. [111]

Although pick-up contributions are treated as employer contributions for income tax purposes, pick-up contributions made pursuant to a salary reduction agreement are wages for FICA tax purposes.[112] However, compensation of State and local government employees who are covered by a qualified retirement plan may be generally exempt from FICA tax.[113]

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[109] A governmental plan may also allow an employee to purchase additional service credit (such as credit for military service) by making additional employee contributions.

[110] Sec. 414(h)(2).

[111] See H.R. Rep. No. 93-807, at 145 (1974).

[112] Sec. 3121(v)(1)(B). For this purpose, a salary reduction agreement includes any arrangement in which there is a reduction in the employee's salary in connection with the employer's contribution of a corresponding amount to a pension plan on the employee's behalf, regardless of whether the employee approves or chooses participation in the plan or whether participation is mandatory. See H.R. Rep. No. 98-861, at 1415 (1984), and *State of New Mexico v. Shalala*, 153 F.3d 1160 (10th Cir. 1998).

[113] Sec. 3121(b)(7)(F).

IRS guidance has applied pick-up treatment in situations in which employees' salaries are reduced by the amount of the contribution as long as individual employees are not given the option of choosing to receive amounts directly instead of having them paid by the employer to the plan.[114] The IRS has issued numerous private letter rulings to taxpayers that deal with the application of the pick-up rules to particular arrangements. Many of these rulings apply pick-up treatment to employee contributions to a State or local governmental pension plan that are required as a condition of employment and withheld from employees' salary. The IRS also has ruled favorably on arrangements that allow individual employees to make an irrevocable election to have contributions made to a plan on their behalf by payroll deduction if a State statute or similar provision provides that the contributions are being paid by the employer in lieu of contributions by the employee.[115] The rulings conclude that, in these circumstances, the employee does not have the option of receiving the amounts directly and that pick-up treatment applies.

Rev. Rul. 2006-43[116] provides that a contribution to a qualified plan established by a State government will not be treated as picked up by the employing unit unless the employing unit (1) specifies that contributions, although designated as employee contributions, are being paid by the employer (which is taken by formal action by a duly authorized person which must only apply prospectively and be evidenced by a contemporaneous written document); and (2) does not permit a participating employee from and after the date of the "pick-up" to have a cash or deferred election right with respect to designated employee contributions.

Description of Proposal

Under the proposal, a contribution shall not fail to be treated as picked up by an employing unit merely because the employee may make an irrevocable election between the application of two alternative benefit formulas involving the same or different levels of

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[114] See, *e.g.*, Rev. Rul. 81-36, 1981-1 C.B. 255. (The employer must also specify that the contributions are being paid by the employer in lieu of contributions by the employee.) Compare Rev. Rul. 81-35, 1981-1 C.B. 255, which denies pick-up treatment to contributions made pursuant to an individual employment agreement under which the employer contributes a certain percentage of the employee's salary to the State's pension plan on behalf of the employee. In Priv. Ltr. Rul. 201417025 (Jan. 28, 2014), the IRS ruled that where a state retirement system had added a qualified defined contribution plan to its qualified defined benefit plan and provided employees who participated in or were eligible to participate in the defined benefit plan a one-time opportunity to move to the defined contribution plan and continue to have their employee contributions treated as "picked up" by the employer, and also provided employees with an additional opportunity to move to the defined contribution plan (1) the amounts transferred, either time, were not distributions, and the transfers did not result in currently taxable income to the participant and (2) neither election to transfer between plans constituted a cash or deferred arrangement under sec. 401(k).

[115] See, *e.g.*, Priv. Ltr. Rul. 200423040 (March 9, 2004) (employees may elect whether to participate in a defined benefit pension plan that requires employee contributions) and Priv. Ltr. Rul. 200317034 (October 10, 2002) (employees may elect to have contributions made to a defined benefit pension plan by payroll reduction to purchase additional service credit). In addition, under Priv. Ltr. Rul. 200317024 (September 30, 2002), pick-up treatment applies to contributions made to a defined contribution plan at the election of employees. This ruling suggests that the pick-up rules may be used to make pretax employee contributions to a defined contribution plan without complying with the rules applicable to elective deferrals.

[116] 2006-35 I.R.B. 329, August 28, 2006.

employee contributions. The proposal leads to a different result than the conclusion reached in Rev. Rul. 2006-43 by permitting an employee contribution to be treated as having been picked up by a State or local governmental employer (and treated as an employer contribution) where the employee makes an irrevocable election between the application of two alternative benefit formulas involving the same or different levels of employee contributions.

Effective Date

The proposal applies to plan years beginning after the date of enactment.

K. Elective Deferrals by Members of the Ready Reserve of a Reserve Component of the Armed Forces

Present Law

Elective deferrals

Tax-favored employer-sponsored retirement plans may allow an employee to make an election between cash and an employer contribution to the plan pursuant to a qualified cash or deferred arrangement or a salary reduction agreement.[117] Amounts contributed pursuant to these qualified cash or deferred arrangements and salary reduction agreements are referred to as elective deferrals. The total elective deferrals that may be made by an individual for a year are subject to a dollar limit, generally $18,500 for 2018.[118] An employee age 50 or over may make additional elective deferrals, referred to as catch-up contributions, generally limited to $6,000 for 2018.[119] These limits apply to the total amount of elective deferrals that an individual may contribute for the year, whether to a single plan or to multiple plans, for example, plans of different employers for whom the individual works during the year.

Thrift Savings Plan and the Ready Reserve

The Thrift Savings Plan ("TSP") is a tax-favored retirement plan sponsored by the Federal government under which Federal employees may contribute elective deferrals.[120] Elective deferrals made to the TSP are subject to the same limits as elective deferrals made to other employer-sponsored retirement plans, including elective deferrals made to plans of different employers for whom the individual works during the year.

The Armed Forces of the United States include seven reserve components: the Army National Guard, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard, the Air Force Reserve, and the Coast Guard Reserve. The Ready Reserve consists of members of the reserve components who are usually called to active duty before other members. A member of the Ready Reserve who is in pay status may make elective deferrals to the TSP. In the case of a member of the Ready Reserve who is eligible to contribute elective deferrals to the TSP in that capacity and to another plan in connection with other employment, the general limit on elective deferrals applies to the total elective deferrals made to the TSP and the other plan. In the case of a member of the Ready Reserve who is also a civilian Federal employee and eligible to make elective deferrals to the TSP in that capacity, the general limit on elective deferrals applies to the total elective deferrals made to the TSP in both capacities.

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[117] See, for example, sections 401(k) and 403(b).

[118] Sec. 402(g).

[119] Sec. 414(v). The total of an employee's elective deferrals for a year, including catch-up contributions, cannot exceed the employee's compensation for the year.

[120] Sec. 7701(j). The provisions of TSP are governed also by 5 U.S.C. 8430 through 8440f.

Description of Proposal

Under the proposal, if an individual who is a member of the Ready Reserve makes elective deferrals to the TSP in that capacity, a separate limit (including a separate catch-up contribution limit) applies to all other elective deferrals that may be made by that individual. This separate limit applies only to one other plan or to the TSP in connection with other employment (that is, employment other than that as a member of the Ready Reserve) of that individual based on the individual's compensation in that other employment. Accordingly, if a member of the Ready Reserve makes elective deferrals to the TSP both as a Reservist and also as a civilian Federal employee, separate limits (including a separate catch-up contribution limit) will apply to the elective deferrals made to the TSP by the individual as a member of the Ready Reserve and in the individual's capacity as a civilian Federal employee. If a member of the Ready Reserve makes elective deferrals to the TSP as a Reservist and also makes elective deferrals to a private sector plan as a private sector employee, separate limits (including a separate catch-up contribution limit) will apply to the elective deferrals made to the TSP by the individual as a member of the Ready Reserve and to the elective deferrals made to the private sector plan in the individual's capacity as a private sector employee.

Effective Date

The proposal is effective for plan years beginning after December 31, 2018.

TITLE II – ADMINISTRATIVE IMPROVEMENTS

A. Plan Adopted by Filing Due Date for Year May be Treated as in Effect as of Close of Year

Present Law

In order for a qualified retirement plan to be treated as maintained for a taxable year, the plan must be adopted by the last day of the taxable year.[121] However, the trust under the plan will not fail to be treated as in existence due to lack of corpus merely because it holds no assets on the last day of the taxable year.[122] Contributions made by the due date (plus extensions) of the tax return for the employer maintaining the plan for a taxable year are treated as contributed on account of that taxable year.[123] Thus a plan can be established on the last day of a taxable year even though the first contribution is not made until the due date of the employer's return of tax for the taxable year. Further, if the terms of a plan adopted during an employer's taxable year fail to satisfy the qualification requirements that apply to the plan for the year, the plan may also be amended retroactively by the due date (including extensions) of the employer's return, provided that the amendment is made retroactively effective.[124] However, this provision does not allow a plan to be adopted after the end of a taxable year and made retroactively effective, for qualification purposes, for the taxable year prior to the taxable year in which the plan was adopted by the employer.[125]

Description of Proposal

Under the proposal, if an employer adopts a qualified retirement plan after the close of a taxable year but before the time prescribed by law for filing the return of tax of the employer for the taxable year (including extensions thereof), the employer may elect to treat the plan as having been adopted as of the last day of the taxable year.

The proposal does not override rules requiring certain plan provisions to be in effect during a plan year, such as the provision for elective deferrals under a qualified cash or deferral arrangement ("generally referred to as a 401(k) plan").[126]

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[121] Rev. Rul. 76-28, 1976-1 C.B. 106.

[122] Rev. Rul. 81-114, 1981-1 C.B. 207.

[123] Sec. 404(a)(6).

[124] Sec. 401(b).

[125] Treas. Reg. sec. 1.401(b)-1(a).

[126] Treas. Reg. sec. 1.401(k)-1(e)(2)(ii).

Effective Date

The proposal applies to plans adopted for taxable years beginning after December 31, 2018.

B. Modification of Nondiscrimination Rules to Protect Older, Longer Service Participants

Present Law

In general

Qualified retirement plans are subject to nondiscrimination requirements, under which the group of employees covered by a plan ("plan coverage") and the contributions or benefits provided to employees, including benefits, rights, and features under the plan, must not discriminate in favor of highly compensated employees.[127] The timing of plan amendments must also not have the effect of discriminating significantly in favor of highly compensated employees. In addition, in the case of a defined benefit plan, the plan must benefit at least the lesser of (1) 50 employees of the employer, or (2) the greater of (a) 40 percent of all employees of the employer or (b) two employees (or one employee if there is only one employee), referred to as the "minimum participation" requirements.[128] These requirements are designed to help ensure that qualified retirement plans achieve the goal of retirement security for both lower and higher paid employees.

For nondiscrimination purposes, an employee generally is treated as highly compensated if the employee (1) was a five-percent owner of the employer at any time during the year or the preceding year, or (2) had compensation for the preceding year in excess of $120,000 (for 2018).[129] Employees who are not highly compensated are referred to as nonhighly compensated employees.

Nondiscriminatory plan coverage

Whether plan coverage of employees is nondiscriminatory is determined by calculating a plan's ratio percentage, that is, the ratio of the percentage of nonhighly compensated employees covered under the plan to the percentage of highly compensated employees covered. For this purpose, certain portions of a defined contribution plan are treated as separate plans to which the plan coverage requirements are applied separately, referred to as mandatory disaggregation. Specifically, the following, if provided under a plan, are treated as separate plans: the portion of a plan consisting of employee elective deferrals, the portion consisting of employer matching contributions, the portion consisting of employer nonelective contributions, and the portion

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[127] Secs. 401(a)(3)-(5) and 410(b). Detailed rules are provided in Treas. Reg. secs. 1.401(a)(4)-1 through -13 and secs. 1.410(b)-2 through -10. In applying the nondiscrimination requirements, certain employees, such as those under age 21 or with less than a year of service, generally may be disregarded. In addition, employees of controlled groups and affiliated service groups under the aggregation rules of section 414(b), (c), (m) and (o) are treated as employed by a single employer.

[128] Sec. 401(a)(26).

[129] Section 414(q). At the election of the employer, employees who are highly compensated based on the amount of their compensation may be limited to employees who were among the top 20 percent of employees based on compensation.

consisting of an employee stock ownership plan ("ESOP").[130] Subject to mandatory disaggregation, different qualified retirement plans may otherwise be aggregated and tested together as a single plan, provided that they use the same plan year. The plan determined under these rules for plan coverage purposes generally is also treated as the plan for purposes of applying the other nondiscrimination requirements.

A plan's coverage is nondiscriminatory if the ratio percentage, as determined above, is 70 percent or greater. If a plan's ratio percentage is less than 70 percent, a multi-part test applies, referred to as the average benefit test. First, the plan must meet a "nondiscriminatory classification requirement," that is, it must cover a group of employees that is reasonable and established under objective business criteria and the plan's ratio percentage must be at or above a level specified in the regulations, which varies depending on the percentage of nonhighly compensated employees in the employer's workforce. In addition, the average benefit percentage test must be satisfied.

Under the average benefit percentage test, in general, the average rate of employer-provided contributions or benefit accruals for all nonhighly compensated employees under all plans of the employer must be at least 70 percent of the average contribution or accrual rate of all highly compensated employees.[131] In applying the average benefit percentage test, elective deferrals made by employees, as well as employer matching and nonelective contributions, are taken into account. Generally, all plans maintained by the employer are taken into account, including ESOPs, regardless of whether plans use the same plan year.

Under a transition rule applicable in the case of the acquisition or disposition of a business, or portion of a business, or a similar transaction, a plan that satisfied the plan coverage requirements before the transaction is deemed to continue to satisfy them for a period after the

[130] Elective deferrals are contributions that an employee elects to have made to a defined contribution plan that includes a qualified cash or deferred arrangement (a section 401(k) plan) rather than receive the same amount as current compensation. Employer matching contributions are contributions made by an employer only if an employee makes elective deferrals or after-tax employee contributions. Employer nonelective contributions are contributions made by an employer regardless of whether an employee makes elective deferrals or after-tax employee contributions. Under section 4975(e)(7), an ESOP is a defined contribution plan, or portion of a defined contribution plan, that is designated as an ESOP and is designed to invest primarily in employer stock.

[131] Contribution and benefit rates are generally determined under the rules for nondiscriminatory contributions or benefit accruals, described below. These rules are generally based on benefit accruals under a defined benefit plan, other than accruals attributable to after-tax employee contributions, and contributions allocated to participants' accounts under a defined contribution plan, other than allocations attributable to after-tax employee contributions. (Under these rules, contributions allocated to participants' accounts are referred to as "allocations," with the related rates referred to as "allocation rates," but "contribution rates" is used herein for convenience.) However, as discussed below, benefit accruals can be converted to actuarially equivalent contributions, and contributions can be converted to actuarially equivalent benefit accruals.

transaction,[132] provided coverage under the plan is not significantly changed during that period.[133]

Nondiscriminatory contributions or benefit accruals

In general

There are three general approaches to testing the amount of benefits under qualified retirement plans: (1) design-based safe harbors under which the plan's contribution or benefit accrual formula satisfies certain uniformity standards, (2) a general test, described below, and (3) cross-testing of equivalent contributions or benefit accruals. Employee elective deferrals and employer matching contributions under defined contribution plans are subject to special testing rules and generally are not permitted to be taken into account in determining whether other contributions or benefits are nondiscriminatory.[134]

The nondiscrimination rules allow contributions and benefit accruals to be provided to highly compensated and nonhighly compensated employees at the same percentage of compensation.[135] Thus, the various testing approaches described below are generally applied to the amount of contributions or accruals provided as a percentage of compensation, referred to as a contribution rate or accrual rate. In addition, under the "permitted disparity" rules, in calculating an employee's contribution or accrual rate, credit may be given for the employer paid portion of Social Security taxes or benefits.[136] The permitted disparity rules do not apply in testing whether elective deferrals, matching contributions, or ESOP contributions are nondiscriminatory.

The general test is generally satisfied by measuring the rate of contribution or benefit accrual for each highly compensated employee to determine if the group of employees with the same or higher rate (a "rate" group) is a nondiscriminatory group, using the nondiscriminatory plan coverage standards described above. For this purpose, if the ratio percentage of a rate group is less than 70 percent, a simplified standard applies, which includes disregarding the reasonable classification requirement, but requires satisfaction of the average benefit percentage test.

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[132] It is for the period beginning on date of the transaction and ending on the last day of the first plan year beginning after the date of the transaction.

[133] Sec. 410(b)(6)(C).

[134] Secs. 401(k) and (m), the latter of which applies also to after-tax employee contributions under a defined contribution plan.

[135] For this purpose, under section 401(a)(17), annual compensation generally is limited to $275,000 per year (for 2018).

[136] See sections 401(a)(5)(C) and (D) and 401(l) and Treas. Reg. section 1.401(a)(4)-7 and 1.401(l)-1 through -6 for rules for determining the amount of contributions or benefits that can be attributed to the employer-paid portion of Social Security taxes or benefits.

Cross-testing

Cross-testing involves the conversion of contributions under a defined contribution plan or benefit accruals under a defined benefit plan to actuarially equivalent accruals or contributions, with the resulting equivalencies tested under the general test. However, employee elective deferrals and employer matching contributions under defined contribution plans are not permitted to be taken into account for this purpose, and cross-testing of contributions under a defined contribution plan, or cross-testing of a defined contribution plan aggregated with a defined benefit plan, is permitted only if certain threshold requirements are satisfied.

In order for a defined contribution plan to be tested on an equivalent benefit accrual basis, one of the following three threshold conditions must be met:

The plan has broadly available allocation rates, that is, each allocation rate under the plan is available to a nondiscriminatory group of employees (disregarding certain permitted additional contributions provided to employees as a replacement for benefits under a frozen defined benefit plan, as discussed below);

The plan provides allocations that meet prescribed designs under which allocations gradually increase with age or service or are expected to provide a target level of annuity benefit; or

The plan satisfies a minimum allocation gateway, under which each nonhighly compensated employee has an allocation rate of (a) at least one-third of the highest rate for any highly compensated employee, or (b) if less, at least five percent.

In order for an aggregated defined contribution and defined benefit plan to be tested on an aggregate equivalent benefit accrual basis, one of the following three threshold conditions must be met:

The plan must be primarily defined benefit in character, that is, for more than fifty percent of the nonhighly compensated employees under the plan, their accrual rate under the defined benefit plan exceeds their equivalent accrual rate under the defined contribution plan;

The plan consists of broadly available separate defined benefit and defined contribution plans, that is, the defined benefit plan and the defined contribution plan would separately satisfy simplified versions of the minimum coverage and nondiscriminatory amount requirements; or

The plan satisfies a minimum aggregate allocation gateway, under which each nonhighly compensated employee has an aggregate allocation rate (consisting of allocations under the defined contribution plan and equivalent allocations under the defined benefit plan) of (a) at least one-third of the highest aggregate allocation rate for any nonhighly compensated employee, or (b) if less, at least five percent in the case of a highest nonhighly compensated employee's rate up to 25 percent, increased by one percentage point for each five-percentage-point increment (or portion thereof) above 25 percent, subject to a maximum of 7.5 percent.

Benefits, rights, and features

Each benefit, right, or feature offered under the plan generally must be available to a group of employees that has a ratio percentage that satisfies the minimum coverage requirements, including the reasonable classification requirement if applicable, except that the average benefit percentage test does not have to be met, even if the ratio percentage is less than 70 percent.

Multiple employer and section 403(b) plans

A multiple employer plan generally is a single plan maintained by two or more unrelated employers, that is, employers that are not treated as a single employer under the aggregation rules for related entities.[137] The plan coverage and other nondiscrimination requirements are applied separately to the portions of a multiple employer plan covering employees of different employers.[138]

Certain tax-exempt charitable organizations may offer their employees a tax-deferred annuity plan ("section 403(b) plan").[139] The nondiscrimination requirements, other than the requirements applicable to elective deferrals, generally apply to section 403(b) plans of private tax-exempt organizations. For purposes of applying the nondiscrimination requirements to a section 403(b) plan, subject to mandatory disaggregation, a qualified retirement plan may be combined with the section 403(b) plan and treated as a single plan.[140] However, a section 403(b) plan and qualified retirement plan may not be treated as a single plan for purposes of applying the nondiscrimination requirements to the qualified retirement plan.

Closed and frozen defined benefit plans

A defined benefit plan may be amended to limit participation in the plan to individuals who are employees as of a certain date. That is, employees hired after that date are not eligible to participate in the plan. Such a plan is sometimes referred to as a "closed" defined benefit plan (that is, closed to new entrants). In such a case, it is common for the employer also to maintain a defined contribution plan and to provide employer matching or nonelective contributions only to employees not covered by the defined benefit plan or at a higher rate to such employees.

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[137] Sec. 413(c). Multiple employer status does not apply if the plan is a multiemployer plan, defined under sec. 414(f) as a plan maintained pursuant to one or more collective bargaining agreements with two or more unrelated employers and to which the employers are required to contribute under the collective bargaining agreement(s). Multiemployer plans are also known as Taft-Hartley plans.

[138] Treas. Reg. sec. 1.413-2(a)(3)(ii)-(iii).

[139] Sec. 403(b). These plans are available to employers that are tax-exempt under section 501(c)(3), as well as to employers that are educational institutions of State or local governments.

[140] Treas. Reg. sec. 1.410(b)-7(f).

Over time, the group of employees continuing to accrue benefits under the defined benefit plan may come to consist more heavily of highly compensated employees, for example, because of greater turnover among nonhighly compensated employees or because increasing compensation causes nonhighly compensated employees to become highly compensated. In that case, the defined benefit plan may have to be combined with the defined contribution plan and tested on a benefit accrual basis. However, under the regulations, if none of the threshold conditions is met, testing on a benefits basis may not be available. Notwithstanding the regulations, recent IRS guidance provides relief for a limited period, allowing certain closed defined benefit plans to be aggregated with a defined contribution plan and tested on an aggregate equivalent benefits basis without meeting any of the threshold conditions.[141] When the group of employees continuing to accrue benefits under a closed defined benefit plan consists more heavily of highly compensated employees, the benefits, rights, and features provided under the plan may also fail the tests under the existing nondiscrimination rules.

In some cases, if a defined benefit plan is amended to cease future accruals for all participants, referred to as a "frozen" defined benefit plan, additional contributions to a defined contribution plan may be provided for participants, in particular for older participants, in order to make up in part for the loss of the benefits they expected to earn under the defined benefit plan ("make-whole" contributions). As a practical matter, testing on a benefit accrual basis may be required in that case, but may not be available because the defined contribution plan does not meet any of the threshold conditions.

Description of Proposal

Closed or frozen defined benefit plans

In general

The proposal provides nondiscrimination relief with respect to benefits, rights, and features for a closed class of participants ("closed class"),[142] and with respect to benefit accruals for a closed class, under a defined benefit plan that meets the requirements described below (referred to herein as an "applicable" defined benefit plan). In addition, the proposal treats a closed or frozen applicable defined benefit plan as meeting the minimum participation requirements if the plan met the requirements as of the effective date of the plan amendment by which the plan was closed or frozen.

If a portion of an applicable defined benefit plan eligible for relief under the proposal is spun off to another employer, and if the spun-off plan continues to satisfy any ongoing

[141] Notice 2014-5, 2014-2 I.R.B. 276, December 13, 2013 extended by Notice 2015-28, 2015-14 I.R.B. 848, March 19, 2015, Notice 2016-57, 2016-40 I.R.B. 432, September 19, 2016, and most recently by Notice 2017-45, 2017-38 I.R.B. 232, August 31, 2017. Proposed regulations revising the nondiscrimination requirements for closed plans were also issued in 2016, subject to various conditions. 81 Fed. Reg. 4976 (January 29, 2016).

[142] References under the proposal to a closed class of participants and similar references to a closed class include arrangements under which one or more classes of participants are closed, except that one or more classes of participants closed on different dates are not aggregated for purposes of determining the date any such class was closed.

requirements applicable for the relevant relief as described below, the relevant relief for the spun-off plan will continue with respect to the other employer.

Benefits, rights, or features for a closed class

Under the proposal, an applicable defined benefit plan that provides benefits, rights, or features to a closed class does not fail the nondiscrimination requirements by reason of the composition of the closed class, or the benefits, rights, or features provided to the closed class, if (1) for the plan year as of which the class closes and the two succeeding plan years, the benefits, rights, and features satisfy the nondiscrimination requirements without regard to the relief under the proposal, but taking into account the special testing rules described below,[143] and (2) after the date as of which the class was closed, any plan amendment modifying the closed class or the benefits, rights, and features provided to the closed class does not discriminate significantly in favor of highly compensated employees.

For purposes of requirement (1) above, the following special testing rules apply:

- In applying the plan coverage transition rule for business acquisitions, dispositions, and similar transactions, the closing of the class of participants is not treated as a significant change in coverage;
- Two or more plans do not fail to be eligible to be a treated as a single plan solely by reason of having different plan years;[144] and
- Changes in employee population are disregarded to the extent attributable to individuals who become employees or cease to be employees, after the date the class is closed, by reason of a merger, acquisition, divestiture, or similar event.

Benefit accruals for a closed class

Under the proposal, an applicable defined benefit plan that provides benefits to a closed class may be aggregated, that is, treated as a single plan, and tested on a benefit accrual basis with one or more defined contribution plans (without having to satisfy the threshold conditions under present law) if (1) for the plan year as of which the class closes and the two succeeding plan years, the plan satisfies the plan coverage and nondiscrimination requirements without regard to the relief under the proposal, but taking into account the special testing rules described above,[145] and (2) after the date as of which the class was closed, any plan amendment modifying the closed class or the benefits provided to the closed class does not discriminate significantly in favor of highly compensated employees.

[143] Other testing options available under present law are also available for this purpose.

[144] This rule applies also for purposes of applying the plan coverage and other nondiscrimination requirements to an applicable defined benefit plan and one or more defined contributions that, under the proposal, may be treated as a single plan as described below.

[145] Other testing options available under present law are also available for this purpose.

Under the proposal, defined contribution plans that may be aggregated with an applicable defined benefit plan and treated as a single plan include the portion of one or more defined contribution plans consisting of matching contributions, an ESOP, or matching or nonelective contributions under a section 403(b) plan. If an applicable defined benefit plan is aggregated with the portion of a defined contribution plan consisting of matching contributions, any portion of the defined contribution plan consisting of elective deferrals must also be aggregated. In addition, the matching contributions are treated in the same manner as nonelective contributions, including for purposes of permitted disparity.

Applicable defined benefit plan

An applicable defined benefit plan to which relief under the proposal applies is a defined benefit plan under which the class was closed (or the plan frozen) before April 5, 2017, or that meets the following alternative conditions: (1) taking into account any predecessor plan, the plan has been in effect for at least five years as of the date the class is closed (or the plan is frozen) and (2) under the plan, during the five-year period preceding that date, (a) for purposes of the relief provided with respect to benefits, rights, and features for a closed class, there has not been a substantial increase in the coverage or value of the benefits, rights, or features, or (b) for purposes of the relief provided with respect to benefit accruals for a closed class or the minimum participation requirements, there has not been a substantial increase in the coverage or benefits under the plan.

For purposes of (2)(a) above, a plan is treated as having a substantial increase in coverage or value of benefits, rights, or features only if, during the applicable five-year period, either the number of participants covered by the benefits, rights, or features on the date the period ends is more than 50 percent greater than the number on the first day of the plan year in which the period began, or the benefits, rights, and features have been modified by one or more plan amendments in such a way that, as of the date the class is closed, the value of the benefits, rights, and features to the closed class as a whole is substantially greater than the value as of the first day of the five-year period, solely as a result of the amendments.

For purposes of (2)(b) above, a plan is treated as having had a substantial increase in coverage or benefits only if, during the applicable five-year period, either the number of participants benefiting under the plan on the date the period ends is more than 50 percent greater than the number of participants on the first day of the plan year in which the period began, or the average benefit provided to participants on the date the period ends is more than 50 percent greater than the average benefit provided on the first day of the plan year in which the period began. In applying this requirement, the average benefit provided to participants under the plan is treated as having remained the same between the two relevant dates if the benefit formula applicable to the participants has not changed between the dates and, if the benefit formula has changed, the average benefit under the plan is considered to have increased by more than 50 percent only if the target normal cost for all participants benefiting under the plan for the plan year in which the five-year period ends exceeds the target normal cost for all such participants for that plan year if determined using the benefit formula in effect for the participants for the first

plan year in the five-year period by more than 50 percent.[146] In applying these rules, a multiple employer plan is treated as a single plan, rather than as separate plans separately covering the employees of each participating employer.

In applying these standards, any increase in coverage or value, or in coverage or benefits, whichever is applicable, is generally disregarded if it is attributable to coverage and value, or coverage and benefits, provided to employees who (1) became participants as a result of a merger, acquisition, or similar event that occurred during the 7-year period preceding the date the class was closed, or (2) became participants by reason of a merger of the plan with another plan that had been in effect for at least five years as of the date of the merger and, in the case of benefits, rights, or features for a closed class, under the merger, the benefits, rights, or features under one plan were conformed to the benefits, rights, or features under the other plan prospectively.

Make-whole contributions under a defined contribution plan

Under the proposal, a defined contribution plan is permitted to be tested on an equivalent benefit accrual basis (without having to satisfy the threshold conditions under present law) if the following requirements are met:

- The plan provides make-whole contributions to a closed class of participants whose accruals under a defined benefit plan have been reduced or ended ("make-whole class");
- For the plan year of the defined contribution plan as of which the make-whole class closes and the two succeeding plan years, the make-whole class satisfies the nondiscriminatory classification requirement under the plan coverage rules, taking into account the special testing rules described above;
- After the date as of which the class was closed, any amendment to the defined contribution plan modifying the make-whole class or the allocations, benefits, rights, and features provided to the make-whole class does not discriminate significantly in favor of highly compensated employees; and
- Either the class was closed before April 5, 2017, or the defined benefit plan is an applicable defined benefit plan under the alternative conditions applicable for purposes of the relief provided with respect to benefit accruals for a closed class.

With respect to one or more defined contribution plans meeting the requirements above, in applying the plan coverage and nondiscrimination requirements, the portion of the plan providing make-whole or other nonelective contributions may also be aggregated and tested on

[146] Under the funding requirements applicable to defined benefit plans, target normal cost for a plan year (defined in section 430(b)(1)(A)(i)) is generally the sum of the present value of the benefits expected to be earned under the plan during the plan year plus the amount of plan-related expenses to be paid from plan assets during the plan year. Under the proposal, in applying this average benefit rule to certain defined benefit plans maintained by cooperative organizations and charities, referred to as CSEC plans (defined in section 414(y)), which are subject to different funding requirements, the CSEC plan's normal cost under section 433(j)(1)(B) is used instead of target normal cost.

an equivalent benefit accrual basis with the portion of one or more other defined contribution plans consisting of matching contributions, an ESOP, or matching or nonelective contributions under a section 403(b) plan. If the plan is aggregated with the portion of a defined contribution plan consisting of matching contributions, any portion of the defined contribution plan consisting of elective deferrals must also be aggregated. In addition, the matching contributions are treated in the same manner as nonelective contributions, including for purposes of permitted disparity.

Under the proposal, "make-whole contributions" generally means nonelective contributions for each employee in the make-whole class that are reasonably calculated, in a consistent manner, to replace some or all of the retirement benefits that the employee would have received under the defined benefit plan and any other plan or qualified cash or deferred arrangement under a section 401(k) plan if no change had been made to the defined benefit plan and other plan or arrangement.[147] However, under a special rule, in the case of a defined contribution plan that provides benefits, rights, or features to a closed class of participants whose accruals under a defined benefit plan have been reduced or eliminated, the plan will not fail to satisfy the nondiscrimination requirements solely by reason of the composition of the closed class, or the benefits, rights, or features provided to the closed class, if the defined contribution plan and defined benefit plan otherwise meet the requirements described above but for the fact that the make-whole contributions under the defined contribution plan are made in whole or in part through matching contributions.

If a portion of a defined contribution plan eligible for relief under the proposal is spun off to another employer, and if the spun-off plan continues to satisfy any ongoing requirements applicable for the relevant relief as described above, the relevant relief for the spun-off plan will continue with respect to the other employer.

Effective Date

The proposal is generally effective on the date of enactment, without regard to whether any plan modifications referred to in the proposal are adopted or effective before, on, or after the date of enactment.

However, at the election of a plan sponsor, the proposal will apply to plan years beginning after December 31, 2013. For purposes of the proposal, a closed class of participants under a defined benefit plan is treated as being closed before April 5, 2017, if the plan sponsor's intention to create the closed class is reflected in formal written documents and communicated to participants before that date. In addition, a plan does not fail to be eligible for the relief under the proposal solely because (1) in the case of benefits, rights, or features for a closed class under a defined benefit plan, the plan was amended before the date of enactment to eliminate one or more benefits, rights, or features and is further amended after the date of enactment to provide the previously eliminated benefits, rights, or features to a closed class of participants, or (2) in the case of benefit accruals for a closed class under a defined benefit plan or application of the minimum benefit requirements to a closed or frozen defined benefit plan, the plan was amended before the date of the enactment to cease all benefit accruals and is further amended after the

[147] For this purpose, consistency is not required with respect to employees who were subject to different benefit formulas under the defined benefit plan.

date of enactment to provide benefit accruals to a closed class of participants. In either case, the relevant relief applies only if the plan otherwise meets the requirements for the relief, and, in applying the relevant relief, the date the class of participants is closed is the effective date of the later amendment.

C. Study of Appropriate PBGC Premiums

Present Law

Minimum funding rules

The Code and ERISA apply minimum funding requirements to defined benefit retirement plans maintained by private-sector employers for their employees (referred to as "single-employer" plans), for purposes of which employers that are members of a controlled group are considered a single employer. For purposes of minimum funding requirements, generally each participating employer in a multiple employer plan is treated as maintaining a separate single plan,[148] and a CSEC plan[149] is treated as if all participants in the plan are employed by a single employer.[150]

The amount of contributions required for a plan year under the minimum funding rules is generally the amount needed to fund benefits earned during that year plus that year's portion of other liabilities that are amortized over a period of years, such as benefits resulting from a grant of past service credit. A minimum contribution is required for a plan year if the value of the plan's assets is less than the plan's "funding target," that is, the present value, determined actuarially, of all benefits earned as of the beginning of the year. If the value of plan assets is less than the plan's funding target, such that the plan has a funding shortfall, the shortfall is generally required to be funded by contributions, with interest, over seven years, taking into account the remaining installments attributable to shortfalls from preceding years. If participants earn additional benefits for the year, the required contribution must include the amount of the plan's "target normal cost," that is, the present value, determined actuarially, of benefits expected to be earned for the year. In the case of a plan funded below a certain level, referred to as an "at-risk" plan, specified assumptions must be used in determining the plan's funding target and target normal cost.

The PBGC

Even if a defined benefit plan is fully funded, the assets may not be sufficient to purchase annuities on a market basis. Thus, it is possible that a plan may be terminated at a time when plan assets are not sufficient to provide all benefits accrued by employees under the plan. In order to protect plan participants from losing retirement benefits in such circumstances, the Pension Benefit Guaranty Corporation ("PBGC"), a corporation within the Department of Labor, was created in 1974 under ERISA to provide an insurance program for benefits under most defined benefit plans maintained by private employers.

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[148] Sec. 413(c)(4)(A).

[149] As defined in section 414(y). See footnote 146, *supra.*

[150] Sec. 413(d)(1).

PBGC premiums

In general

Under ERISA, the PBGC is funded solely by assets in terminated plans, amounts recovered from employers who terminate underfunded plans, premiums paid with respect to covered plans, and investment earnings. All covered single employer (including multiple employer) plans are required to pay a flat per-participant premium; underfunded plans are subject to an additional rate variable premium based on the level of underfunding. The amount of both the flat rate premium and the variable rate premium are set by statute.

Under ERISA and PBGC's regulations, a termination premium must be paid to the PBGC annually for three years after plan termination for certain distress and involuntary pension plan terminations. The amount of the termination premium is $1,250 per participant except for certain airline-related plans.

Flat rate premiums

In 2018, the annual flat rate per participant premium is $74 per participant. By statute, the 2019 flat rate premium will go up by $6 to $80.[151] In addition, with the exception of the single employer flat rate premium for 2019, all rates and caps are indexed to inflation based on the National Average Wage Index.[152]

Variable rate premiums

In 2018, the variable rate premium is equal to $38 per $1,000 of unfunded vested benefits, and is indexed to inflation based on the National Average Wage Index. By statute, the 2019 variable rate premium will go up by $4 to $42 per $1,000 of unfunded vested benefits.[153] The term "unfunded vested benefits" means the amount which would be the unfunded current liability (as defined under the minimum funding rules) if only vested (nonforfeitable) benefits were taken into account and if benefits were valued at the variable premium interest rate. No variable rate premium is imposed for a year if contributions to the plan for the prior year were at least equal to the full funding limit for that year.

2005 Congressional Budget Office ("CBO") Report

A CBO report published in 2005, "The Risk Exposure of the Pension Benefit Guaranty Corporation," concluded that the market value of the PBGC's Fiscal Year 2004 financial position was a deficit of $86.7 billion. The PBGC reported its financial position for Fiscal Year 2004 as a deficit of $23.3 billion.

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[151] ERISA sec. 4006, 29 U.S.C. 1306.

[152] Sec. 209(k)(1) of the Social Security Act (42 U.S.C. 409(k)(1)).

[153] ERISA sec. 4006, 29 U.S.C. 1306.

Description of Proposal

Under the proposal, the PBGC is required to contract with an appropriate agency or organization (to be selected by the PBGC's Board of Directors) to conduct an independent study of the PBGC's Single-Employer Pension Insurance Modeling System (PIMS).

The study, which is required to begin no later than six months after the date of enactment, will:

- examine the current structure and level of PBGC premiums required to be paid by single employer plans (including fixed, variable and termination premiums) to evaluate whether such premiums are sufficient to pay PBGC guaranteed benefits;

- evaluate whether alternative structures and levels of premiums would better account for the risks posed by various categories of single employer plans, including on the basis of (A) industry, ownership structure, or size of the plan sponsor, (B) plan funded status, risk or volatility of plan investments, or the credit worthiness of the plan sponsor, or (C) a combination of the factors described in (A) and (B);

- evaluate whether other methods of estimating the value of assets and liabilities should be used in the PBGC's financial statements such as those described by the CBO in its September 2005 report, "The Risk Exposure of the Pension Benefit Guaranty Corporation," and in its August 2016 report, "Options to Improve the Financial Condition of the Pension Benefit Guaranty Corporation's Multiemployer Program;"

- evaluate whether multiple employer plans (including CSEC plans) have characteristics that warrant a separate structure and level of PBGC premiums; and

- include an explanation of the assumptions underlying each analysis involved in conducting such study.

Effective Date

The proposal is effective on the date of enactment.

TITLE III – OTHER SAVINGS PROVISIONS

A. Universal Savings Accounts

Present Law

Savings plans and accounts under the Code

Tax-favored retirement arrangements

The Code provides two general vehicles for tax-favored retirement savings: employer-sponsored plans and IRAs. Code provisions are generally within the jurisdiction of the Secretary of the Treasury).[154]

The most common type of tax-favored employer-sponsored retirement plan is a qualified retirement plan,[155] which may be a defined contribution plan or a defined benefit plan. Under a defined contribution plan, separate individual accounts are maintained for participants, to which accumulated contributions, earnings and losses are allocated, and participants' benefits are based on the value of their accounts.[156] Defined contribution plans commonly allow participants to direct the investment of their accounts, usually by choosing among investment options offered under the plan. Under a defined benefit plan, benefits are determined under a plan formula and paid from general plan assets, rather than individual accounts.[157] Besides qualified retirement plans, certain tax-exempt employers and public schools may maintain tax-deferred annuity plans.[158]

An IRA is generally established by the individual for whom the IRA is maintained.[159] However, in some cases, an employer may establish IRAs on behalf of employees and provide

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[154] Retirement plans of private employers, including qualified retirement plans and tax-deferred annuity plans, are generally subject to requirements under ERISA, and are generally within the jurisdiction of the Secretary of Labor.

[155] Sec. 401(a). A qualified annuity plan under section 403(a) is similar to and subject to requirements similar to those applicable to qualified retirement plans.

[156] Sec. 414(i). Defined contribution plans generally provide for contributions by employers and may include a qualified cash or deferred arrangement under a section 401(k) plan, under which employees may elect to contribute to the plan.

[157] Sec. 414(j).

[158] Sec. 403(b). Private and governmental employers that are exempt from tax under section 501(c)(3), including tax-exempt private schools, may maintain tax-deferred annuity plans. State and local governmental employers may maintain another type of tax-favored retirement plan, an eligible deferred compensation plan under section 457(b).

[159] Sections 219, 408 and 408A provide rules for IRAs. Under section 408(a)(2) and (n), only certain entities are permitted to be the trustee of an IRA. The trustee of an IRA generally must be a bank, an insured credit union, or a corporation subject to supervision and examination by the Commissioner of Banking or other officer in charge of the administration of the banking laws of the State in which it is incorporated. Alternatively, an IRA

retirement contributions to the IRAs.[160] An individual retirement account ("IRA") is a tax-exempt trust or account established for the exclusive benefit of an individual and his or her beneficiaries.[161] There are two general types of IRAs: traditional IRAs, to which both deductible and nondeductible contributions may be made, and Roth IRAs, contributions to which are not deductible. In general, amounts held in a traditional IRA are includible in income when withdrawn (except to the extent the withdrawal is a return of nondeductible contributions). Amounts held in a Roth IRA that are withdrawn as a qualified distribution are not includible in income; distributions from a Roth IRA that are not qualified distributions are includible in income to the extent attributable to earnings. A qualified distribution is a distribution that is made (1) after the five-taxable year period beginning with the first taxable year for which the individual made a contribution to a Roth IRA, and (2) after attainment of age 59½, on account of death or disability, or for first-time homebuyer expenses of up to $10,000.

Other tax-favored savings arrangements

The Code provides for certain other tax-advantaged savings arrangements, allowing taxpayers to save both for education and for expenses associated with a disability.

A qualified tuition program (known as a "529 plan") is a program established and maintained by a State or agency or instrumentality thereof, under which a person may make contributions to an account that is established for the purpose of satisfying the qualified higher education expenses of the designated beneficiary of the account.[162] Similarly, Coverdell education savings accounts are trusts or custodial accounts established on behalf of a designated beneficiary for the purpose of saving for the education expenses of the designated beneficiary.[163] For both of these accounts, contributions are not tax deductible for Federal income tax purposes, but qualified distributions (generally distributions made for the purpose of meeting the designated beneficiary's education expenses) are not subject to tax.

A qualified ABLE program is a program established and maintained by a State or agency or instrumentality thereof, under which individuals may open accounts (an "ABLE account") for

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trustee may be another person who demonstrates to the satisfaction of the Secretary that the manner in which the person will administer the IRA will be consistent with the IRA requirements.

[160] SEP plans under section 408(k) and SIMPLE IRA plans under section 408(p) are employer-sponsored retirement plans funded using IRAs for employees. In addition, IRA treatment may apply to accounts maintained for employees under a trust created by an employer (or an employee association) for the exclusive benefit of employees or their beneficiaries, provided that the trust complies with the relevant IRA requirements and separate accounting is maintained for the interest of each employee or beneficiary. Sec. 408(c). In that case, the assets of the trust may be held in a common fund for the account of all individuals who have an interest in the trust.

[161] Secs. 408 and 408A.

[162] Sec. 529.

[163] Sec. 530.

the purpose of meeting the account owner's qualified disability expenses.[164] Limitations apply on eligibility to establish an ABLE account, the number of ABLE accounts any individual may own, and to the maximum annual contributions an ABLE account may receive in a given year. Amounts contributed to an ABLE account are not deductible for Federal income tax purposes, but qualified distributions (generally distributions made for the purpose of meeting the designated beneficiary's qualified disability expenses) are not subject to tax.

Description of Proposal

The proposal permits a universal savings account to be established by an individual for whom the account is maintained, through a trust arrangement subject to substantially all of the same requirements that apply to trust arrangements under IRAs. For each taxable year, an individual may contribute cash in an amount up to $2,500, not to exceed the individual's compensation[165] includible in the individual's gross income for the taxable year. The individual's account balance is nonforfeitable. Contributions are not permitted for dependents; thus, if an individual is a dependent of another taxpayer, the dollar limit for contributions for such individual is zero. The dollar limit is subject to indexing; if the dollar amount after any increase is applied is not a multiple of $100, it is rounded to the next lower multiple of $100.

In the case of taxpayers who file a joint income tax return, if an individual's compensation includible in gross income for the taxable year is less than such compensation of the individual's spouse, the compensation on which the contribution limit is based for that individual may include the spouse's compensation includible in gross income for the taxable year reduced (but not below zero) by the amount the spouse contributed for the taxable year to universal savings accounts of the spouse. For example, if the joint income tax return for the individual and the spouse results in $4,000 of compensation includible in gross income for the taxable year (all of which was earned by the spouse), and the spouse contributed $2,500 for the taxable year to the spouse's universal savings accounts, then the individual may contribute a maximum of $1,500 for the taxable year to the individual's universal savings accounts.

Distributions from universal savings accounts are generally not includible in gross income. Distributions may be made in cash or in other property that has a readily ascertainable fair market value as identified by the Secretary. Excess contributions (along with any attributable net income) must be corrected by the due date of the tax return for the taxable year, in order to avoid being subject to the excess contribution excise tax of 6 percent. Any related net income on such excess contributions is includible in gross income for such taxable year.

Rollovers are not permitted into or from a universal savings account, other than qualified rollovers. For this purpose, a qualified rollover is a contribution to a universal savings account from another universal savings account of the same individual, if such amount is contributed not later than 60 days after the distribution from the other universal savings account. Qualified

[164] Sec. 529A.

[165] Within the meaning of section 219.

rollovers are not taken into account with respect to the contribution limit applicable to universal savings accounts.

If an individual acquires a spouse's universal savings account by reason of the spouse's death, the individual is treated as the account holder of the deceased spouse's universal savings account. In any other case, when an account holder of a universal savings account dies, the account ceases to be treated as a universal savings account and all amounts in the account are treated as distributed on the date of death of the account holder.

Prohibited transaction rules apply to universal savings accounts. In addition, the trustee of a universal savings account is required to make a report with respect to the account to the account holder not later than January 31 of the calendar year following the calendar year to which the report relates and to the IRS as specified by the Secretary, in a manner similar to IRA reporting.

Effective Date

The proposal is effective for taxable years beginning after December 31, 2018.

B. Expansion of 529 Plans

Present Law

In general

A qualified tuition program (often referred to as a "529 plan") is a program established and maintained by a State or agency or instrumentality thereof, or by one or more eligible educational institutions, which satisfies certain requirements and under which a person may purchase tuition credits or certificates on behalf of a designated beneficiary that entitle the beneficiary to the waiver or payment of qualified higher education expenses of the beneficiary (a "prepaid tuition program"). Section 529 provides specified income tax and transfer tax rules for the treatment of accounts and contracts established under qualified tuition programs.[166] In the case of a program established and maintained by a State or agency or instrumentality thereof, a qualified tuition program also includes a program under which a person may make contributions to an account that is established for the purpose of satisfying the qualified higher education expenses of the designated beneficiary of the account, provided it satisfies certain specified requirements (a "savings account program"). Under both types of qualified tuition programs, a contributor establishes an account for the benefit of a particular designated beneficiary to provide for that beneficiary's higher education expenses.

In general, prepaid tuition contracts and tuition savings accounts established under a qualified tuition program involve prepayments or contributions made by one or more individuals for the benefit of a designated beneficiary. Decisions with respect to the contract or account are typically made by an individual who is not the designated beneficiary. Qualified tuition accounts or contracts generally require the designation of a person (generally referred to as an "account owner")[167] whom the program administrator (oftentimes a third-party administrator retained by the State or by the educational institution that established the program) may look to for decisions, recordkeeping, and reporting with respect to the account established for a designated beneficiary. The person or persons who make the contributions to the account need not be the same person who is regarded as the account owner for purposes of administering the account. Under many qualified tuition programs, the account owner generally has control over the account or contract, including the ability to change designated beneficiaries and to withdraw funds at any time and for any purpose. Thus, in practice, qualified tuition accounts or contracts generally involve a contributor, a designated beneficiary, an account owner (who oftentimes is not the contributor or the designated beneficiary), and an administrator of the account or contract.

Qualified higher education expenses

Distributions for the purpose of meeting the designated beneficiary's higher education expenses are generally not subject to tax. For purposes of receiving a distribution from a

[166] For purposes of this description, the term "account" is used interchangeably to refer to a prepaid tuition benefit contract or a tuition savings account established pursuant to a qualified tuition program.

[167] Section 529 refers to contributors and designated beneficiaries, but does not define or otherwise refer to the term "account owner," which is a commonly used term among qualified tuition programs.

qualified tuition program that qualifies for this favorable tax treatment, the term qualified higher education expenses means tuition, fees, books, supplies, and equipment required for the enrollment or attendance of a designated beneficiary at an eligible educational institution, and expenses for special needs services in the case of a special needs beneficiary that are incurred in connection with such enrollment or attendance. Qualified higher education expenses generally also include room and board for students who are enrolled at least half-time. Qualified higher education expenses include the purchase of any computer technology or equipment, or Internet access or related services, if such technology or services are to be used primarily by the beneficiary during any of the years a beneficiary is enrolled at an eligible institution.

For distributions made after December 31, 2017, a designated beneficiary may, on an annual basis, receive up to $10,000 in aggregate 529 distributions to be used in connection with expenses for tuition in connection with enrollment or attendance at an elementary or secondary public, private, or religious school. To the extent such distributions do not exceed $10,000, they are treated in the same manner as distributions for qualified higher education expenses.

Contributions to qualified tuition programs

Contributions to a qualified tuition program must be made in cash. Section 529 does not impose a specific dollar limit on the amount of contributions, account balances, or prepaid tuition benefits relating to a qualified tuition account; however, the program is required to have adequate safeguards to prevent contributions in excess of amounts necessary to provide for the beneficiary's qualified higher education expenses. Contributions generally are treated as a completed gift eligible for the gift tax annual exclusion. Contributions are not tax deductible for Federal income tax purposes, although they may be deductible for State income tax purposes. Amounts in the account accumulate on a tax-free basis (*i.e.*, income on accounts in the plan is not subject to current income tax).

A qualified tuition program may not permit any contributor to, or designated beneficiary under, the program to direct (directly or indirectly) the investment of any contributions (or earnings thereon) more than two times in any calendar year, and must provide separate accounting for each designated beneficiary. A qualified tuition program may not allow any interest in an account or contract (or any portion thereof) to be used as security for a loan.

Description of Proposal

The proposal makes four modifications to section 529 plans.

First, the proposal allows tax-free treatment applicable to distributions for higher education expenses to apply to expenses for books, supplies, equipment and fees required for the participation of a designated beneficiary in an apprenticeship program. The apprenticeship program must be registered and certified with the Secretary of Labor under section 1 of the National Apprenticeship Act.[168]

[168] 29 U.S.C. 50.

Second, the proposal allows tax-free treatment to apply to distributions made for expenses in connection with a homeschool. Under the proposal, distributions for certain homeschool expenses are treated in the same manner as distributions for qualified higher education expenses, and like distributions for elementary and secondary school tuition, are also subject to an annual limit of $10,000 in aggregate 529 distributions, per beneficiary.[169] For these purposes, qualifying homeschool expenses are those expenses, with respect to a beneficiary, which are incurred in connection with a homeschool and are for: (i) curriculum and curricular materials; (ii) books or other instructional materials; (iii) online educational materials; (iv) tuition for tutoring or educational classes outside of the home; (v) dual enrollment in an institution of higher education; and (vi) educational therapies for students with disabilities.

Third, the proposal adds additional qualifying expenses for distributions made on behalf of designated beneficiaries attending elementary or secondary school. Under the proposal, in addition to tuition, a distribution may be made for expenses for fees, academic tutoring, special needs services, books, supplies, and other equipment, incurred in connection with enrollment or attendance at such elementary or secondary school.

Fourth, the proposal treats as a qualified distribution certain amounts used to make payments on principal or interest of a qualified education loan. No individual may receive more than $10,000 of such distributions, in aggregate, over the course of the individual's lifetime.[170] To the extent that an individual receives in excess of $10,000 of such distributions, they are subject to the usual tax treatment of 529 distributions (*i.e.*, the earnings are included in income and subject to a 10-percent penalty). The proposal contains a special rule allowing such amounts to be distributed to a sibling of a designated beneficiary (*i.e.*, a brother, sister, stepbrother, or stepsister). This rule allows a 529 account holder to make a student loan distribution to a sibling of the designated beneficiary without changing the designated beneficiary of the account. For purposes of the $10,000 lifetime limit on student loan distributions, a distribution to a sibling of a designated beneficiary is applied towards the sibling's lifetime limit, and not the designated beneficiary's lifetime limit.

Effective Date

The proposal applies to distributions made after December 31, 2018.

[169] The $10,000 per beneficiary limit applies to the combined distributions used for either (i) elementary and secondary school tuition or (ii) homeschool expenses.

[170] This limitation applies to such distributions from all 529 accounts. Thus, an individual may not avoid the limitation by receiving separate $10,000 distributions from multiple 529 accounts.

C. Penalty-Free Withdrawals from Retirement Plans for Individuals in Case of Birth of Child or Adoption

Present Law

Distributions from tax-favored retirement plans

A distribution from a qualified retirement plan, a tax-sheltered annuity plan (a "section 403(b) plan"), an eligible deferred compensation plan of a State or local government employer (a "governmental section 457(b) plan"), or an an IRA generally is included in income for the year distributed.[171] These plans are referred to collectively as "eligible retirement plans." In addition, unless an exception applies, a distribution from a qualified retirement plan, a section 403(b) plan, or an IRA received before age 59½ is subject to a 10-percent additional tax (referred to as the "early withdrawal tax") on the amount includible in income.[172]

In general, a distribution from an eligible retirement plan may be rolled over to another eligible retirement plan within 60 days, in which case the amount rolled over generally is not includible in income. The IRS has the authority to waive the 60-day requirement if failure to waive the requirement would be against equity or good conscience, including cases of casualty, disaster or other events beyond the reasonable control of the individual.

The terms of a qualified retirement plan, section 403(b) plan, or governmental section 457(b) plan generally determine when distributions are permitted. However, in some cases, restrictions may apply to distributions before an employee's termination of employment, referred to as "in-service" distributions. Despite such restrictions, an in-service distribution may be permitted in the case of financial hardship or an unforeseeable emergency.

Description of Proposal

In general

Under the proposal, an exception to the 10-percent early withdrawal tax applies in the case of a qualified birth or adoption distribution from an applicable eligible retirement plan (as defined). In addition, qualified birth or adoption distributions may be recontributed to an individual's applicable eligible retirement plans, subject to certain requirements.

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[171] Secs. 401(a), 403(a), 403(b), 457(b) and 408. Under section 3405, distributions from these plans are generally subject to income tax withholding unless the recipient elects otherwise. In addition, certain distributions from a qualified retirement plan, a section 403(b) plan, or a governmental section 457(b) plan are subject to mandatory income tax withholding at a 20-percent rate unless the distribution is rolled over.

[172] Sec. 72(t). Under present law, the 10-percent early withdrawal tax does not apply to distributions from a governmental section 457(b) plan.

Distributions from applicable eligible retirement plans

A qualified birth or adoption distribution is a permissible distribution from an applicable eligible retirement plan which, for this purpose, encompasses eligible retirement plans other than defined benefit plans, including qualified retirement plans, section 403(b) plans, governmental section 457(b) plans, and IRAs.[173]

A qualified birth or adoption distribution is a distribution from an applicable eligible retirement plan to an individual if made during the one-year period beginning on the date on which a child of the individual is born or on which the legal adoption by the individual of an eligible child is finalized. An eligible child means any individual (other than a child of the taxpayer's spouse) who has not attained age 18 or is physically or mentally incapable of self-support. The proposal requires the name, age, and taxpayer identification number of the child or eligible child to which any qualified birth or adoption distribution relates to be provided on the tax return of the individual taxpayer for the taxable year.

The maximum aggregate amount which may be treated as qualified birth or adoption distributions by any individual with respect to a birth or adoption is $7,500. The maximum aggregate amount applies on an individual basis. Therefore, each spouse separately may receive a maximum aggregate amount of $7,500 of qualified birth or adoption distributions (with respect to a birth or adoption) from applicable eligible retirement plans in which each spouse participates or holds accounts.

An employer plan is not treated as violating any Code requirement merely because it treats a distribution (that would otherwise be a qualified birth or adoption distribution) to an individual as a qualified birth or adoption distribution, provided that the aggregate amount of such distributions to that individual from plans maintained by the employer and members of the employer's controlled group[174] does not exceed $7,500. Thus, under such circumstances an employer plan is not treated as violating any Code requirement merely because an individual might receive total distributions in excess of $7,500 as a result of distributions from plans of other employers or IRAs.

Recontributions to applicable eligible retirement plans

Generally, any portion of a qualified birth or adoption distribution may, at any time after the date on which the distribution was received, be recontributed to an applicable eligible retirement plan to which a rollover can be made. Such a recontribution is treated as a rollover and thus is not includible in income. If an employer adds the ability for plan participants to receive qualified birth or adoption distributions from a plan, the plan must permit an employee who has received qualified birth or adoption distributions from that plan to recontribute only up to the amount that was distributed from that plan to that employee, provided the employee

[173] A qualified birth or adoption distribution is subject to income tax withholding unless the recipient elects otherwise. Mandatory 20-percent withholding does not apply.

[174] The term "controlled group" means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414.

otherwise is eligible to make contributions (other than recontributions of qualified birth or adoption distributions) to that plan. Any portion of a qualified birth or adoption distribution from an individual's applicable eligible retirement plans (whether employer plans or IRAs) may be recontributed to an IRA held by such an individual which is an applicable eligible retirement plan to which a rollover can be made.

Effective Date

The proposal applies to distributions made after December 31, 2018.