

117TH CONGRESS }  
2d Session

HOUSE OF REPRESENTATIVES

{ REPT. 117-283  
Part 1

SECURING A STRONG RETIREMENT ACT OF  
2021

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R E P O R T  
OF THE  
COMMITTEE ON WAYS AND MEANS  
HOUSE OF REPRESENTATIVES  
ON  
H.R. 2954



MARCH 29, 2022.—Ordered to be printed

# **SECURING A STRONG RETIREMENT ACT OF 2021**

# SECURING A STRONG RETIREMENT ACT OF 2021

MARCH 29, 2022.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NEAL, from the Committee on Ways and Means,  
submitted the following

## R E P O R T

[To accompany H.R. 2954]

[Including cost estimate of the Congressional Budget Office]

The Committee on Ways and Means, to whom was referred the bill (H.R. 2954) to increase retirement savings, simplify and clarify retirement plan rules, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) **SHORT TITLE.**—This Act may be cited as the “Securing a Strong Retirement Act of 2021”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

**TITLE I—EXPANDING COVERAGE AND INCREASING RETIREMENT SAVINGS**

Sec. 101. Expanding automatic enrollment in retirement plans.

Sec. 102. Modification of credit for small employer pension plan startup costs.

Sec. 103. Promotion of Saver's Credit.

Sec. 104. Enhancement of 403(b) plans.

Sec. 105. Increase in age for required beginning date for mandatory distributions.

Sec. 106. Indexing IRA catch-up limit.

Sec. 107. Higher catch-up limit to apply at age 62, 63, and 64.

Sec. 108. Multiple employer 403(b) plans.

Sec. 109. Treatment of student loan payments as elective deferrals for purposes of matching contributions.

- Sec. 110. Application of credit for small employer pension plan startup costs to employers which join an existing plan.
- Sec. 111. Military spouse retirement plan eligibility credit for small employers.
- Sec. 112. Small immediate financial incentives for contributing to a plan.
- Sec. 113. Safe harbor for corrections of employee elective deferral failures.
- Sec. 114. One-year reduction in period of service requirement for long-term, part-time workers.
- Sec. 115. Findings relating to S corporation ESOPs.

#### TITLE II—PRESERVATION OF INCOME

- Sec. 201. Remove required minimum distribution barriers for life annuities.
- Sec. 202. Qualifying longevity annuity contracts.
- Sec. 203. Insurance-dedicated exchange-traded funds.

#### TITLE III—SIMPLIFICATION AND CLARIFICATION OF RETIREMENT PLAN RULES

- Sec. 301. Recovery of retirement plan overpayments.
- Sec. 302. Reduction in excise tax on certain accumulations in qualified retirement plans.
- Sec. 303. Performance benchmarks for asset allocation funds.
- Sec. 304. Review and report to the Congress relating to reporting and disclosure requirements.
- Sec. 305. Eliminating unnecessary plan requirements related to unenrolled participants.
- Sec. 306. Retirement savings lost and found.
- Sec. 307. Expansion of Employee Plans Compliance Resolution System.
- Sec. 308. Eliminate the “first day of the month” requirement for governmental section 457(b) plans.
- Sec. 309. One-time election for qualified charitable distribution to split-interest entity; increase in qualified charitable distribution limitation.
- Sec. 310. Distributions to firefighters.
- Sec. 311. Exclusion of certain disability-related first responder retirement payments.
- Sec. 312. Individual retirement plan statute of limitations for excise tax on excess contributions and certain accumulations.
- Sec. 313. Requirement to provide paper statements in certain cases.
- Sec. 314. Separate application of top heavy rules to defined contribution plans covering excludible employees.
- Sec. 315. Repayment of qualified birth or adoption distribution limited to 3 years.
- Sec. 316. Employer may rely on employee certifying that deemed hardship distribution conditions are met.
- Sec. 317. Penalty-free withdrawals from retirement plans for individuals in case of domestic abuse.
- Sec. 318. Reform of family attribution rule.
- Sec. 319. Amendments to increase benefit accruals under plan for previous plan year allowed until employer tax return due date.
- Sec. 320. Retroactive first year elective deferrals for sole proprietors.
- Sec. 321. Limiting cessation of IRA treatment to portion of account involved in a prohibited transaction.

#### TITLE IV—TECHNICAL AMENDMENTS

- Sec. 401. Amendments relating to Setting Every Community Up for Retirement Enhancement Act of 2019.

#### TITLE V—ADMINISTRATIVE PROVISIONS

- Sec. 501. Provisions relating to plan amendments.

#### TITLE VI—REVENUE PROVISIONS

- Sec. 601. Simple and SEP Roth IRAs.
- Sec. 602. Hardship withdrawal rules for 403(b) plans.
- Sec. 603. Elective deferrals generally limited to regular contribution limit.
- Sec. 604. Optional treatment of employer matching contributions as Roth contributions.

## TITLE I—EXPANDING COVERAGE AND INCREASING RETIREMENT SAVINGS

### SEC. 101. EXPANDING AUTOMATIC ENROLLMENT IN RETIREMENT PLANS.

(a) IN GENERAL.—Subpart B of part I of subchapter D of chapter 1 of the Internal Revenue Code of 1986 is amended by inserting after section 414 the following new section:

#### “SEC. 414A. REQUIREMENTS RELATED TO AUTOMATIC ENROLLMENT.

“(a) IN GENERAL.—Except as otherwise provided in this section—

“(1) an arrangement shall not be treated as a qualified cash or deferred arrangement described in section 401(k) unless such arrangement meets the automatic enrollment requirements of subsection (b), and

“(2) an annuity contract otherwise described in section 403(b)(1) which is purchased under a salary reduction agreement shall not be treated as described in such section unless such agreement meets the automatic enrollment requirements of subsection (b).

“(b) AUTOMATIC ENROLLMENT REQUIREMENTS.—

“(1) IN GENERAL.—An arrangement or agreement meets the requirements of this subsection if such arrangement or agreement is an eligible automatic contribution arrangement (as defined in section 414(w)(3)) which meets the requirements of paragraphs (2) through (4).

“(2) ALLOWANCE OF PERMISSIBLE WITHDRAWALS.—An eligible automatic contribution arrangement meets the requirements of this paragraph if such arrangement allows employees to make permissible withdrawals (as defined in section 414(w)(2)).

“(3) MINIMUM CONTRIBUTION PERCENTAGE.—

“(A) IN GENERAL.—An eligible automatic contribution arrangement meets the requirements of this paragraph if—

“(i) the uniform percentage of compensation contributed by the participant under such arrangement during the first year of participation is not less than 3 percent and not more than 10 percent (unless the participant specifically elects not to have such contributions made or to have such contributions made at a different percentage), and

“(ii) effective for the first day of each plan year starting after each completed year of participation under such arrangement such uniform percentage is increased by 1 percentage point (to at least 10 percent, but not more than 15 percent) unless the participant specifically elects not to have such contributions made or to have such contributions made at a different percentage.

“(B) INITIAL REDUCED CEILING FOR CERTAIN PLANS.—In the case of any arrangement to which this section applies (other than an arrangement that meets the requirements of paragraph (12) or (13) of section 401(k)), for plan years ending before January 1, 2025, subparagraph (A)(ii) shall be applied by substituting ‘10 percent’ for ‘15 percent’.

“(4) INVESTMENT REQUIREMENTS.—An eligible automatic contribution arrangement meets the requirements of this paragraph if amounts contributed pursuant to such arrangement, and for which no investment is elected by the participant, are invested consistent with the requirements of section 2550.404c-5 of title 29, Code of Federal Regulations (or any successor regulations).

“(c) EXCEPTIONS.—For purposes of this section—

“(1) SIMPLE PLANS.—Subsection (a) shall not apply to any simple plan (within the meaning of section 401(k)(11)).

“(2) EXCEPTION FOR PLANS OR ARRANGEMENTS ESTABLISHED BEFORE ENACTMENT OF SECTION.—

“(A) IN GENERAL.—Subsection (a) shall not apply to—

“(i) any qualified cash or deferred arrangement established before the date of the enactment of this section, or

“(ii) any annuity contract purchased under a plan established before the date of the enactment of this section.

“(B) POST-ENACTMENT ADOPTION OF MULTIPLE EMPLOYER PLAN.—Subparagraph (A) shall not apply in the case of an employer adopting after such date of enactment a plan maintained by more than one employer, and subsection (a) shall apply with respect to such employer as if such plan were a single plan.

“(3) EXCEPTION FOR GOVERNMENTAL AND CHURCH PLANS.—Subsection (a) shall not apply to any governmental plan (within the meaning of section 414(d)) or any church plan (within the meaning of section 414(e)).

“(4) EXCEPTION FOR NEW AND SMALL BUSINESSES.—

“(A) NEW BUSINESS.—Subsection (a) shall not apply to any qualified cash or deferred arrangement, or any annuity contract purchased under a plan, while the employer maintaining such plan (and any predecessor employer) has been in existence for less than 3 years.

“(B) SMALL BUSINESSES.—Subsection (a) shall not apply to any qualified cash or deferred arrangement, any annuity contract purchased under a plan, earlier than the date that is 1 year after the close of the first taxable year with respect to which the employer maintaining the plan normally employed more than 10 employees.

“(C) TREATMENT OF MULTIPLE EMPLOYER PLANS.—In the case of a plan maintained by more than 1 employer, subparagraphs (A) and (B) shall be applied separately with respect to each such employer, and all such employers to which subsection (a) applies (after the application of this paragraph) shall be treated as maintaining a separate plan for purposes of this section.”.

(b) CLERICAL AMENDMENT.—The table of sections for subpart B of part I of subchapter D of chapter 1 of the Internal Revenue Code of 1986 is amended by inserting after the item relating to section 414 the following new item:

“Sec. 414A. Requirements related to automatic enrollment.”.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2022.

#### SEC. 102. MODIFICATION OF CREDIT FOR SMALL EMPLOYER PENSION PLAN STARTUP COSTS.

(a) INCREASE IN CREDIT PERCENTAGE FOR SMALLER EMPLOYERS.—Section 45E(e) of the Internal Revenue Code of 1986 is amended by adding at the end the following new paragraph:

“(4) INCREASED CREDIT FOR CERTAIN SMALL EMPLOYERS.—In the case of an employer which would be an eligible employer under subsection (c) if section 408(p)(2)(C)(i) was applied by substituting ‘50 employees’ for ‘100 employees’, subsection (a) shall be applied by substituting ‘100 percent’ for ‘50 percent’.”.

(b) ADDITIONAL CREDIT FOR EMPLOYER CONTRIBUTIONS BY CERTAIN SMALL EMPLOYERS.—Section 45E of such Code, as amended by subsection (a), is amended by adding at the end the following new subsection:

“(f) ADDITIONAL CREDIT FOR EMPLOYER CONTRIBUTIONS BY CERTAIN ELIGIBLE EMPLOYERS.—

“(1) IN GENERAL.—In the case of an eligible employer, the credit allowed for the taxable year under subsection (a) (determined without regard to this subsection) shall be increased by an amount equal to the applicable percentage of employer contributions (other than any elective deferrals (as defined in section 402(g)(3)) by the employer to an eligible employer plan (other than a defined benefit plan (as defined in section 414(j))).

“(2) LIMITATIONS.—

“(A) DOLLAR LIMITATION.—The amount determined under paragraph (1) (before the application of subparagraph (B)) with respect to any employee of the employer shall not exceed \$1,000.

“(B) CREDIT PHASE-IN.—In the case of any eligible employer which had for the preceding taxable year more than 50 employees, the amount determined under paragraph (1) (without regard to this subparagraph) shall be reduced by an amount equal to the product of—

“(i) the amount otherwise so determined under paragraph (1), multiplied by

“(ii) a percentage equal to 2 percentage points for each employee of the employer for the preceding taxable year in excess of 50 employees.

“(3) APPLICABLE PERCENTAGE.—For purposes of this section, the applicable percentage for the taxable year during which the eligible employer plan is established with respect to the eligible employer shall be 100 percent, and for taxable years thereafter shall be determined under the following table:

“**In the case of the following taxable year beginning after the taxable year during which plan is established with respect to the eligible employer:**

	The applicable percentage shall be:
1st .....	100%
2nd .....	75%
3rd .....	50%
4th .....	25%
Any taxable year thereafter .....	0%

“(4) DETERMINATION OF ELIGIBLE EMPLOYER; NUMBER OF EMPLOYEES.—For purposes of this subsection, whether an employer is an eligible employer and the number of employees of an employer shall be determined under the rules of subsection (c), except that paragraph (2) thereof shall only apply to the taxable year during which the eligible employer plan to which this section applies is established with respect to the eligible employer.”.

(c) DISALLOWANCE OF DEDUCTION.—Section 45E(e)(2) of such Code is amended to read as follows:

“(2) DISALLOWANCE OF DEDUCTION.—No deduction shall be allowed—

“(A) for that portion of the qualified startup costs paid or incurred for the taxable year which is equal to so much of the portion of the credit determined under subsection (a) as is properly allocable to such costs, and

“(B) for that portion of the employer contributions by the employer for the taxable year which is equal to so much of the credit increase determined under subsection (f) as is properly allocable to such contributions.”.

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2021.

#### SEC. 103. PROMOTION OF SAVER'S CREDIT.

(a) IN GENERAL.—The Secretary of the Treasury shall take such steps as the Secretary determines are necessary and appropriate to increase public awareness of the credit provided under section 25B of the Internal Revenue Code of 1986.

(b) REPORT TO CONGRESS.—

(1) IN GENERAL.—Not later than 90 days after the date of the enactment of this Act, the Secretary shall provide a report to Congress to summarize the anticipated promotion efforts of the Treasury under subsection (a).

(2) CONTENTS.—Such report shall include—

(A) a description of plans for—

(i) the development and distribution of digital and print materials, including the distribution of such materials to States for participants in State facilitated retirement savings programs, and



- (ii) the translation of such materials into the 10 most commonly spoken languages in the United States after English (as determined by reference to the most recent American Community Survey of the Bureau of the Census), and
- (B) such other information as the Secretary determines is necessary

**SEC. 104. ENHANCEMENT OF 403(b) PLANS.**

**(a) IN GENERAL.—**

(1) **PERMITTED INVESTMENTS.**—Section 403(b)(7)(A) of the Internal Revenue Code of 1986 is amended by striking “if the amounts are to be invested in regulated investment company stock to be held in that custodial account” and inserting “if the amounts are to be held in that custodial account and invested in regulated investment company stock or a group trust intended to satisfy the requirements of Internal Revenue Service Revenue Ruling 81–100 (or any successor guidance)”.

(2) **CONFORMING AMENDMENT.**—The heading of paragraph (7) of section 403(b) of such Code is amended by striking “FOR REGULATED INVESTMENT COMPANY STOCK”.

(3) **EFFECTIVE DATE.**—The amendments made by this subsection shall apply to amounts invested after December 31, 2021.

**(b) AMENDMENTS TO THE INVESTMENT COMPANY ACT OF 1940.**—Section 3(c)(11) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(c)(11)) is amended to read as follows:

“(11) Any—

“(A) employee’s stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1986;

“(B) custodial account meeting the requirements of section 403(b)(7) of such Code;

“(C) governmental plan described in section 3(a)(2)(C) of the Securities Act of 1933;

“(D) collective trust fund maintained by a bank consisting solely of assets of one or more—

“(i) trusts described in subparagraph (A);

“(ii) government plans described in subparagraph (C);

“(iii) church plans, companies, or accounts that are excluded from the definition of an investment company under paragraph (14) of this subsection; or

“(iv) plans which meet the requirements of section 403(b) of the Internal Revenue Code of 1986 if—

“(I) such plan is subject to title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.);

“(II) any employer making such plan available agrees to serve as a fiduciary for the plan with respect to the selection of the plan’s investments among which participants can choose; or

“(III) such plan is a governmental plan (as defined in section 414(d) of such Code); or

“(E) separate account the assets of which are derived solely from—

“(i) contributions under pension or profit-sharing plans which meet the requirements of section 401 of the Internal Revenue Code of 1986 or the requirements for deduction of the employer’s contribution under section 404(a)(2) of such Code;

“(ii) contributions under governmental plans in connection with which interests, participations, or securities are exempted from the registration provisions of section 5 of the Securities Act of 1933 by section 3(a)(2)(C) of such Act;

“(iii) advances made by an insurance company in connection with the operation of such separate account; and

“(iv) contributions to a plan described in subparagraph (D)(iv).”.

**(c) AMENDMENTS TO THE SECURITIES ACT OF 1933.**—Section 3(a)(2) of the Securities Act of 1933 (15 U.S.C. 77c(a)(2)) is amended—

(1) by striking “or (D)” and inserting “(D) a plan which meets the requirements of section 403(b) of such Code if (i) such plan is subject to title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), (ii) any employer making such plan available agrees to serve as a fiduciary for the plan with respect to the selection of the plan’s investments among which participants can choose, or (iii) such plan is a governmental plan (as defined in section 414(d) of such Code); or (E)”;

(2) by striking “(C), or (D)” and inserting “(C), (D), or (E)”; and

- (3) by striking “(iii) which is a plan funded” and inserting “(iii) in the case of a plan not described in subparagraph (D), which is a plan funded”.
- (d) AMENDMENTS TO THE SECURITIES EXCHANGE ACT OF 1934.—Section 3(a)(12)(C) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)(C)) is amended—
  - (1) by striking “or (iv)” and inserting “(iv) a plan which meets the requirements of section 403(b) of such Code if (I) such plan is subject to title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), (II) any employer making such plan available agrees to serve as a fiduciary for the plan with respect to the selection of the plan’s investments among which participants can choose, or (III) such plan is a governmental plan (as defined in section 414(d) of such Code), or (v)”;
  - (2) by striking “(ii), or (iii)” and inserting “(ii), (iii), or (iv)”;
  - (3) by striking “(II) is a plan funded” and inserting “(II) in the case of a plan not described in clause (iv), is a plan funded”.

**SEC. 105. INCREASE IN AGE FOR REQUIRED BEGINNING DATE FOR MANDATORY DISTRIBUTIONS.**

- (a) IN GENERAL.—Section 401(a)(9)(C)(i)(I) of the Internal Revenue Code of 1986 is amended by striking “age 72” and inserting “the applicable age”.
- (b) SPOUSE BENEFICIARIES; SPECIAL RULE FOR OWNERS.—Subparagraphs (B)(iv)(I) and (C)(ii)(I) of section 401(a)(9) of such Code are each amended by striking “age 72” and inserting “the applicable age”.
- (c) APPLICABLE AGE.—Section 401(a)(9)(C) of such Code is amended by adding at the end the following new clause:

“(v) APPLICABLE AGE.—

“(I) In the case of an individual who attains age 72 after December 31, 2021, and age 73 before January 1, 2029, the applicable age is 73.

“(II) In the case of an individual who attains age 73 after December 31, 2028, and age 74 before January 1, 2032, the applicable age is 74.

“(III) In the case of an individual who attains age 74 after December 31, 2031, the applicable age is 75.”.

- (d) CONFORMING AMENDMENTS.—The last sentence of section 408(b) of such Code is amended by striking “age 72” and inserting “the applicable age (determined under section 401(a)(9)(C)(v) for the calendar year in which such taxable year begins)”.

- (e) EFFECTIVE DATE.—The amendments made by this section shall apply to distributions required to be made after December 31, 2021, with respect to individuals who attain age 72 after such date.

**SEC. 106. INDEXING IRA CATCH-UP LIMIT.**

- (a) IN GENERAL.—Subparagraph (C) of section 219(b)(5) of the Internal Revenue Code of 1986 is amended by adding at the end the following new clause:

“(iii) INDEXING OF CATCH-UP LIMITATION.—In the case of any taxable year beginning in a calendar year after 2022, the \$1,000 amount under subparagraph (B)(ii) shall be increased by an amount equal to—

“(I) such dollar amount, multiplied by

“(II) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting ‘calendar year 2021’ for ‘calendar year 2016’ in subparagraph (A)(ii) thereof.

If any amount after adjustment under the preceding sentence is not a multiple of \$100, such amount shall be rounded to the next lower multiple of \$100.”.

- (b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2022.

**SEC. 107. HIGHER CATCH-UP LIMIT TO APPLY AT AGE 62, 63, AND 64.**

- (a) IN GENERAL.—

(1) PLANS OTHER THAN SIMPLE PLANS.—Section 414(v)(2)(B)(i) of the Internal Revenue Code of 1986 is amended by inserting the following before the period: “(\$10,000, in the case of an eligible participant who has attained age 62, but not age 65, before the close of the taxable year)”.

(2) SIMPLE PLANS.—Section 414(v)(2)(B)(ii) of such Code is amended by inserting the following before the period: “(\$5,000, in the case of an eligible participant who has attained age 62, but not age 65, before the close of the taxable year)”.

- (b) COST-OF-LIVING ADJUSTMENTS.—Subparagraph (C) of section 414(v)(2) of such Code is amended by adding at the end the following: “In the case of a year beginning after December 31, 2022, the Secretary shall adjust annually the \$10,000

amount in subparagraph (B)(i) and the \$5,000 amount in subparagraph (B)(ii) for increases in the cost-of-living at the same time and in the same manner as adjustments under the preceding sentence; except that the base period taken into account shall be the calendar quarter beginning July 1, 2021.”

(c) **EFFECTIVE DATE.**—The amendments made by this section shall apply to taxable years beginning after December 31, 2022.

**SEC. 108. MULTIPLE EMPLOYER 403(b) PLANS.**

(a) **IN GENERAL.**—Section 403(b) of the Internal Revenue Code of 1986 is amended by adding at the end the following new paragraph:

“(15) **MULTIPLE EMPLOYER PLANS.**—

“(A) **IN GENERAL.**—Except in the case of a church plan, this subsection shall not be treated as failing to apply to an annuity contract solely by reason of such contract being purchased under a plan maintained by more than 1 employer.

“(B) **TREATMENT OF EMPLOYERS FAILING TO MEET REQUIREMENTS OF PLAN.**—

“(i) **IN GENERAL.**—In the case of a plan maintained by more than 1 employer, this subsection shall not be treated as failing to apply to an annuity contract held under such plan merely because of one or more employers failing to meet the requirements of this subsection if such plan satisfies rules similar to the rules of section 413(e)(2) with respect to any such employer failure.

“(ii) **ADDITIONAL REQUIREMENTS IN CASE OF NON-GOVERNMENTAL PLANS.**—A plan shall not be treated as meeting the requirements of this subparagraph unless the plan meets the requirements of subparagraph (A) or (B) of section 413(e)(1), except in the case of a multiple employer plan maintained solely by any of the following: A State, a political subdivision of a State, or an agency or instrumentality of any one or more of the foregoing.”

(b) **ANNUAL REGISTRATION FOR 403(b) MULTIPLE EMPLOYER PLAN.**—Section 6057 of such Code is amended by redesignating subsection (g) as subsection (h) and by inserting after subsection (f) the following new subsection:

“(g) **403(b) MULTIPLE EMPLOYER PLANS TREATED AS ONE PLAN.**—In the case of annuity contracts to which this section applies and to which section 403(b) applies by reason of the plan under which such contracts are purchased meeting the requirements of paragraph (15) thereof, such plan shall be treated as a single plan for purposes of this section.”

(c) **ANNUAL INFORMATION RETURNS FOR 403(b) MULTIPLE EMPLOYER PLAN.**—Section 6058 of the Internal Revenue Code of 1986 is amended by redesignating subsection (f) as subsection (g) and by inserting after subsection (e) the following new subsection:

“(f) **403(b) MULTIPLE EMPLOYER PLANS TREATED AS ONE PLAN.**—In the case of annuity contracts to which this section applies and to which section 403(b) applies by reason of the plan under which such contracts are purchased meeting the requirements of paragraph (15) thereof, such plan shall be treated as a single plan for purposes of this section.”

(d) **AMENDMENTS TO EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.**—

(1) **TREATED AS POOLED EMPLOYER PLAN.**—

(A) **IN GENERAL.**—Section 3(43)(A) of the Employee Retirement Income Security Act of 1974 is amended—

(i) in clause (ii), by striking “section 501(a) of such Code or” and inserting “501(a) of such Code, a plan that consists of contracts described in section 403(b) of such Code, or”; and

(ii) in the flush text at the end, by striking “the plan.” and inserting “the plan, but such term shall include any program (other than a governmental plan) maintained for the benefit of the employees of more than 1 employer that consists of contracts described in section 403(b) of such Code and that meets the requirements of subparagraph (A) or (B) of section 413(e)(1) of such Code.”

(B) **CONFORMING AMENDMENTS.**—Sections 3(43)(B)(v)(II) and 3(44)(A)(i)(I) of such Act are each amended by striking “section 401(a) of such Code or” and inserting “401(a) of such Code, a plan that consists of contracts described in section 403(b) of such Code, or”.

(2) **FIDUCIARIES.**—Section 3(43)(B)(ii) of such Act is amended—

(A) by striking “trustees meeting the requirements of section 408(a)(2) of the Internal Revenue Code of 1986” and inserting “trustees (or other fiduciaries in the case of a plan that consists of contracts described in section

403(b) of the Internal Revenue Code of 1986) meeting the requirements of section 408(a)(2) of such Code”, and

(B) by striking “holding” and inserting “holding (or causing to be held under the terms of a plan consisting of such contracts)”.

(e) REGULATIONS RELATING TO PLAN TERMINATION.—The Secretary of the Treasury (or the Secretary’s designee) shall prescribe such regulations as may be necessary to clarify the treatment of a plan termination by an employer in the case of plans to which section 403(b)(15) of such Code applies.

(f) MODIFICATION OF MODEL PLAN LANGUAGE. ETC.—

(1) PLAN NOTIFICATIONS.—The Secretary of the Treasury (or the Secretary’s designee) shall modify the model plan language published under section 413(e)(5) of the Internal Revenue Code of 1986 to include language which notifies participating employers described in section 501(c)(3), and which are exempt from tax under section 501(a), that the plan is subject to the Employee Retirement Income Security Act of 1974 and that such employer is a plan sponsor with respect to its employees participating in the multiple employer plan and, as such, has certain fiduciary duties with respect to the plan and to its employees.

(2) MODEL PLANS FOR MULTIPLE EMPLOYER 403(b) NON-GOVERNMENTAL PLANS.—For plans to which section 403(b)(15)(A) of the Internal Revenue Code of 1986 applies (other than a plan maintained for its employees by a State, a political subdivision of a State, or an agency or instrumentality of any one or more of the foregoing) the Secretary shall publish model plan language similar to model plan language published under section 413(e)(5) of such Code.

(3) EDUCATIONAL OUTREACH TO EMPLOYERS EXEMPT FROM TAX.—The Secretary shall provide education and outreach to increase awareness to employers described in section 501(c)(3), and which are exempt from tax under section 501(a), that multiple employer plans are subject to the Employee Retirement Income Security Act of 1974 and that such employer is a plan sponsor with respect to its employees participating in the multiple employer plan and, as such, has certain fiduciary duties with respect to the plan and to its employees.

(g) NO INFERENCE WITH RESPECT TO CHURCH PLANS.—Regarding any application of section 403(b) of the Internal Revenue Code of 1986 to an annuity contract purchased under a church plan (as defined in section 414(e) of such Code) maintained by more than 1 employer, or to any application of rules similar to section 413(e) of such Code to such a plan, no inference shall be made from section 403(b)(15)(A) of such Code (as added by this Act) not applying to such plans.

(h) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to plan years beginning after December 31, 2021.

(2) RULE OF CONSTRUCTION.—Nothing in the amendments made by subsection (a) shall be construed as limiting the authority of the Secretary of the Treasury or the Secretary’s delegate (determined without regard to such amendment) to provide for the proper treatment of a failure to meet any requirement applicable under such Code with respect to one employer (and its employees) in the case of a plan to which section 403(b)(15) applies.

#### SEC. 109. TREATMENT OF STUDENT LOAN PAYMENTS AS ELECTIVE DEFERRALS FOR PURPOSES OF MATCHING CONTRIBUTIONS.

(a) IN GENERAL.—Section 401(m)(4)(A) of the Internal Revenue Code of 1986 is amended by striking “and” at the end of clause (i), by striking the period at the end of clause (ii) and inserting “, and”, and by adding at the end the following new clause:

“(iii) subject to the requirements of paragraph (13), any employer contribution made to a defined contribution plan on behalf of an employee on account of a qualified student loan payment.”.

(b) QUALIFIED STUDENT LOAN PAYMENT.—Section 401(m)(4) of such Code is amended by adding at the end the following new subparagraph:

“(D) QUALIFIED STUDENT LOAN PAYMENT.—The term ‘qualified student loan payment’ means a payment made by an employee in repayment of a qualified education loan (as defined section 221(d)(1)) incurred by the employee to pay qualified higher education expenses, but only—

“(i) to the extent such payments in the aggregate for the year do not exceed an amount equal to—

“(I) the limitation applicable under section 402(g) for the year (or, if lesser, the employee’s compensation (as defined in section 415(c)(3)) for the year), reduced by

“(II) the elective deferrals made by the employee for such year, and

“(ii) if the employee certifies to the employer making the matching contribution under this paragraph that such payment has been made on such loan.

For purposes of this subparagraph, the term ‘qualified higher education expenses’ means the cost of attendance (as defined in section 472 of the Higher Education Act of 1965, as in effect on the day before the date of the enactment of the Taxpayer Relief Act of 1997) at an eligible educational institution (as defined in section 221(d)(2)).”

(c) MATCHING CONTRIBUTIONS FOR QUALIFIED STUDENT LOAN PAYMENTS.—Section 401(m) of such Code is amended by redesignating paragraph (13) as paragraph (14), and by inserting after paragraph (12) the following new paragraph:

“(13) MATCHING CONTRIBUTIONS FOR QUALIFIED STUDENT LOAN PAYMENTS.—

“(A) IN GENERAL.—For purposes of paragraph (4)(A)(iii), an employer contribution made to a defined contribution plan on account of a qualified student loan payment shall be treated as a matching contribution for purposes of this title if—

“(i) the plan provides matching contributions on account of elective deferrals at the same rate as contributions on account of qualified student loan payments,

“(ii) the plan provides matching contributions on account of qualified student loan payments only on behalf of employees otherwise eligible to receive matching contributions on account of elective deferrals,

“(iii) under the plan, all employees eligible to receive matching contributions on account of elective deferrals are eligible to receive matching contributions on account of qualified student loan payments, and

“(iv) the plan provides that matching contributions on account of qualified student loan payments vest in the same manner as matching contributions on account of elective deferrals.

“(B) TREATMENT FOR PURPOSES OF NONDISCRIMINATION RULES, ETC.—

“(i) NONDISCRIMINATION RULES.—For purposes of subparagraph (A)(iii), subsection (a)(4), and section 410(b), matching contributions described in paragraph (4)(A)(iii) shall not fail to be treated as available to an employee solely because such employee does not have debt incurred under a qualified education loan (as defined in section 221(d)(1)).

“(ii) STUDENT LOAN PAYMENTS NOT TREATED AS PLAN CONTRIBUTION.—Except as provided in clause (iii), a qualified student loan payment shall not be treated as a contribution to a plan under this title.

“(iii) MATCHING CONTRIBUTION RULES.—Solely for purposes of meeting the requirements of paragraph (11)(B) or (12) of this subsection, or paragraph (11)(B)(i)(II), (12)(B), or (13)(D) of subsection (k), a plan may treat a qualified student loan payment as an elective deferral or an elective contribution, whichever is applicable.

“(iv) ACTUAL DEFERRAL PERCENTAGE TESTING.—In determining whether a plan meets the requirements of subsection (k)(3)(A)(ii) for a plan year, the plan may apply the requirements of such subsection separately with respect to all employees who receive matching contributions described in paragraph (4)(A)(iii) for the plan year.

“(C) EMPLOYER MAY RELY ON EMPLOYEE CERTIFICATION.—The employer may rely on an employee certification of payment under paragraph (4)(D)(ii).”

(d) SIMPLE RETIREMENT ACCOUNTS.—Section 408(p)(2) of such Code is amended by adding at the end the following new subparagraph:

“(F) MATCHING CONTRIBUTIONS FOR QUALIFIED STUDENT LOAN PAYMENTS.—

“(i) IN GENERAL.—Subject to the rules of clause (iii), an arrangement shall not fail to be treated as meeting the requirements of subparagraph (A)(iii) solely because under the arrangement, solely for purposes of such subparagraph, qualified student loan payments are treated as amounts elected by the employee under subparagraph (A)(i)(I) to the extent such payments do not exceed—

“(I) the applicable dollar amount under subparagraph (E) (after application of section 414(v)) for the year (or, if lesser, the employee’s compensation (as defined in section 415(c)(3)) for the year), reduced by

“(II) any other amounts elected by the employee under subparagraph (A)(i)(I) for the year.

“(ii) QUALIFIED STUDENT LOAN PAYMENT.—For purposes of this subparagraph—

“(I) IN GENERAL.—The term ‘qualified student loan payment’ means a payment made by an employee in repayment of a qualified education loan (as defined in section 221(d)(1)) incurred by the employee to pay qualified higher education expenses, but only if the employee certifies to the employer making the matching contribution that such payment has been made on such a loan.

“(II) QUALIFIED HIGHER EDUCATION EXPENSES.—The term ‘qualified higher education expenses’ has the same meaning as when used in section 401(m)(4)(D).

“(iii) APPLICABLE RULES.—Clause (i) shall apply to an arrangement only if, under the arrangement—

“(I) matching contributions on account of qualified student loan payments are provided only on behalf of employees otherwise eligible to elect contributions under subparagraph (A)(i)(I), and

“(II) all employees otherwise eligible to participate in the arrangement are eligible to receive matching contributions on account of qualified student loan payments.”.

(e) 403(b) PLANS.—Section 403(b)(12)(A) of such Code is amended by adding at the end the following: “The fact that the employer offers matching contributions on account of qualified student loan payments as described in section 401(m)(13) shall not be taken into account in determining whether the arrangement satisfies the requirements of clause (ii) (and any regulation thereunder).”.

(f) 457(b) PLANS.—Section 457(b) of such Code is amended by adding at the end the following: “A plan which is established and maintained by an employer which is described in subsection (e)(1)(A) shall not be treated as failing to meet the requirements of this subsection solely because the plan, or another plan maintained by the employer which meets the requirements of section 401(a) or 403(b), provides for matching contributions on account of qualified student loan payments as described in section 401(m)(13).”.

(g) REGULATORY AUTHORITY.—The Secretary shall prescribe regulations for purposes of implementing the amendments made by this section, including regulations—

(1) permitting a plan to make matching contributions for qualified student loan payments, as defined in sections 401(m)(4)(D) and 408(p)(2)(F) of the Internal Revenue Code of 1986, as added by this section, at a different frequency than matching contributions are otherwise made under the plan, provided that the frequency is not less than annually;

(2) permitting employers to establish reasonable procedures to claim matching contributions for such qualified student loan payments under the plan, including an annual deadline (not earlier than 3 months after the close of each plan year) by which a claim must be made; and

(3) promulgating model amendments which plans may adopt to implement matching contributions on such qualified student loan payments for purposes of sections 401(m), 408(p), 403(b), and 457(b) of the Internal Revenue Code of 1986.

(h) EFFECTIVE DATE.—The amendments made by this section shall apply to contributions made for plan years beginning after December 31, 2021.

#### **SEC. 110. APPLICATION OF CREDIT FOR SMALL EMPLOYER PENSION PLAN STARTUP COSTS TO EMPLOYERS WHICH JOIN AN EXISTING PLAN.**

(a) IN GENERAL.—Section 45E(d)(3)(A) of the Internal Revenue Code of 1986 is amended by striking “effective” and inserting “effective with respect to the eligible employer”.

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to eligible employer plans which become effective with respect to the eligible employer after the date of the enactment of this Act.

#### **SEC. 111. MILITARY SPOUSE RETIREMENT PLAN ELIGIBILITY CREDIT FOR SMALL EMPLOYERS.**

(a) IN GENERAL.—Subpart D of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1986 is amended by adding at the end the following new section:

##### **“SEC. 45U. MILITARY SPOUSE RETIREMENT PLAN ELIGIBILITY CREDIT FOR SMALL EMPLOYERS.**

“(a) IN GENERAL.—For purposes of section 38, in the case of any eligible small employer, the military spouse retirement plan eligibility credit determined under this section for any taxable year is an amount equal to the sum of—

“(1) \$250 with respect to each military spouse who is an employee of such employer and who is eligible to participate in an eligible defined contribution plan of such employer at any time during such taxable year, plus

“(2) so much of the contributions made by such employer to all such plans with respect to such employee during such taxable year as do not exceed \$250.

“(b) LIMITATION.—An individual shall only be taken into account as a military spouse under subsection (a) for the taxable year which includes the date on which such individual began participating in the eligible defined contribution plan of the employer and the 2 succeeding taxable years.

“(c) ELIGIBLE SMALL EMPLOYER.—For purposes of this section—

“(1) IN GENERAL.—The term ‘eligible small employer’ means an eligible employer (as defined in section 408(p)(2)(C)(i)(I)).

“(2) APPLICATION OF 2-YEAR GRACE PERIOD.—A rule similar to the rule of section 408(p)(2)(C)(i)(II) shall apply for purposes of this section.

“(d) MILITARY SPOUSE.—For purposes of this section—

“(1) IN GENERAL.—The term ‘military spouse’ means, with respect to any employer, any individual who is married (within the meaning of section 7703 as of the first date that the employee is employed by the employer) to an individual who is a member of the uniformed services (as defined section 101(a)(5) of title 10, United States Code). For purposes of this section, an employer may rely on an employee’s certification that such employee’s spouse is a member of the uniformed services if such certification provides the name, rank, and service branch of such spouse.

“(2) EXCLUSION OF HIGHLY COMPENSATED EMPLOYEES.—With respect to any employer, the term ‘military spouse’ shall not include any individual if such individual is a highly compensated employee of such employer (within the meaning of section 414(q)).

“(e) ELIGIBLE DEFINED CONTRIBUTION PLAN.—For purposes of this section, the term ‘eligible defined contribution plan’ means, with respect to any eligible small employer, any defined contribution plan (as defined in section 414(i)) of such employer if, under the terms of such plan—

“(1) military spouses employed by such employer are eligible to participate in such plan not later than the date which is 2 months after the date on which such individual begins employment with such employer, and

“(2) military spouses who are eligible to participate in such plan—

“(A) are immediately eligible to receive an amount of employer contributions under such plan which is not less the amount of such contributions that a similarly situated participant who is not a military spouse would be eligible to receive under such plan after 2 years of service, and

“(B) immediately have a nonforfeitable right to the employee’s accrued benefit derived from employer contributions under such plan.

“(f) AGGREGATION RULE.—All persons treated as a single employer under subsection (b), (c), (m) or (o) of section 414 shall be treated as one employer for purposes of this section.”.

(b) CREDIT ALLOWED AS PART OF GENERAL BUSINESS CREDIT.—Section 38(b) of such Code is amended by striking “plus” at the end of paragraph (32), by striking the period at the end of paragraph (33) and inserting “, plus”, and by adding at the end the following new paragraph:

“(34) in the case of an eligible small employer (as defined in section 45U(c)), the military spouse retirement plan eligibility credit determined under section 45U(a).”.

(c) SPECIFIED CREDIT FOR PURPOSES OF CERTIFIED PROFESSIONAL ORGANIZATIONS.—Section 3511(d)(2) of such Code is amended by redesignating subparagraphs (F), (G), and (H) as subparagraphs (G), (H), and (I), respectively, and by inserting after subparagraph (E) the following new subparagraph:

“(F) section 45U (military spouse retirement plan eligibility credit).”.

(d) CLERICAL AMENDMENT.—The table of sections for subpart D of part IV of subchapter A of chapter 1 of such Code is amended by adding at the end the following new item:

“Sec. 45U. Military spouse retirement plan eligibility credit for small employers.”.

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after the date of the enactment of this Act.

#### SEC. 112. SMALL IMMEDIATE FINANCIAL INCENTIVES FOR CONTRIBUTING TO A PLAN.

(a) IN GENERAL.—Subparagraph (A) of section 401(k)(4) of the Internal Revenue Code of 1986 is amended by inserting “(other than a de minimis financial incentive)” after “any other benefit”.

(b) SECTION 403(b) PLANS.—Subparagraph (A) of section 403(b)(12) of such Code, as amended by the preceding provisions of this Act, is further amended by adding at the end the following: “A plan shall not fail to satisfy clause (ii) solely by reason of offering a de minimis financial incentive to employees to elect to have the employer make contributions pursuant to a salary reduction agreement.”.

(c) EXEMPTION FROM PROHIBITED TRANSACTION RULES.—Subsection (d) of section 4975 of such Code is amended by striking “or” at the end of paragraph (22), by striking the period at the end of paragraph (23) and inserting “, or”, and by adding at the end the following new paragraph:

“(24) the provision of a de minimis financial incentive described in section 401(k)(4)(A) or 403(b)(12)(A).”.

(d) AMENDMENT OF EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—Subsection (b) of section 408 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1108(b)) is amended by adding at the end the following new paragraph:

“(21) The provision of a de minimis financial incentive described in section 401(k)(4)(A) or 403(b)(12)(A) of the Internal Revenue Code of 1986.”.

(e) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to plan years beginning after the date of enactment of this Act.

**SEC. 113. SAFE HARBOR FOR CORRECTIONS OF EMPLOYEE ELECTIVE DEFERRAL FAILURES.**

(a) IN GENERAL.—Section 414 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection:

“(aa) CORRECTING AUTOMATIC CONTRIBUTION ERRORS.—

“(1) IN GENERAL.—Any plan or arrangement shall not fail to be treated as a plan described in sections 401(a), 403(b), 408, or 457(b), as applicable, solely by reason of a corrected error.

“(2) CORRECTED ERROR DEFINED.—For purposes of this subsection, the term ‘corrected error’ means a reasonable administrative error in implementing an automatic enrollment or automatic escalation feature in accordance with the terms of an eligible automatic contribution arrangement (as defined under subsection (w)(3)), provided that such implementation error—

“(A) is corrected by the date that is 9½ months after the end of the plan year during which the failure occurred,

“(B) is corrected in a manner that is favorable to the participant, and

“(C) is of a type which is so corrected for all similarly situated participants in a nondiscriminatory manner.

Such correction may occur before or after the participant has terminated employment and may occur without regard to whether the error is identified by the Secretary.

“(3) REGULATIONS AND GUIDANCE FOR FAVORABLE CORRECTION METHODS.—The Secretary shall, by regulations or other guidance of general applicability, specify the correction methods that are in a manner favorable to the participant for purposes of paragraph (2)(B).”.

(b) EFFECTIVE DATE.—The amendment made by this section shall apply with respect to any errors with respect to which the date referred to in section 414(aa) (as added by this section) is after the date of enactment of this Act.

**SEC. 114. ONE-YEAR REDUCTION IN PERIOD OF SERVICE REQUIREMENT FOR LONG-TERM, PART-TIME WORKERS.**

(a) IN GENERAL.—Section 401(k)(2)(D)(ii) of the Internal Revenue Code of 1986 is amended by striking “3” and inserting “2”.

(b) CLARIFICATION OF PRIOR SERVICE FOR PURPOSES OF VESTING RULES.—Section 112(b) of the Setting Every Community Up for Retirement Enhancement Act of 2019 is amended by striking “section 401(k)(2)(D)(ii)” and inserting “paragraphs (2)(D)(ii) and (15)(B)(iii) of section 401(k)”.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect as if included in the enactment of section 112 of the Setting Every Community Up for Retirement Enhancement Act of 2019.

**SEC. 115. FINDINGS RELATING TO S CORPORATION ESOPs.**

Congress finds the following:

(1) On January 1, 1998, nearly 25 years after the Employee Retirement Income Security Act of 1974 was enacted and the employee stock ownership plan (hereafter in this section referred to as an “ESOP”) was created, employees were first permitted to be owners of subchapter S corporations pursuant to the Small Business Job Protection Act of 1996 (Public Law 104–188).

(2) With the passage of the Taxpayer Relief Act of 1997 (Public Law 105–34), Congress designed incentives to encourage businesses to become ESOP-owned S corporations.

(3) Since that time, several thousand companies have become ESOP-owned S corporations, creating an ownership interest for several million Americans in companies in every State in the country, in industries ranging from heavy manufacturing to construction and contracting to services.

(4) Every United States worker who is an employee-owner of an S corporation company through an ESOP has a valuable qualified retirement savings account.



(5) Recent studies have shown that employees of ESOP-owned S corporations enjoy greater job stability, wages and benefits than employees of comparable companies; and ESOP companies are better able to weather economic downturns.

(6) Studies also show that employee-owners of S corporation ESOP companies have amassed meaningful retirement savings through their ESOP accounts that will give them the means to retire with dignity.

(7) It is the goal of Congress to preserve and foster employee ownership of S corporations through ESOPs.

## TITLE II—PRESERVATION OF INCOME

### SEC. 201. REMOVE REQUIRED MINIMUM DISTRIBUTION BARRIERS FOR LIFE ANNUITIES.

(a) IN GENERAL.—Section 401(a)(9) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraph:

“(J) CERTAIN INCREASES IN PAYMENTS UNDER A COMMERCIAL ANNUITY.—Nothing in this section shall prohibit a commercial annuity (within the meaning of section 3405(e)(6)) that is issued in connection with any eligible retirement plan (within the meaning of section 402(c)(8)(B), other than a defined benefit plan) from providing one or more of the following types of payments on or after the annuity starting date:

“(i) annuity payments that increase by a constant percentage, applied not less frequently than annually, at a rate that is less than 5 percent per year,

“(ii) a lump sum payment that—

“(I) results in a shortening of the payment period with respect to an annuity or a full or partial commutation of the future annuity payments, provided that such lump sum is determined using reasonable actuarial methods and assumptions, as determined in good faith by the issuer of the contract, or

“(II) accelerates the receipt of annuity payments that are scheduled to be received within the ensuing 12 months, regardless of whether such acceleration shortens the payment period with respect to the annuity, reduces the dollar amount of benefits to be paid under the contract, or results in a suspension of annuity payments during the period being accelerated,

“(iii) an amount which is in the nature of a dividend or similar distribution, provided that the issuer of the contract determines such amount based on a reasonable comparison of the actuarial factors assumed when calculating the initial annuity payments and the issuer’s experience with respect to those factors, or

“(iv) a final payment upon death that does not exceed the excess of the total amount of the consideration paid for the annuity payments, less the aggregate amount of prior distributions or payments from or under the contract.”.

(b) REGULATIONS AND ENFORCEMENT.—

(1) REGULATIONS.—By the date that is one year after the date of enactment of this Act, the Secretary of the Treasury shall amend the regulation issued by the Department of the Treasury relating to “Required Distributions from Retirement Plans,” 69 Fed. Reg. 33288 (June 15, 2004), and make any corresponding amendments to other regulations, in order to—

(A) conform such regulations to subsection (a), including by eliminating the types of payments described in subsection (a) from the scope of the requirement in Q&A–14(c) of Treasury Regulation section 1.401(a)(9)–6 that the total future expected payments must exceed the total value being annuitized;

(B) amend Q&A–14(c) of Treasury Regulation section 1.401(a)(9)–6 to provide that a commercial annuity that provides an initial payment that is at least equal to the initial payment that would be required from an individual account pursuant to Treasury Regulation section 1.401(a)(9)–5 will be deemed to satisfy the requirement in Q&A–14(c) of Treasury Regulation section 1.401(a)(9)–6 that the total future expected payments must exceed the total value being annuitized; and

(C) amend Q&A–14(e)(3) of Treasury Regulation section 1.401(a)(9)–6 to provide that the total future expected payments under a commercial annuity are determined using the tables or other actuarial assumptions that the issuer of the contract actually uses in pricing the premiums and benefits

with respect to the contract, provided that such tables or other actuarial assumptions are reasonable.

(2) ENFORCEMENT.—As of the date of enactment of this Act, the Secretary of the Treasury shall administer and enforce the law in accordance with subsections (a) and (b).

(c) EFFECTIVE DATE.—This section shall take effect on the date of the enactment of this Act.

**SEC. 202. QUALIFYING LONGEVITY ANNUITY CONTRACTS.**

(a) IN GENERAL.—Not later than the date which is 1 year after the date of the enactment of this Act, the Secretary of the Treasury or the Secretary's delegate (hereafter in this section referred to as the "Secretary") shall amend the regulation issued by the Department of the Treasury relating to "Longevity Annuity Contracts" (79 Fed. Reg. 37633 (July 2, 2014)), as follows:

(1) REPEAL 25-PERCENT PREMIUM LIMIT.—The Secretary shall amend Q&A-17(b)(3) of Treasury Regulation section 1.401(a)(9)-6 and Q&A-12(b)(3) of Treasury Regulation section 1.408-8 to eliminate the requirement that premiums for qualifying longevity annuity contracts be limited to a percentage of an individual's account balance, and to make such corresponding changes to the regulations and related forms as are necessary to reflect the elimination of this requirement.

(2) FACILITATE JOINT AND SURVIVOR BENEFITS.—The Secretary shall amend Q&A-17(c) of Treasury Regulation section 1.401(a)(9)-6, and make such corresponding changes to the regulations and related forms as are necessary, to provide that, in the case of a qualifying longevity annuity contract which was purchased with joint and survivor annuity benefits for the individual and the individual's spouse which were permissible under the regulations at the time the contract was originally purchased, a divorce occurring after the original purchase and before the annuity payments commence under the contract will not affect the permissibility of the joint and survivor annuity benefits or other benefits under the contract, or require any adjustment to the amount or duration of benefits payable under the contract, provided that any qualified domestic relations order (within the meaning of section 414(p) of the Internal Revenue Code of 1986) or any divorce or separation instrument (as defined in subsection (b))—

(A) provides that the former spouse is entitled to the survivor benefits under the contract;

(B) does not modify the treatment of the former spouse as the beneficiary under the contract who is entitled to the survivor benefits; or

(C) does not modify the treatment of the former spouse as the measuring life for the survivor benefits under the contract.

(3) PERMIT SHORT FREE LOOK PERIOD.—The Secretary shall amend Q&A-17(a)(4) of Treasury Regulation section 1.401(a)(9)-6 to ensure that such Q&A does not preclude a contract from including a provision under which an employee may rescind the purchase of the contract within a period not exceeding 90 days from the date of purchase.

(b) DIVORCE OR SEPARATION INSTRUMENT.—For purposes of subsection (a)(2), the term "divorce or separation instrument" means—

(1) a decree of divorce or separate maintenance or a written instrument incident to such a decree,

(2) a written separation agreement, or

(3) a decree (not described in paragraph (1)) requiring a spouse to make payments for the support or maintenance of the other spouse.

(c) EFFECTIVE DATES, ENFORCEMENT, AND INTERPRETATIONS.—

(1) EFFECTIVE DATES.—

(A) Paragraph (1) of subsection (a) shall be effective with respect to contracts purchased or received in an exchange on or after the date of the enactment of this Act.

(B) Paragraphs (2) and (3) of subsection (a) shall be effective with respect to contracts purchased or received in an exchange on or after July 2, 2014.

(2) ENFORCEMENT AND INTERPRETATIONS.—Prior to the date on which the Secretary issues final regulations pursuant to subsection (a)—

(A) the Secretary (or delegate) shall administer and enforce the law in accordance with subsection (a) and the effective dates in paragraph (1) of this subsection; and

(B) taxpayers may rely upon their reasonable good faith interpretations of subsection (a).

**SEC. 203. INSURANCE-DEDICATED EXCHANGE-TRADED FUNDS.**

(a) **IN GENERAL.**—Not later than the date which is 7 years after the date of the enactment of this Act, the Secretary of the Treasury (or the Secretary's delegate) shall amend the regulation issued by the Department of the Treasury relating to "Income Tax; Diversification Requirements for Variable Annuity, Endowment, and Life Insurance Contracts", 54 Fed. Reg. 8728 (March 2, 1989), and make any necessary corresponding amendments to other regulations, in order to facilitate the use of exchange-traded funds as investment options under variable contracts within the meaning of section 817(d) of the Internal Revenue Code of 1986, in accordance with subsections (b) and (c) of this section.

(b) **DESIGNATE CERTAIN AUTHORIZED PARTICIPANTS AND MARKET MAKERS AS ELIGIBLE INVESTORS.**—The Secretary of the Treasury (or the Secretary's delegate) shall amend Treas. Reg. section 1.817-5(f)(3) to provide that satisfaction of the requirements in Treas. Reg. section 1.817-5(f)(2)(i) with respect to an exchange-traded fund shall not be prevented by reason of beneficial interests in such a fund being held by 1 or more authorized participants or market makers.

(c) **DEFINE RELEVANT TERMS.**—In amending Treas. Reg. section 1.817-5(f)(3) in accordance with subsections (b) of this section, the Secretary of the Treasury (or the Secretary's delegate) shall provide definitions consistent with the following:

(1) **EXCHANGE-TRADED FUND.**—The term "exchange-traded fund" means a regulated investment company, partnership, or trust—

(A) that is registered with the Securities and Exchange Commission as an open-end investment company or a unit investment trust;

(B) the shares of which can be purchased or redeemed directly from the fund only by an authorized participant; and

(C) the shares of which are traded throughout the day on a national stock exchange at market prices that may or may not be the same as the net asset value of the shares.

(2) **AUTHORIZED PARTICIPANT.**—The term "authorized participant" means a financial institution that is a member or participant of a clearing agency registered under section 17A(b) of the Securities Exchange Act of 1934 that enters into a contractual relationship with an exchange-traded fund pursuant to which the financial institution is permitted to purchase and redeem shares directly from the fund and to sell such shares to third parties, but only if the contractual arrangement or applicable law precludes the financial institution from—

(A) purchasing the shares for its own investment purposes rather than for the exclusive purpose of creating and redeeming such shares on behalf of third parties; and

(B) selling the shares to third parties who are not market makers or otherwise described in Treas. Reg. section 1.817-5(f)(1) and (3).

(3) **MARKET MAKER.**—The term "market maker" means a financial institution that is a registered broker or dealer under section 15(b) of the Securities Exchange Act of 1934 that maintains liquidity for an exchange-traded fund on a national stock exchange by being always ready to buy and sell shares of such fund on the market, but only if the financial institution is contractually or legally precluded from selling or buying such shares to or from persons who are not authorized participants or otherwise described in Treas. Reg. section 1.817-5(f)(2) and (3).

(d) **EFFECTIVE DATE.**—Subsections (b) and (c) shall apply to segregated asset account investments made on or after the date that is 7 years after the date of the enactment of this Act.

## **TITLE III—SIMPLIFICATION AND CLARIFICATION OF RETIREMENT PLAN RULES**

**SEC. 301. RECOVERY OF RETIREMENT PLAN OVERPAYMENTS.**

(a) **OVERPAYMENTS UNDER INTERNAL REVENUE CODE OF 1986.**—

(1) **QUALIFICATION REQUIREMENTS.**—Section 414 of the Internal Revenue Code of 1986, as amended by the preceding provisions of this Act, is further amended by adding at the end the following new subsection:

“(b) **SPECIAL RULES APPLICABLE TO BENEFIT OVERPAYMENTS.**—

“(1) **IN GENERAL.**—A plan shall not fail to be treated as described in clause (i), (ii), (iii), or (iv) of section 219(g)(5)(A) (and shall not fail to be treated as satisfying the requirements of section 401(a) or 403) merely because—

“(A) the plan fails to obtain payment from any participant, beneficiary, employer, plan sponsor, fiduciary, or other party on account of any inadvertent benefit overpayment made by the plan, or

“(B) the plan sponsor amends the plan to increase past or future benefit payments to affected participants and beneficiaries in order to adjust for prior inadvertent benefit overpayments.

“(2) REDUCTION IN FUTURE BENEFIT PAYMENTS AND RECOVERY FROM RESPONSIBLE PARTY.—Paragraph (1) shall not fail to apply to a plan merely because, after discovering a benefit overpayment, such plan—

“(A) reduces future benefit payments to the correct amount provided for under the terms of the plan, or

“(B) seeks recovery from the person or persons responsible for such overpayment.

“(3) EMPLOYER FUNDING OBLIGATIONS.—Nothing in this subsection shall relieve an employer of any obligation imposed on it to make contributions to a plan to meet the minimum funding standards under sections 412 and 430 or to prevent or restore an impermissible forfeiture in accordance with section 411.

“(4) OBSERVANCE OF BENEFIT LIMITATIONS.—Notwithstanding paragraph (1), a plan to which paragraph (1) applies shall observe any limitations imposed on it by section 401(a)(17) or 415. The plan may enforce such limitations using any method approved by the Secretary for recouping benefits previously paid or allocations previously made in excess of such limitations.

“(5) COORDINATION WITH OTHER QUALIFICATION REQUIREMENTS.—The Secretary may issue regulations or other guidance of general applicability specifying how benefit overpayments and their recoupment or non-recoupment from a participant or beneficiary shall be taken into account for purposes of satisfying any requirement applicable to a plan to which paragraph (1) applies.”.

(2) ROLLOVERS.—Section 402(c) of such Code is amended by adding at the end the following new paragraph:

“(12) In the case of an inadvertent benefit overpayment from a plan to which section 414(b)(1) applies which is transferred to an eligible retirement plan by or on behalf of a participant or beneficiary—

“(A) the portion of such overpayment with respect to which recoupment is not sought on behalf of the plan shall be treated as having been paid in an eligible rollover distribution if the payment would have been an eligible rollover distribution but for being an overpayment, and

“(B) the portion of such overpayment with respect to which recoupment is sought on behalf of the plan shall be permitted to be returned to such plan and in such case shall be treated as an eligible rollover distribution transferred to such plan by the participant or beneficiary who received such overpayment (and the plans making and receiving such transfer shall be treated as permitting such transfer).

In any case in which recoupment is sought on behalf of the plan but is disputed by the participant or beneficiary who received such overpayment, such dispute shall be subject to the claims and appeals procedures of the plan that made such overpayment, such plan shall notify the plan receiving the rollover of such dispute, and the plan receiving the rollover shall retain such overpayment on behalf of the participant or beneficiary (and shall be entitled to treat such overpayment as plan assets) pending the outcome of such procedures.”.

(b) OVERPAYMENTS UNDER ERISA.—Section 206 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1056) is amended by adding at the end the following new subsection:

“(h) SPECIAL RULES APPLICABLE TO BENEFIT OVERPAYMENTS.—

“(1) GENERAL RULE.—In the case of an inadvertent benefit overpayment by any pension plan, the responsible plan fiduciary shall not be considered to have failed to comply with the requirements of this title merely because such fiduciary determines, in the exercise of its fiduciary discretion, not to seek recovery of all or part of such overpayment from—

“(A) any participant or beneficiary,

“(B) any plan sponsor of, or contributing employer to—

“(i) an individual account plan, provided that the amount needed to prevent or restore any impermissible forfeiture from any participant’s or beneficiary’s account arising in connection with the overpayment is, separately from and independently of the overpayment, allocated to such account pursuant to the nonforfeitability requirements of section 203 (for example, out of the plan’s forfeiture account, additional employer contributions, or recoveries from those responsible for the overpayment), or

“(ii) a defined benefit pension plan subject to the funding rules in part 3 of this subtitle B, unless the responsible plan fiduciary determines, in the exercise of its fiduciary discretion, that failure to recover all or part of the overpayment faster than required under such funding

rules would materially affect the plan's ability to pay benefits due to other participants and beneficiaries, or

“(C) any fiduciary of the plan, other than a fiduciary (including a plan sponsor or contributing employer acting in a fiduciary capacity) whose breach of its fiduciary duties resulted in such overpayment, provided that if the plan has established prudent procedures to prevent and minimize overpayment of benefits and the relevant plan fiduciaries have followed such procedures, an inadvertent benefit overpayment will not give rise to a breach of fiduciary duty.

“(2) REDUCTION IN FUTURE BENEFIT PAYMENTS AND RECOVERY FROM RESPONSIBLE PARTY.—Paragraph (1) shall not fail to apply with respect to any inadvertent benefit overpayment merely because, after discovering such overpayment, the responsible plan fiduciary—

“(A) reduces future benefit payments to the correct amount provided for under the terms of the plan, or

“(B) seeks recovery from the person or persons responsible for the overpayment.

“(3) EMPLOYER FUNDING OBLIGATIONS.—Nothing in this subsection shall relieve an employer of any obligation imposed on it to make contributions to a plan to meet the minimum funding standards under part 3 of this subtitle B or to prevent or restore an impermissible forfeiture in accordance with section 203.

“(4) RECOUPMENT FROM PARTICIPANTS AND BENEFICIARIES.—If the responsible plan fiduciary, in the exercise of its fiduciary discretion, decides to seek recoupment from a participant or beneficiary of all or part of an inadvertent benefit overpayment made by the plan to such participant or beneficiary, it may do so, subject to the following conditions:

“(A) No interest or other additional amounts (such as collection costs or fees) are sought on overpaid amounts.

“(B) If the plan seeks to recoup past overpayments of a non-decreasing periodic benefit by reducing future benefit payments—

“(i) the reduction ceases after the plan has recovered the full dollar amount of the overpayment,

“(ii) the amount recouped each calendar year does not exceed 10 percent of the full dollar amount of the overpayment, and

“(iii) future benefit payments are not reduced to below 90 percent of the periodic amount otherwise payable under the terms of the plan.

Alternatively, if the plan seeks to recoup past overpayments of a non-decreasing periodic benefit through one or more installment payments, the sum of such installment payments in any calendar year does not exceed the sum of the reductions that would be permitted in such year under the preceding sentence.

“(C) If the plan seeks to recoup past overpayments of a benefit other than a non-decreasing periodic benefit, the plan satisfies requirements developed by the Secretary of the Treasury for purposes of this subparagraph.

“(D) Efforts to recoup overpayments are not made through a collection agency or similar third party and such efforts are not accompanied by threats of litigation, unless the responsible plan fiduciary reasonably believes it could prevail in a civil action brought in Federal or State court to recoup the overpayments.

“(E) Recoupment of past overpayments to a participant is not sought from any beneficiary of the participant, including a spouse, surviving spouse, former spouse, or other beneficiary.

“(F) Recoupment may not be sought if the first overpayment occurred more than 3 years before the participant or beneficiary is first notified in writing of the error.

“(G) A participant or beneficiary from whom recoupment is sought is entitled to contest all or part of the recoupment pursuant to the plan's claims and appeals procedures.

“(H) In determining the amount of recoupment to seek, the responsible plan fiduciary may take into account the hardship that recoupment likely would impose on the participant or beneficiary.

“(5) EFFECT OF CULPABILITY.—Subparagraphs (A) through (F) of paragraph (4) shall not apply to protect a participant or beneficiary who is culpable. For purposes of this paragraph, a participant or beneficiary is culpable if the individual bears responsibility for the overpayment (such as through misrepresentations or omissions that led to the overpayment), or if the individual knew, or had good reason to know under the circumstances, that the benefit payment or payments were materially in excess of the correct amount. Notwithstanding the preceding

sentence, an individual is not culpable merely because the individual believed the benefit payment or payments were or might be in excess of the correct amount, if the individual raised that question with an authorized plan representative and was told the payment or payments were not in excess of the correct amount. With respect to a culpable participant or beneficiary, efforts to recoup overpayments shall not be made through threats of litigation, unless a lawyer for the plan could make the representations required under Rule 11 of the Federal Rules of Civil Procedure if the litigation were brought in Federal court.”.

(c) **EFFECTIVE DATE.**—The amendments made by this section shall apply as of the date of the enactment of this Act.

(d) **CERTAIN ACTIONS BEFORE DATE OF ENACTMENT.**—Plans, fiduciaries, employers, and plan sponsors are entitled to rely on—

(1) a good faith interpretation of then existing administrative guidance for inadvertent benefit overpayment recoupments and recoveries that commenced before the date of enactment of this Act, and

(2) determinations made before such date of enactment by the responsible plan fiduciary, in the exercise of its fiduciary discretion, not to seek recoupment or recovery of all or part of an inadvertent benefit overpayment.

In the case of a benefit overpayment that occurred prior to the date of enactment of this Act, any installment payments by the participant or beneficiary to the plan or any reduction in periodic benefit payments to the participant or beneficiary, which were made in recoupment of such overpayment and which commenced prior to such date, may continue after such date. Nothing in this subsection shall relieve a fiduciary from responsibility for an overpayment that resulted from a breach of its fiduciary duties.

**SEC. 302. REDUCTION IN EXCISE TAX ON CERTAIN ACCUMULATIONS IN QUALIFIED RETIREMENT PLANS.**

(a) **IN GENERAL.**—Section 4974(a) of the Internal Revenue Code of 1986 is amended by striking “50 percent” and inserting “25 percent”.

(b) **REDUCTION IN EXCISE TAX ON FAILURES TO TAKE REQUIRED MINIMUM DISTRIBUTIONS.**—Section 4974 of such Code is amended by adding at the end the following new subsection:

“(e) **REDUCTION OF TAX IN CERTAIN CASES.**—

“(1) **REDUCTION.**—In the case of a taxpayer who—

“(A) corrects, during the correction window, a shortfall of distributions from an individual retirement plan which resulted in imposition of a tax under subsection (a), and

“(B) submits a return, during the correction window, reflecting such tax (as modified by this subsection),

the first sentence of subsection (a) shall be applied by substituting ‘10 percent’ for ‘25 percent’.

“(2) **CORRECTION WINDOW.**—For purposes of this subsection, the term ‘correction window’ means the period of time beginning on the date on which the tax under subsection (a) is imposed with respect to a shortfall of distributions from an individual retirement plan, and ending on the earlier of—

“(A) the date on which the Secretary initiates an audit, or otherwise demands payment, with respect to the shortfall of distributions, or

“(B) the last day of the second taxable year that begins after the end of the taxable year in which the tax under subsection (a) is imposed.”.

(c) **EFFECTIVE DATE.**—The amendments made by this section shall apply to taxable years beginning after December 31, 2021.

**SEC. 303. PERFORMANCE BENCHMARKS FOR ASSET ALLOCATION FUNDS.**

(a) **IN GENERAL.**—Not later than 6 months after the date of the enactment of this Act, the Secretary of Labor (or the Secretary’s delegate) shall modify the regulations under section 404 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104) to provide that, in the case of a designated investment alternative which contains a mix of asset classes, a plan administrator may, but is not required to, use a benchmark which is a blend of different broad-based securities market indices if—

(1) the blend is reasonably representative of the asset class holdings of the designated investment alternative;

(2) for purposes of determining the blend’s returns for 1-, 5-, and 10-calendar-year periods (or for the life of the alternative, if shorter), the blend is modified at least once per year to reflect changes in the asset class holdings of the designated investment alternative;

(3) the blend is furnished to participants and beneficiaries in a manner that is reasonably designed to be understandable and helpful; and

(4) each securities market index which is used for an associated asset class would separately satisfy the requirements of such regulations for such asset class.

(b) **STUDY.**—Not later than December 31, 2022, the Secretary of Labor (or the Secretary’s delegate) shall deliver a report to the Committees on Ways and Means and Education and Labor of the House of Representatives and the Committees on Finance and Health, Education, Labor, and Pensions of the Senate regarding the effectiveness of the benchmarking requirements under section 2550.404a–5 of title 29, Code of Federal Regulations.

**SEC. 304. REVIEW AND REPORT TO THE CONGRESS RELATING TO REPORTING AND DISCLOSURE REQUIREMENTS.**

(a) **STUDY.**—As soon as practicable after the date of the enactment of this Act, the Secretary of Labor, the Secretary of the Treasury, and the Pension Benefit Guaranty Corporation shall review the reporting and disclosure requirements of—

(1) title I of the Employee Retirement Income Security Act of 1974 applicable to pension plans (as defined in section 3(2) of such Act); and

(2) the Internal Revenue Code of 1986 applicable to qualified retirement plans (as defined in section 4974(c) of such Code without regard to paragraphs (4) and (5) thereof).

(b) **REPORT.**—Not later than 18 months after the date of the enactment of this Act, the Secretary of Labor, the Secretary of the Treasury, and the Pension Benefit Guaranty Corporation, jointly, and after consultation with a balanced group of participant and employer representatives, shall with respect to plans referenced in subsection (a) report on the effectiveness of the applicable reporting and disclosure requirements and make such recommendations as may be appropriate to the appropriate committees of the Congress to consolidate, simplify, standardize, and improve such requirements so as to simplify reporting for such plans and ensure that plans can simply furnish and participants and beneficiaries timely receive and better understand the information they need to monitor their plans, plan for retirement, and obtain the benefits they have earned. Such report shall assess the extent to which retirement plans are retaining disclosures, work records, and plan documents that are needed to ensure accurate calculation of future benefits. To assess the effectiveness of the applicable reporting and disclosure requirements, the report shall include an analysis, based on plan data, of how participants and beneficiaries are providing preferred contact information, the methods by which plan sponsors and plans are furnishing disclosures, and the rate at which participants and beneficiaries (grouped by key demographics) are receiving, accessing, and retaining disclosures. The agencies shall conduct appropriate surveys and data collection to obtain any needed information.

**SEC. 305. ELIMINATING UNNECESSARY PLAN REQUIREMENTS RELATED TO UNENROLLED PARTICIPANTS.**

(a) **AMENDMENT OF INTERNAL REVENUE CODE OF 1986.**—Section 414 of the Internal Revenue Code of 1986, as amended by the preceding provisions of this Act, is further amended by adding at the end the following new subsection:

“(cc) **ELIMINATING UNNECESSARY PLAN REQUIREMENTS RELATED TO UNENROLLED PARTICIPANTS.**—

“(1) **IN GENERAL.**—Notwithstanding any other provision of this title, with respect to any defined contribution plan, no disclosure, notice, or other plan document (other than the notices and documents described in subparagraphs (A) and (B)) shall be required to be furnished under this title to any unenrolled participant if the unenrolled participant receives—

“(A) an annual reminder notice (in paper format, or in any electronic format consented to by the participant) of such participant’s eligibility to participate in such plan and any applicable election deadlines under the plan, and

“(B) any document requested by such participant which the participant would be entitled to receive without regard to this subsection.

“(2) **UNENROLLED PARTICIPANT.**—For purposes of this subsection, the term ‘unenrolled participant’ means an employee who—

“(A) is eligible to participate in a defined contribution plan,

“(B) has received all required notices, disclosures, and other plan documents required to be furnished under this title and the summary plan description as provided in section 104(b) of the Employee Retirement Income Security Act of 1974 in connection with such participant’s initial eligibility to participate in such plan,

“(C) is not participating in such plan, and

“(D) does not have a balance in the plan.

For purposes of this subsection, any eligibility to participate in the plan following any period for which such employee was not eligible to participate shall be treated as initial eligibility.

“(3) ANNUAL REMINDER NOTICE.—For purposes of this subsection, the term ‘annual reminder notice’ means the notice described in section 111(c) of the Employee Retirement Income Security Act of 1974.”

(b) AMENDMENT OF EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—

(1) IN GENERAL.—Part 1 of subtitle B of subchapter I of the Employee Retirement Income Security Act of 1974 is amended by redesignating section 111 as section 112 and by inserting after section 110 the following new section:

**“SEC. 111. ELIMINATING UNNECESSARY PLAN REQUIREMENTS RELATED TO UNENROLLED PARTICIPANTS.**

“(a) IN GENERAL.—Notwithstanding any other provision of this title, with respect to any individual account plan, no disclosure, notice, or other plan document (other than the notices and documents described in paragraphs (1) and (2)) shall be required to be furnished under this title to any unenrolled participant if the unenrolled participant receives—

“(1) an annual reminder notice of such participant’s eligibility to participate in such plan and any applicable election deadlines under the plan; and

“(2) any document requested by such participant which the participant would be entitled to receive without regard to this section.

“(b) UNENROLLED PARTICIPANT.—For purposes of this section, the term ‘unenrolled participant’ means an employee who—

“(1) is eligible to participate in an individual account plan;

“(2) has received all required notices, disclosures, and other plan documents, including the summary plan description, required to be furnished under this title in connection with such participant’s initial eligibility to participate in such plan;

“(3) is not participating in such plan; and

“(4) does not have a balance in the plan.

For purposes of this section, any eligibility to participate in the plan following any period for which such employee was not eligible to participate shall be treated as initial eligibility.

“(c) ANNUAL REMINDER NOTICE.—For purposes of this section, the term ‘annual reminder notice’ means a notice provided in accordance with section 2520.104b–1 of title 29, Code of Federal Regulations (or any successor regulation), which—

“(1) is furnished in connection with the annual open season election period with respect to the plan or, if there is no such period, is furnished within a reasonable period prior to the beginning of each plan year;

“(2) notifies the unenrolled participant of—

“(A) the unenrolled participant’s eligibility to participate in the plan; and

“(B) the key benefits under the plan and the key rights and features under the plan affecting such benefits; and

“(3) provides such information in a prominent manner calculated to be understood by the average participant.”

(2) CLERICAL AMENDMENT.—The table of contents in section 1 of the Employee Retirement Income Security Act of 1974 is amended by striking the item relating to section 111 and by inserting after the item relating to section 110 the following new items:

“Sec. 111. Eliminating unnecessary plan requirements related to unenrolled participants.

“Sec. 112. Repeal and effective date.”

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2021.

**SEC. 306. RETIREMENT SAVINGS LOST AND FOUND.**

(a) RETIREMENT SAVINGS LOST AND FOUND.—

(1) ESTABLISHMENT.—

(A) IN GENERAL.—Not later than 3 years after the date of the enactment of this Act, the Secretary of Labor, the Secretary of the Treasury, and the Secretary of Commerce, in cooperation, shall establish an online searchable database (to be managed by the Pension Benefit Guaranty Corporation in accordance with section 4051 of the Employee Retirement Income Security Act of 1974) to be known as the “Retirement Savings Lost and Found”. The Retirement Savings Lost and Found shall—

(i) allow an individual to search for information that enables the individual to locate the plan administrator of any plans with respect to which the individual is or was a participant or beneficiary, and to pro-



vide contact information for the plan administrator of any plan described in subparagraph (B);

(ii) allow the corporation to assist such an individual in locating any plan of the individual; and

(iii) allow the corporation to make any necessary changes to contact information on record for the plan administrator based on any changes to the plan due to merger or consolidation of the plan with any other plan, division of the plan into two or more plans, bankruptcy, termination, change in name of the plan, change in name or address of the plan administrator, or other causes.

The Retirement Savings Lost and Found established under this paragraph shall include information reported under section 4051 of the Employee Retirement Income Security Act of 1974 and other relevant information obtained by the Pension Benefit Guaranty Corporation.

(B) PLANS DESCRIBED.—A plan described in this subparagraph is a plan to which the vesting standards of section 203 of part 2 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 apply.

(2) ADMINISTRATION.—The Retirement Savings Lost and Found established under paragraph (1) shall provide individuals described in paragraph (1)(A) only with the ability to view contact information for the plan administrator of any plan with respect to which the individual is or was a participant or beneficiary, sufficient to allow the individual to locate the individual's plan in order to recover any benefit owing to the individual under the plan.

(3) SAFEGUARDING PARTICIPANT PRIVACY AND SECURITY.—In establishing the Retirement Savings Lost and Found under paragraph (1), the Pension Benefit Guaranty Corporation, in consultation with the Secretary of Labor, the Secretary of Treasury, and the Secretary of Commerce, shall take all necessary and proper precautions to ensure that individuals' plan information maintained by the Retirement Savings Lost and Found is protected and that persons other than the individual cannot fraudulently claim the benefits to which any individual is entitled, and to allow any individual to opt out of inclusion in the Retirement Savings Lost and Found at the election of the individual.

(b) OFFICE OF THE RETIREMENT SAVINGS LOST AND FOUND.—

(1) IN GENERAL.—Subtitle C of title IV of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1341 et seq.) is amended by adding at the end the following:

**“SEC. 4051. OFFICE OF THE RETIREMENT SAVINGS LOST AND FOUND.**

**“(a) ESTABLISHMENT; RESPONSIBILITIES OF OFFICE.—**

**“(1) IN GENERAL.—**Not later than 2 years after the date of the enactment of this section, the Secretary of Labor, the Secretary of Treasury, and the Secretary of Commerce shall establish within the corporation an Office of the Retirement Savings Lost and Found (in this section referred to as the ‘Office’).

**“(2) RESPONSIBILITIES OF OFFICE.—**

**“(A) IN GENERAL.—**The Office shall—

**“(i) carry out subsection (b) of this section;**

**“(ii) maintain the Retirement Savings Lost and Found established under section 306(a) of the Securing a Strong Retirement Act of 2021; and**

**“(iii) perform an annual audit of plan information contained in the Retirement Savings Lost and Found and ensure that such information is current and accurate.**

**“(B) OPTION TO CONTRACT.—**

**“(i) IN GENERAL.—**Not later than 2 years after the date of enactment of this section, the corporation shall conduct an analysis of the cost effectiveness of contracting with a third party to carry out the responsibilities under subparagraph (A)(iii) and, upon a determination that such contracting would be more cost effective than carrying out such responsibilities within the Office, the corporation may enter into such contracts as merited by such analysis.

**“(ii) REPORT.—**The corporation shall report on the results of the analysis under clause (i) to the Committees on Finance and Health, Education, Labor, and Pensions of the Senate and the Committees on Ways and Means and Education and Labor of the House of Representatives.

**“(b) CERTAIN NON-RESPONSIVE PARTICIPANTS ENTITLED TO SMALL BENEFITS.—**

**“(1) GENERAL RULE.—**

**“(A) TRANSFER TO THE OFFICE OF THE RETIREMENT SAVINGS LOST AND FOUND.—**The administrator of a plan that is not terminated and to which section 401(a)(31)(B) of the Internal Revenue Code of 1986 applies shall

transfer to the Office the amount required to be transferred under section 401(a)(31)(B)(iv) of such Code for a non-responsive participant.

“(B) INFORMATION AND PAYMENT TO THE OFFICE.—Upon making a transfer under subparagraph (A), the plan administrator shall provide such information and certifications as the Office shall specify, including with respect to the transferred amount and the non-responsive participant.

“(C) INFORMATION REQUIREMENTS AFTER TRANSFER.—In the event that, after a transfer is made under subparagraph (A), the relevant non-responsive participant contacts the plan administrator or the plan administrator discovers information that may assist the Office in locating the non-responsive participant, the plan administrator shall notify and provide such information as the Office shall specify to the Office.

“(D) SEARCH AND PAYMENT BY THE OFFICE FOLLOWING TRANSFER.—The Office shall periodically, and upon receiving information described in subparagraph (C), conduct a search for the non-responsive participant for whom the Office has received a transfer under subparagraph (A). Upon location of a non-responsive participant who claims benefits, the Office shall make a single payment to the non-responsive participant in an amount equal to the sum of—

“(i) the amount transferred to the Office under subparagraph (A) for such participant; and

“(ii) the return on the investment attributable to such amount under section 4005(j)(3).

“(2) DEFINITION.—For purposes of this subsection, the term ‘non-responsive participant’ means a participant or beneficiary of a plan described in paragraph (1)(A)—

“(A) who is entitled to a benefit subject to a mandatory transfer under section 401(a)(31)(B)(iii) of the Internal Revenue Code of 1986; and

“(B) for whom the plan has satisfied the conditions in section 401(a)(31)(B)(iv) of such Code.

“(3) REGULATORY AUTHORITY.—The Office shall prescribe such regulations as are necessary to carry out the purposes of this section, including rules relating to the amount payable to the Office and the amount to be paid by the Office.

“(c) INFORMATION COLLECTION.—Within such period after the end of a plan year as the Office may by regulations prescribe, the administrator of a plan to which the vesting standards of section 203 apply shall submit the following information, and such other information as the corporation may require, to the corporation in such form as the corporation may require:

“(1) The information described in paragraphs (1) through (4) of section 6057(b) of the Internal Revenue Code of 1986.

“(2) The information described in subparagraphs (A), (B), (E), and (F) of section 6057(a)(2) of the Internal Revenue Code of 1986.

“(d) EFFECTIVE DATE.—The requirements of subsections (b) and (c) shall apply with respect to plan years beginning after the second December 31 occurring after the date of the enactment of this section.

“(e) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to carry out this section.”

(2) ESTABLISHMENT OF FUND FOR TRANSFERRED ASSETS.—Section 4005 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1305) is amended by adding at the end the following:

“(j)(1) A ninth fund shall be established for the payment of benefits under section 4051(b)(1)(D).

“(2) Such fund shall be credited with the appropriate—

“(A) amounts transferred to the Office of the Retirement Savings Lost and Found under section 4051(b)(1)(A); and

“(B) earnings on investments of the fund or on assets credited to the fund.

“(3) Whenever the corporation determines that the moneys of any fund are in excess of current needs, it may request the investment of such amounts as it determines advisable by the Secretary of the Treasury in obligations issued or guaranteed by the United States.”

(3) CONFORMING AMENDMENT.—The table of contents for the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.) is amended by inserting after the matter relating to section 4050 the following:

“Sec. 4051. Certain non-responsive participants entitled to small benefits.”

(c) MANDATORY TRANSFERS OF ROLLOVER DISTRIBUTIONS.—

(1) INVESTMENT OPTIONS.—

(A) IN GENERAL.—Subparagraph (B) of section 404(c)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104(c)(3)) is amended

by striking the period at the end and inserting “, and, to the extent the Secretary provides in guidance or regulations issued after the enactment of the Securing a Strong Retirement Act of 2021, is made to—

“(i) a target date or life cycle fund held under such account;

“(ii) as described in section 2550.404a–2 of title 29, Code of Federal Regulations, an investment product held under such account designed to preserve principal and provide a reasonable rate of return;

“(iii) the Office of the Retirement Savings Lost and Found in accordance with section 401(a)(31)(B)(iv) of the Internal Revenue Code of 1986 and section 306(c)(2)(A)(ii) of the Securing a Strong Retirement Act of 2020; or

“(iv) such other option as the Secretary may so provide.”.

(B) REGULATIONS.—Not later than 270 days after the date of the enactment of this Act, the Secretary of Labor shall promulgate regulations identifying the target date or life cycle funds, or specifying the characteristics of such a fund, that will be deemed to meet the requirements of section 404(c)(3)(B)(i) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104(c)(3)(B)), as amended by subparagraph (A).

(2) EXPANSION OF CAP; AUTHORITY TO TRANSFER LESSER AMOUNTS.—

(A) CAP.—Sections 401(a)(31)(B)(ii) and 411(a)(11)(A) of the Internal Revenue Code of 1986 and section 203(e)(1) of the Employee Retirement Income Security Act of 1974 are each amended by striking “\$5,000” and inserting “\$6,000”.

(B) DISTRIBUTION OF LARGER AMOUNTS TO INDIVIDUAL RETIREMENT PLANS ONLY.—Section 401(a)(31)(B)(i) of such Code is amended by adding at the end the following: “The Office of the Retirement Savings Lost and Found established by section 306 of the Securing a Strong Retirement Act shall not be treated as a trustee or issuer that is eligible to receive such distributions.”.

(C) LESSER AMOUNTS.—Section 401(a)(31)(B) of such Code is amended by adding at the end the following new clauses:

“(iii) TREATMENT OF LESSER AMOUNTS.—In the case of a trust which is part of an eligible plan, such trust shall not be a qualified trust under this section unless such plan provides that, if a participant in the plan separates from the service covered by the plan and the non-forfeitable accrued benefit described in clause (ii) is not in excess of \$1,000, the plan administrator shall (either separately or as part of the notice under section 402(f)) notify the participant that the participant is entitled to such benefit or attempt to pay the benefit directly to the participant.

“(iv) TRANSFERS TO RETIREMENT SAVINGS LOST AND FOUND.—If, after a plan administrator takes the action required under clause (iii), the participant does not—

“(I) within 6 months of the notification under such clause, make an election under subparagraph (A) or elect to receive a distribution of the benefit directly, or

“(II) accept any direct payment made under such clause within 6 months of the attempted payment,

the plan administrator shall transfer the amount of such benefit to the Office of the Retirement Savings Lost and Found in accordance with section 4051(b) of the Employee Retirement Income Security Act of 1974.

“(v) INCOME TAX TREATMENT OF TRANSFERS TO RETIREMENT SAVINGS LOST AND FOUND.—For purposes of determining the income tax treatment of transfers to the Office of the Retirement Savings Lost and Found under clause (iv)—

“(I) such a transfer shall be treated as a transfer to an individual retirement plan under clause (i), and

“(II) the distribution of such amounts by the Office of the Retirement Savings Lost and Found shall be treated as a distribution from an individual retirement plan.”.

(D) EFFECTIVE DATE.—The amendments made by this paragraph shall apply to vested benefits with respect to participants who separate from service connected to the plan in plan years beginning after the second December 31 occurring after the date of the enactment of this Act.

(d) BETTER REPORTING FOR MANDATORY TRANSFERS.—

(1) IN GENERAL.—Paragraph (2) of section 6057(a) of the Internal Revenue Code of 1986 is amended—

(A) in subparagraph (C)—

- (i) by striking “during such plan year” in clause (i) and inserting “during the plan year immediately preceding such plan year”;
  - (ii) by adding “and” at the end of clause (i); and
  - (iii) by striking clause (iii);
  - (B) by redesignating subparagraph (E) as subparagraph (G);
  - (C) by striking “and” at the end of subparagraph (D); and
  - (D) by inserting after subparagraph (D) the following new subparagraphs:
    - “(E) the name and taxpayer identifying number of each participant or former participant in the plan—
      - “(i) who, during the current plan year or any previous plan year, was reported under subparagraph (C), and with respect to whom the benefits described in subparagraph (C)(ii) were fully paid during the plan year,
      - “(ii) with respect to whom any amount was distributed under section 401(a)(31)(B) during the plan year, or
      - “(iii) with respect to whom a deferred annuity contract was distributed during the plan year,
    - “(F) in the case of a participant or former participant to whom subparagraph (E) applies—
      - “(i) in the case of a participant described in clause (ii) thereof, the name and address of the designated trustee or issuer described in section 401(a)(31)(B)(i) and the account number of the individual retirement plan to which the amount was distributed, and
      - “(ii) in the case of a participant described in clause (iii) thereof, the name and address of the issuer of such annuity contract and the contract or certificate number, and”.
- (2) RULES RELATING TO DIRECT TRUSTEE-TO-TRUSTEE TRANSFERS.—
- (A) IN GENERAL.—Paragraph (6) of section 402(e) of such Code is amended—
    - (i) by striking “TRANSFERS.—Any” and inserting “TRANSFERS.—
    - “(A) IN GENERAL.—Any”; and
    - (ii) by adding at the end the following new subparagraph:
      - “(B) NOTIFICATION OF TRUSTEE.—In the case of a distribution under section 401(a)(31)(B), the plan administrator shall notify the designated trustee or issuer described in clause (i) thereof that the transfer is a mandatory distribution required by such section.”
  - (B) PENALTY.—Subsection (i) of section 6652 of such Code is amended—
    - (i) by striking “TO RECIPIENTS” in the heading and inserting “OR NOTIFICATION”;
    - (ii) by striking “402(f),” and inserting “402(f) or a notification as required by section 402(e)(6)(B).”; and
    - (iii) by striking “such written explanation” and inserting “such written explanation or notification”.
  - (C) REPORTS.—Subsection (i) of section 408 of such Code is amended—
    - (i) by redesignating subparagraphs (A) and (B) of paragraph (2) as clauses (i) and (ii), respectively, and by moving such clauses 2 ems to the right;
    - (ii) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively, and by moving such subparagraphs 2 ems to the right;
    - (iii) by striking “as the Secretary prescribes” in subparagraph (B)(ii), as so redesignated, and all that follows through “a simple retirement account” and inserting “as the Secretary prescribes.”
- “(3) SIMPLE RETIREMENT ACCOUNTS.—In the case of a simple retirement account”;
- (iv) by striking “REPORTS.—The trustee of” and inserting “REPORTS.—
  - “(1) IN GENERAL.—The trustee of”;
  - (v) by striking “under paragraph (2)” in paragraph (3), as designated by clause (iii), and inserting “under paragraph (1)(B).”; and
  - (vi) by inserting after paragraph (1)(B)(ii), as redesignated by the preceding clauses, the following new paragraph:
    - “(2) MANDATORY DISTRIBUTIONS.—In the case of an account, contract, or annuity to which a transfer under section 401(a)(31)(B) is made (including a transfer from the individual retirement plan to which the original transfer under such section was made to another individual retirement plan), the report required by this subsection for the year of the transfer and any year in which the information previously reported in subparagraph (B) changes shall—
      - “(A) identify such transfer as a mandatory distribution required by such section,

“(B) include the name, address, and taxpayer identifying number of the trustee or issuer of the individual retirement plan to which the amount is transferred, and

“(C) be filed with the Pension Benefit Guaranty Corporation as well as with the Secretary.”

(3) NOTIFICATION OF PARTICIPANTS UPON SEPARATION.—Subsection (e) of section 6057 of such Code is amended by inserting “, and, with respect to any benefit of the individual subject to section 401(a)(31)(B), a notice of availability of, and the contact information for, the Retirement Savings Lost and Found established under section 306(a)(1) of the Securing a Strong Retirement Act of 2021” before the period at the end of the second sentence.

(4) EFFECTIVE DATE.—The amendments made by this paragraph shall apply to distributions made in, and returns and reports relating to, years beginning after the second December 31 occurring after the date of the enactment of this Act.

(e) REQUIREMENT OF ELECTRONIC FILING.—

(1) IN GENERAL.—Paragraph (2) of section 6011(e) of the Internal Revenue Code of 1986 is amended—

(A) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively, and by moving such clauses 2 ems to the right;

(B) by striking “REGULATIONS.—In prescribing” and inserting “REGULATIONS.—

“(A) IN GENERAL.—In prescribing”; and

(C) by adding at the end the following new subparagraph:

“(B) EXCEPTIONS.—Notwithstanding subparagraph (A), the Secretary shall require returns or reports required under—

“(i) sections 6057, 6058, and 6059, and

“(ii) sections 408(i), 6041, and 6047 to the extent such return or report relates to the tax treatment of a distribution from a plan, account, contract, or annuity,

to be filed on magnetic media, but only with respect to persons who are required to file at least 50 returns during the calendar year which includes the first day of the plan year to which such returns or reports relate.”

(2) EFFECTIVE DATE.—The amendments made by this paragraph shall apply to returns and reports relating to years beginning after the second December 31 occurring after the date of the enactment of this Act.

(f) RULEMAKING TO CLARIFY FIDUCIARY DUTIES.—

(1) REQUEST FOR INFORMATION.—Not later than 1 year after the date of enactment of this Act, the Secretary of Labor, in consultation with the Secretary of the Treasury, shall issue a request for information relating to the rulemaking described in paragraph (2).

(2) ISSUANCE OF FINAL RULE.—Not later than 3 years after such date, the Secretary of Labor, in consultation with the Secretary of the Treasury, shall issue a final rule that defines the following:

(A) The steps a plan sponsor must take to locate a deferred vested participant in order to meet its fiduciary duty under section 404 of the Employee Retirement Income Security Act of 1974 with respect to locating that participant.

(B) The ongoing practices and procedures a plan sponsor must institute in order to meet such fiduciary duty with respect to maintaining up-to-date contact information on deferred vested participants.

#### SEC. 307. EXPANSION OF EMPLOYEE PLANS COMPLIANCE RESOLUTION SYSTEM.

(a) IN GENERAL.—Except as otherwise provided in the Internal Revenue Code of 1986 or regulations prescribed by the Secretary of the Treasury or the Secretary's delegate (referred to in this section as the “Secretary”), any eligible inadvertent failure to comply with the rules applicable under section 401(a), 403(a), 403(b), 408(p), or 408(k) of such Code may be self-corrected under the Employee Plans Compliance Resolution System (as described in Revenue Procedure 2019–19 or any successor guidance and hereafter in this section referred to as the “EPCRS”), except to the extent that such failure was identified by the Secretary prior to any actions which demonstrate a commitment to implement a self-correction. Revenue Procedure 2019–19 is deemed amended as of the date of the enactment of this Act to provide that the correction period under section 9.02 of such Revenue Procedure (or any successor guidance) for an eligible inadvertent failure, except as otherwise provided under such Code or in regulations prescribed by the Secretary, is indefinite and has no last day, other than with respect to failures identified by the Secretary prior to any self-correction as described in the preceding sentence.

(b) **LOAN ERRORS.**—In the case of an eligible inadvertent failure relating to a loan from a plan to a participant—

(1) such failure may be self-corrected under subsection (a) according to the rules of section 6.07 of Revenue Procedure 2019–19 (or any successor guidance), including the provisions related to whether a deemed distribution must be reported on Form 1099–R, and

(2) the Secretary of Labor shall treat any such failure which is so self-corrected under subsection (a) as meeting the requirements of the Voluntary Fiduciary Correction Program of the Department of Labor if, with respect to the violation of the fiduciary standards of the Employee Retirement Income Security Act of 1974, there is a similar loan error eligible for correction under EPCRS and the loan error is corrected in such manner.

(c) **EPCRS FOR IRAS.**—The Secretary shall expand the EPCRS to allow custodians of individual retirement plans (as defined in section 7701(a)(37) of the Internal Revenue Code of 1986) to address eligible inadvertent failures with respect to an individual retirement plan (as so defined), including (but not limited to)—

(1) waivers of the excise tax which would otherwise apply under section 4974 of the Internal Revenue Code of 1986,

(2) under the self-correction component of the EPCRS, waivers of the 60-day deadline for a rollover where the deadline is missed for reasons beyond the reasonable control of the account owner, and

(3) rules permitting a nonspouse beneficiary to return distributions to an inherited individual retirement plan described in section 408(d)(3)(C) of the Internal Revenue Code of 1986 in a case where, due to an inadvertent error by a service provider, the beneficiary had reason to believe that the distribution could be rolled over without inclusion in income of any part of the distributed amount.

(d) **ADDITIONAL SAFE HARBORS.**—The Secretary shall expand the EPCRS to provide additional safe harbor means of correcting eligible inadvertent failures described in subsection (a), including safe harbor means of calculating the earnings which must be restored to a plan in cases where plan assets have been depleted by reason of an eligible inadvertent failure.

(e) **ELIGIBLE INADVERTENT FAILURE.**—For purposes of this section—

(1) **IN GENERAL.**—Except as provided in paragraph (2), the term “eligible inadvertent failure” means a failure that occurs despite the existence of practices and procedures which—

(A) satisfy the standards set forth in section 4.04 of Revenue Procedure 2019–19 (or any successor guidance), or

(B) satisfy similar standards in the case of an individual retirement plan.

(2) **EXCEPTION.**—The term “eligible inadvertent failure” shall not include any failure which is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction.

(f) **APPLICATION OF CERTAIN REQUIREMENTS FOR CORRECTING ERRORS.**—This section shall not apply to any failure unless the correction of such failure under this section is made in conformity with the general principles that apply to corrections of such failures under the Internal Revenue Code of 1986, including regulations or other guidance issued thereunder and including those principles and corrections set forth in Revenue Procedure 2019–19 (or any successor guidance).”

**SEC. 308. ELIMINATE THE “FIRST DAY OF THE MONTH” REQUIREMENT FOR GOVERNMENTAL SECTION 457(B) PLANS.**

(a) **IN GENERAL.**—Paragraph (4) of section 457(b) of the Internal Revenue Code of 1986 is amended to read as follows:

“(4) which provides that compensation—

“(A) in the case of an eligible employer described in subsection (e)(1)(A), will be deferred only if an agreement providing for such deferral has been entered into before the compensation is currently available to the individual, and

“(B) in any other case, will be deferred for any calendar month only if an agreement providing for such deferral has been entered into before the beginning of such month.”.

(b) **EFFECTIVE DATE.**—The amendment made by this section shall apply to taxable years beginning after the date of the enactment of this Act.

**SEC. 309. ONE-TIME ELECTION FOR QUALIFIED CHARITABLE DISTRIBUTION TO SPLIT-INTEREST ENTITY; INCREASE IN QUALIFIED CHARITABLE DISTRIBUTION LIMITATION.**

(a) **ONE-TIME ELECTION FOR QUALIFIED CHARITABLE DISTRIBUTION TO SPLIT-INTEREST ENTITY.**—Section 408(d)(8) of such Code is amended by adding at the end the following new subparagraph:

“(F) ONE-TIME ELECTION FOR QUALIFIED CHARITABLE DISTRIBUTION TO SPLIT-INTEREST ENTITY.—

“(i) IN GENERAL.—A taxpayer may for a taxable year elect under this subparagraph to treat as meeting the requirement of subparagraph (B)(i) any distribution from an individual retirement account which is made directly by the trustee to a split-interest entity, but only if—

“(I) an election is not in effect under this subparagraph for a preceding taxable year,

“(II) the aggregate amount of distributions of the taxpayer with respect to which an election under this subparagraph is made does not exceed \$50,000, and

“(III) such distribution meets the requirements of clauses (iii) and (iv).

“(ii) SPLIT-INTEREST ENTITY.—For purposes of this subparagraph, the term ‘split-interest entity’ means—

“(I) a charitable remainder annuity trust (as defined in section 664(d)(1)), but only if such trust is funded exclusively by qualified charitable distributions,

“(II) a charitable remainder unitrust (as defined in section 664(d)(2)), but only if such unitrust is funded exclusively by qualified charitable distributions, or

“(III) a charitable gift annuity (as defined in section 501(m)(5)), but only if such annuity is funded exclusively by qualified charitable distributions and commences fixed payments of 5 percent or greater not later than 1 year from the date of funding.

“(iii) CONTRIBUTIONS MUST BE OTHERWISE DEDUCTIBLE.—A distribution meets the requirement of this clause only if—

“(I) in the case of a distribution to a charitable remainder annuity trust or a charitable remainder unitrust, a deduction for the entire value of the remainder interest in the distribution for the benefit of a specified charitable organization would be allowable under section 170 (determined without regard to subsection (b) thereof and this paragraph), and

“(II) in the case of a charitable gift annuity, a deduction in an amount equal to the amount of the distribution reduced by the value of the annuity described in section 501(m)(5)(B) would be allowable under section 170 (determined without regard to subsection (b) thereof and this paragraph).

“(iv) LIMITATION ON INCOME INTERESTS.—A distribution meets the requirements of this clause only if—

“(I) no person holds an income interest in the split-interest entity other than the individual for whose benefit such account is maintained, the spouse of such individual, or both, and

“(II) the income interest in the split-interest entity is nonassignable.

“(v) SPECIAL RULES.—

“(I) CHARITABLE REMAINDER TRUSTS.—Notwithstanding section 664(b), distributions made from a trust described in subclause (I) or (II) of clause (ii) shall be treated as ordinary income in the hands of the beneficiary to whom the annuity described in section 664(d)(1)(A) or the payment described in section 664(d)(2)(A) is paid.

“(II) CHARITABLE GIFT ANNUITIES.—Qualified charitable distributions made to fund a charitable gift annuity shall not be treated as an investment in the contract for purposes of section 72(c).”.

(b) INFLATION ADJUSTMENT.—Section 408(d)(8) of such Code, as amended by subsection (a), is amended by adding at the end the following new subparagraph:

“(G) INFLATION ADJUSTMENT.—

“(i) IN GENERAL.—In the case of any taxable year beginning after 2021, each of the dollar amounts in subparagraphs (A) and (F) shall be increased by an amount equal to—

“(I) such dollar amount, multiplied by

“(II) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting ‘calendar year 2020’ for ‘calendar year 2016’ in subparagraph (A)(ii) thereof.

“(ii) ROUNDING.—If any dollar amount increased under clause (i) is not a multiple of \$1,000, such dollar amount shall be rounded to the nearest multiple of \$1,000.”.

(c) **EFFECTIVE DATE.**—The amendment made by this section shall apply to distributions made in taxable years ending after the date of the enactment of this Act.

**SEC. 310. DISTRIBUTIONS TO FIREFIGHTERS.**

(a) **IN GENERAL.**—Subparagraph (A) of section 72(t)(10) of the Internal Revenue Code of 1986 is amended by striking “414(d)” and inserting “414(d) or a distribution from a plan described in clause (iii), (iv), or (vi) of section 402(c)(8)(B) to an employee who provides firefighting services”.

(b) **CONFORMING AMENDMENT.**—The heading of paragraph (10) of section 72(t) of such Code is amended—

(1) by striking “QUALIFIED”, and

(2) by striking “IN GOVERNMENTAL PLANS”.

(c) **EFFECTIVE DATE.**—The amendments made by this section shall apply to distributions made after December 31, 2021.

**SEC. 311. EXCLUSION OF CERTAIN DISABILITY-RELATED FIRST RESPONDER RETIREMENT PAYMENTS.**

(a) **IN GENERAL.**—Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986 is amended by inserting after section 139B the following new section:

**“SEC. 139C. CERTAIN DISABILITY-RELATED FIRST RESPONDER RETIREMENT PAYMENTS.**

“(a) **IN GENERAL.**—In the case of an individual who receives qualified first responder retirement payments for any taxable year, gross income shall not include so much of such payments as do not exceed the annualized excludable disability amount with respect to such individual.

“(b) **QUALIFIED FIRST RESPONDER RETIREMENT PAYMENTS.**—For purposes of this section, the term ‘qualified first responder retirement payments’ means, with respect to any taxable year, any pension or annuity which but for this section would be includible in gross income for such taxable year and which is received—

“(1) from a plan described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B), and

“(2) in connection with such individual’s qualified first responder service.

“(c) **ANNUALIZED EXCLUDABLE DISABILITY AMOUNT.**—For purposes of this section—

“(1) **IN GENERAL.**—The term ‘annualized excludable disability amount’ means, with respect to any individual, the service-connected excludable disability amounts which are properly attributable to the 12-month period immediately preceding the date on which such individual attains retirement age.

“(2) **SERVICE-CONNECTED EXCLUDABLE DISABILITY AMOUNT.**—The term ‘service-connected excludable disability amount’ means periodic payments received by an individual which—

“(A) are not includible in such individual’s gross income under section 104(a)(1),

“(B) are received in connection with such individual’s qualified first responder service, and

“(C) terminate when such individual attains retirement age.

“(3) **SPECIAL RULE FOR PARTIAL-YEAR PAYMENTS.**—In the case of an individual who only receives service-connected excludable disability amounts properly attributable to a portion of the 12-month period described in paragraph (1), such paragraph shall be applied by multiplying such amounts by the ratio of 365 to the number of days in such period to which such amounts were properly attributable.

“(d) **QUALIFIED FIRST RESPONDER SERVICE.**—For purposes of this section, the term ‘qualified first responder service’ means service as a law enforcement officer, firefighter, paramedic, or emergency medical technician.”.

(b) **CLERICAL AMENDMENT.**—The table of sections for part III of subchapter B of chapter 1 of such Code is amended by inserting after the item relating to section 139B the following new item:

“Sec. 139C. Certain disability-related first responder retirement payments.”.

(c) **EFFECTIVE DATE.**—The amendments made by this section shall apply to amounts with respect to taxable years beginning after December 31, 2026.

**SEC. 312. INDIVIDUAL RETIREMENT PLAN STATUTE OF LIMITATIONS FOR EXCISE TAX ON EXCESS CONTRIBUTIONS AND CERTAIN ACCUMULATIONS.**

Section 6501(l) of the Internal Revenue Code of 1986 is amended by adding at the end the following new paragraph:

“(4) **INDIVIDUAL RETIREMENT PLANS.**—

“(A) **IN GENERAL.**—For purposes of any tax imposed by section 4973 or 4974 in connection with an individual retirement plan, the return referred to in this section shall be the income tax return filed by the person on



whom the tax under such section is imposed for the year in which the act (or failure to act) giving rise to the liability for such tax occurred.

“(B) RULE IN CASE OF INDIVIDUALS NOT REQUIRED TO FILE RETURN.—In the case of a person who is not required to file an income tax return for such year—

“(i) the return referred to in this section shall be the income tax return that such person would have been required to file but for the fact that such person was not required to file such return, and

“(ii) the 3-year period referred to in subsection (a) with respect to the return shall be deemed to begin on the date by which the return would have been required to be filed (excluding any extension thereof).”.

**SEC. 313. REQUIREMENT TO PROVIDE PAPER STATEMENTS IN CERTAIN CASES.**

(a) IN GENERAL.—Section 105(a)(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1025(a)(2)) is amended—

(1) in subparagraph (A)(iv), by inserting “subject to subparagraph (E),” before “may be delivered”; and

(2) by adding at the end the following:

“(E) PROVISION OF PAPER STATEMENTS.—With respect to at least 1 pension benefit statement furnished for a calendar year with respect to an individual account plan under paragraph (1)(A), and with respect to at least 1 pension benefit statement furnished every 3 calendar years with respect to a defined benefit plan under paragraph (1)(B), such statement shall be furnished on paper in written form except—

“(i) in the case of a plan that furnishes such statement in accordance with section 2520.104b-1(c) of title 29, Code of Federal Regulations; or

“(ii) in the case of a plan that permits a participant or beneficiary to request that the statements referred to in the matter preceding clause (i) be furnished by electronic delivery, if the participant or beneficiary requests that such statements be delivered electronically and the statements are so delivered.”.

(b) IMPLEMENTATION.—

(1) IN GENERAL.—The Secretary of Labor shall, not later than December 31, 2021, update section 2520.104b-1(c) of title 29, Code of Federal Regulations, to provide that a plan may furnish the statements referred to in subparagraph (E) of section 105(a)(2) by electronic delivery only if, in addition to meeting the other requirements under the regulations—

(A) such plan furnishes each participant or beneficiary, including participants described in subparagraph (B), a one-time initial notice on paper in written form, prior to the electronic delivery of any pension benefit statement, of their right to request that all documents required to be disclosed under title I of the Employee Retirement Income Security Act of 1974 be furnished on paper in written form; and

(B) such plan furnishes each participant who is separated from service with at least 1 pension benefit statement on paper in written form for each calendar year, unless, on election of the participant, the participant receives such statements electronically.

(2) OTHER GUIDANCE.—In implementing the amendment made by subsection (a) with respect to a plan that discloses required documents or statements electronically, in accordance with applicable guidance governing electronic disclosure by the Department of Labor (with the exception of section 2520.104b-1(c) of title 29, Code of Federal Regulations), the Secretary of Labor shall, not later than December 31, 2021, update such guidance to the extent necessary to ensure that—

(A) a participant or beneficiary under such a plan is permitted the opportunity to request that any disclosure required to be delivered on paper under applicable guidance by the Department of Labor shall be furnished by electronic delivery;

(B) each paper statement furnished under such a plan pursuant to the amendment shall include—

(i) an explanation of how to request that all such statements, and any other document required to be disclosed under title I of the Employee Retirement Income Security Act of 1974, be furnished by electronic delivery; and

(ii) contact information for the plan sponsor, including a telephone number;

(C) the plan may not charge any fee to a participant or beneficiary for the delivery of any paper statements;

(D) each paper pension benefit statement shall identify each plan document required to be disclosed and shall include information about how a participant or beneficiary may access each such document;

(E) each document required to be disclosed that is furnished by electronic delivery under such a plan shall include an explanation of how to request that all such documents be furnished on paper in written form; and

(F) a plan is permitted to furnish a duplicate electronic statement in any case in which the plan furnishes a paper pension benefit statement.

(c) **EFFECTIVE DATE.**—The amendment made by subsection (a) shall apply with respect to plan years beginning after December 31, 2022.

**SEC. 314. SEPARATE APPLICATION OF TOP HEAVY RULES TO DEFINED CONTRIBUTION PLANS COVERING EXCLUDIBLE EMPLOYEES.**

(a) **IN GENERAL.**—Section 416(c)(2) of the Internal Revenue Code of 1986 is amended by adding at the end the following:

“(C) **SEPARATE APPLICATION TO EMPLOYEES NOT MEETING AGE AND SERVICE REQUIREMENTS.**—If employees not meeting the age or service requirements of section 410(a)(1) (without regard to subparagraph (B) thereof) are covered under a plan of the employer which meets the requirements of subparagraphs (A) and (B) separately with respect to such employees, such employees may be excluded from consideration in determining whether any plan of the employer meets the requirements of subparagraphs (A) and (B).”

(b) **EFFECTIVE DATE.**—The amendment made by subsection (a) shall apply to plan years beginning after the date of the enactment of this Act.

**SEC. 315. REPAYMENT OF QUALIFIED BIRTH OR ADOPTION DISTRIBUTION LIMITED TO 3 YEARS.**

(a) **IN GENERAL.**—Section 72(t)(2)(H)(v)(I) of the Internal Revenue Code of 1986 is amended by striking “may make” and inserting “may, at any time during the 3-year period beginning on the day after the date on which such distribution was received, make”.

(b) **EFFECTIVE DATE.**—The amendment made by this section shall take effect as if included in the enactment of section 113 of the Setting Every Community Up for Retirement Enhancement Act of 2019.

**SEC. 316. EMPLOYER MAY RELY ON EMPLOYEE CERTIFYING THAT DEEMED HARDSHIP DISTRIBUTION CONDITIONS ARE MET.**

(a) **CASH OR DEFERRED ARRANGEMENTS.**—Section 401(k)(14) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraph:

“(C) **EMPLOYEE CERTIFICATION.**—In determining whether a distribution is upon the hardship of an employee, the administrator of the plan may rely on a certification by the employee that the distribution is on account of a financial need of a type that is deemed in regulations prescribed by the Secretary to be an immediate and heavy financial need and that such distribution is not in excess of the amount required to satisfy such financial need.”.

(b) **403(b) PLANS.**—

(1) **CUSTODIAL ACCOUNTS.**—Section 403(b)(7) of such Code is amended by adding at the end the following new subparagraph:

“(D) **EMPLOYEE CERTIFICATION.**—In determining whether a distribution is upon the financial hardship of an employee, the administrator of the plan may rely on a certification by the employee that the distribution is on account of a financial need of a type that is deemed in regulations prescribed by the Secretary to be an immediate and heavy financial need and that such distribution is not in excess of the amount required to satisfy such financial need.”.

(2) **ANNUITY CONTRACTS.**—Section 403(b)(11) of such Code is amended by adding at the end the following: “In determining whether a distribution is upon hardship of an employee, the administrator of the plan may rely on a certification by the employee that the distribution is on account of a financial need of a type that is deemed in regulations prescribed by the Secretary to be an immediate and heavy financial need and that such distribution is not in excess of the amount required to satisfy such financial need.”.

(c) **457(b) PLAN.**—Section 457(d) of such Code is amended by adding at the end the following new paragraph:

“(4) **PARTICIPANT CERTIFICATION.**—In determining whether a distribution of a participant is made when the participant is faced with an unforeseeable emergency, the administrator of a plan maintained by an eligible employer described in subsection (e)(1)(A) may rely on a certification by the participant that the distribution is made when the participant is faced with unforeseeable emergency

of a type that is specifically described in regulations prescribed by the Secretary as an unforeseeable emergency and that the distribution is not in excess of the amount reasonably necessary to satisfy the emergency need.”.

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2021.

**SEC. 317. PENALTY-FREE WITHDRAWALS FROM RETIREMENT PLANS FOR INDIVIDUALS IN CASE OF DOMESTIC ABUSE.**

(a) IN GENERAL.—Section 72(t)(2) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraph:

“(I) DISTRIBUTIONS FROM RETIREMENT PLAN IN CASE OF DOMESTIC ABUSE.—

“(i) IN GENERAL.—Any eligible distribution to a domestic abuse victim.

“(ii) LIMITATION.—The aggregate amount which may be treated as an eligible distribution to a domestic abuse victim by any individual shall not exceed an amount equal to the lesser of—

“(I) \$10,000, or

“(II) 50 percent of the present value of the nonforfeitable accrued benefit of the employee under the plan.

“(iii) ELIGIBLE DISTRIBUTION TO A DOMESTIC ABUSE VICTIM.—For purposes of this subparagraph—

“(I) IN GENERAL.—A distribution shall be treated as an eligible distribution to a domestic abuse victim if such distribution is from an applicable eligible retirement plan to an individual and made during the 1-year period beginning on any date on which the individual is a victim of domestic abuse by a spouse or domestic partner.

“(II) DOMESTIC ABUSE.—The term ‘domestic abuse’ means physical, psychological, sexual, emotional, or economic abuse, including efforts to control, isolate, humiliate, or intimidate the victim, or to undermine the victim’s ability to reason independently, including by means of abuse of the victim’s child or another family member living in the household.

“(iv) TREATMENT OF PLAN DISTRIBUTIONS.—

“(I) IN GENERAL.—If a distribution to an individual would (without regard to clause (ii)) be an eligible distribution to a domestic abuse victim, a plan shall not be treated as failing to meet any requirement of this title merely because the plan treats the distribution as an eligible distribution to a domestic abuse victim, unless the aggregate amount of such distributions from all plans maintained by the employer (and any member of any controlled group which includes the employer) to such individual exceeds the limitation under clause (ii).

“(II) CONTROLLED GROUP.—For purposes of subclause (I), the term ‘controlled group’ means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414.

“(v) AMOUNT DISTRIBUTED MAY BE REPAID.—

“(I) IN GENERAL.—Any individual who receives a distribution described in clause (i) may, at any time during the 3-year period beginning on the day after the date on which such distribution was received, make one or more contributions in an aggregate amount not to exceed the amount of such distribution to an applicable eligible retirement plan of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made under section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), as the case may be.

“(II) LIMITATION ON CONTRIBUTIONS TO APPLICABLE ELIGIBLE RETIREMENT PLANS OTHER THAN IRAs.—The aggregate amount of contributions made by an individual under subclause (I) to any applicable eligible retirement plan which is not an individual retirement plan shall not exceed the aggregate amount of eligible distributions to a domestic abuse victim which are made from such plan to such individual. Subclause (I) shall not apply to contributions to any applicable eligible retirement plan which is not an individual retirement plan unless the individual is eligible to make contributions (other than those described in subclause (I)) to such applicable eligible retirement plan.

“(III) TREATMENT OF REPAYMENTS OF DISTRIBUTIONS FROM APPLICABLE ELIGIBLE RETIREMENT PLANS OTHER THAN IRAs.—If a con-

tribution is made under subclause (I) with respect to an eligible distribution to a domestic abuse victim from an applicable eligible retirement plan other than an individual retirement plan, then the taxpayer shall, to the extent of the amount of the contribution, be treated as having received such distribution in an eligible rollover distribution (as defined in section 402(c)(4)) and as having transferred the amount to the applicable eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.

“(IV) TREATMENT OF REPAYMENTS FOR DISTRIBUTIONS FROM IRAS.—If a contribution is made under subclause (I) with respect to an eligible distribution to a domestic abuse victim from an individual retirement plan, then, to the extent of the amount of the contribution, such distribution shall be treated as a distribution described in section 408(d)(3) and as having been transferred to the applicable eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.

“(vi) DEFINITION AND SPECIAL RULES.—For purposes of this subparagraph:

“(I) APPLICABLE ELIGIBLE RETIREMENT PLAN.—The term ‘applicable eligible retirement plan’ means an eligible retirement plan (as defined in section 402(c)(8)(B)) other than a defined benefit plan.

“(II) EXEMPTION OF DISTRIBUTIONS FROM TRUSTEE TO TRUSTEE TRANSFER AND WITHHOLDING RULES.—For purposes of sections 401(a)(31), 402(f), and 3405, an eligible distribution to a domestic abuse victim shall not be treated as an eligible rollover distribution.

“(III) DISTRIBUTIONS TREATED AS MEETING PLAN DISTRIBUTION REQUIREMENTS; SELF-CERTIFICATION.—Any distribution which the employee or participant certifies as being an eligible distribution to a domestic abuse victim shall be treated as meeting the requirements of sections 401(k)(2)(B)(i), 403(b)(7)(A)(i), 403(b)(11), and 457(d)(1)(A).”.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to distributions made after the date of the enactment of this Act.

#### SEC. 318. REFORM OF FAMILY ATTRIBUTION RULE.

(a) IN GENERAL.—Section 414 of the Internal Revenue Code of 1986 is amended—

(1) in subsection (b)—

(A) by striking “For purposes of” and inserting the following:

“(1) IN GENERAL.—For purposes of”, and

(B) by adding at the end the following new paragraphs:

“(2) SPECIAL RULES FOR APPLYING FAMILY ATTRIBUTION.—For purposes of applying the attribution rules under section 1563 with respect to paragraph (1), the following rules apply:

“(A) Community property laws shall be disregarded for purposes of determining ownership.

“(B) Except as provided by the Secretary, stock of an individual not attributed under section 1563(e)(5) to such individual’s spouse shall not be attributed to such spouse by reason of section 1563(e)(6)(A).

“(C) Except as provided by the Secretary, in the case of stock in different corporations that is attributed to a child under section 1563(e)(6)(A) from each parent, and is not attributed to such parents as spouses under section 1563(e)(5), such attribution to the child shall not by itself result in such corporations being members of the same controlled group.

“(3) PLAN SHALL NOT FAIL TO BE TREATED AS SATISFYING THIS SECTION.—If application of paragraph (2) causes two or more entities to be a controlled group, or an affiliated service group, or to no longer be in a controlled group or an affiliated service group, such change shall be treated as a transaction to which section 410(b)(6)(C) applies.”, and

(2) in subsection (m)(6)(B), by striking “apply” and inserting “apply, except that community property laws shall be disregarded for purposes of determining ownership”.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning on or after the date of the enactment of this section.

#### SEC. 319. AMENDMENTS TO INCREASE BENEFIT ACCRUALS UNDER PLAN FOR PREVIOUS PLAN YEAR ALLOWED UNTIL EMPLOYER TAX RETURN DUE DATE.

(a) IN GENERAL.—Section 401(b) of the Internal Revenue Code of 1986 is amended by adding at the end the following new paragraph:

“(3) RETROACTIVE PLAN AMENDMENTS THAT INCREASE BENEFIT ACCRUALS.—If—

“(A) an employer amends a stock bonus, pension, profit-sharing, or annuity plan to increase benefits accrued under the plan effective for the preceding plan year (other than increasing the amount of matching contributions (as defined in subsection (m)(4)(A))),

“(B) such amendment would not otherwise cause the plan to fail to meet any of the requirements of this subchapter, and

“(C) such amendment is adopted before the time prescribed by law for filing the return of the employer for a taxable year (including extensions thereof) during which such amendment is effective, the employer may elect to treat such amendment as having been adopted as of the last day of the plan year in which the amendment is effective.”.

(b) **EFFECTIVE DATE.**—The amendments made by this section shall apply to plan years beginning after December 31, 2022.

**SEC. 320. RETROACTIVE FIRST YEAR ELECTIVE DEFERRALS FOR SOLE PROPRIETORS.**

(a) **IN GENERAL.**—Section 401(b)(2) of the Internal Revenue Code of 1986 is amended by adding at the end the following: “In the case of an individual who owns the entire interest in an unincorporated trade or business, and who is the only employee of such trade or business, any elective deferrals (as defined in section 402(g)(3)) under a qualified cash or deferred arrangement to which the preceding sentence applies, which are made by such individual before the time for filing the return of such individual for the taxable year (determined without regard to any extensions) ending after or with the end of the plan’s first year, shall be treated as having been made before the end of such first plan year.”.

(b) **EFFECTIVE DATE.**—The amendment made by this section shall apply to plan years beginning after the date of the enactment of this Act.

**SEC. 321. LIMITING CESSATION OF IRA TREATMENT TO PORTION OF ACCOUNT INVOLVED IN A PROHIBITED TRANSACTION.**

(a) **IN GENERAL.**—Section 408(e)(2)(A) of the Internal Revenue Code of 1986 is amended by striking “such account ceases to be an individual retirement account” and inserting the following: “the portion of such account which is used in such transaction shall be treated as distributed to the individual”.

(b) **CONFORMING AMENDMENTS.**—

(1) Section 408(e)(2)(B) of such Code is amended—

(A) by striking “ALL ITS ASSETS.—In any case” and all that follows through “by reason of subparagraph (A)” and inserting the following: “PORTION OF ASSETS USED IN PROHIBITED TRANSACTION.—In any case in which a portion of an individual retirement account is treated as distributed under subparagraph (A)”, and

(B) by striking “all assets in the account” and inserting “such portion”.

(2) Section 4975(c)(3) of such Code is amended by striking “the account ceases” and all that follows and inserting the following: “the portion of the account used in the transaction is treated as distributed under paragraph (2)(A) or (4) of section 408(e).”.

(c) **EFFECTIVE DATE.**—The amendments made by this section shall apply to taxable years beginning after the date of the enactment of this Act.

## TITLE IV—TECHNICAL AMENDMENTS

**SEC. 401. AMENDMENTS RELATING TO SETTING EVERY COMMUNITY UP FOR RETIREMENT ENHANCEMENT ACT OF 2019.**

(a) **TECHNICAL AMENDMENTS.**—

(1) **AMENDMENT RELATING TO SECTION 114.**—Section 401(a)(9)(C)(iii) of the Internal Revenue Code of 1986 is amended by striking “employee to whom clause (i)(II) applies” and inserting “employee (other than an employee to whom clause (i)(II) does not apply by reason of clause (ii))”.

(2) **AMENDMENT RELATING TO SECTION 116.**—Section 4973(b) of the Internal Revenue Code of 1986 is amended by adding at the end of the flush matter the following: “Such term shall not include any designated nondeductible contribution (as defined in subparagraph (C) of section 408(o)(2)) which does not exceed the nondeductible limit under subparagraph (B) thereof by reason of an election under section 408(o)(5).”.

(3) **EFFECTIVE DATE.**—The amendments made by this section shall take effect as if included in section of the Setting Every Community Up for Retirement Enhancement Act of 2019 to which the amendment relates.

(b) **CLERICAL AMENDMENT.**—Section 72(t)(2)(H)(vi)(IV) of the Internal Revenue Code of 1986 is amended by striking “403(b)(7)(A)(ii)” and inserting “403(b)(7)(A)(i)”.

## TITLE V—ADMINISTRATIVE PROVISIONS

### SEC. 501. PROVISIONS RELATING TO PLAN AMENDMENTS.

(a) IN GENERAL.—If this section applies to any retirement plan or contract amendment—

(1) such retirement plan or contract shall be treated as being operated in accordance with the terms of the plan during the period described in subsection (b)(2)(A); and

(2) except as provided by the Secretary of the Treasury (or the Secretary's delegate), such retirement plan shall not fail to meet the requirements of section 411(d)(6) of the Internal Revenue Code of 1986 and section 204(g) of the Employee Retirement Income Security Act of 1974 by reason of such amendment.

(b) AMENDMENTS TO WHICH SECTION APPLIES.—

(1) IN GENERAL.—This section shall apply to any amendment to any retirement plan or annuity contract which is made—

(A) pursuant to any amendment made by this Act or pursuant to any regulation issued by the Secretary of the Treasury or the Secretary of Labor (or a delegate of either such Secretary) under this Act; and

(B) on or before the last day of the first plan year beginning on or after January 1, 2023, or such later date as the Secretary of the Treasury may prescribe.

In the case of a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986), this paragraph shall be applied by substituting “2025” for “2023”.

(2) CONDITIONS.—This section shall not apply to any amendment unless—

(A) during the period—

(i) beginning on the date the legislative or regulatory amendment described in paragraph (1)(A) takes effect (or in the case of a plan or contract amendment not required by such legislative or regulatory amendment, the effective date specified by the plan); and

(ii) ending on the date described in paragraph (1)(B) (as modified by the second sentence of paragraph (1)) (or, if earlier, the date the plan or contract amendment is adopted),

the plan or contract is operated as if such plan or contract amendment were in effect; and

(B) such plan or contract amendment applies retroactively for such period.

(c) COORDINATION WITH OTHER PROVISIONS RELATING TO PLAN AMENDMENTS.—

(1) SECURE ACT.—Section 601(b)(1) of the Setting Every Community Up for Retirement Enhancement Act of 2019 is amended—

(A) by striking “January 1, 2022” in subparagraph (B) and inserting “January 1, 2023”, and

(B) by striking “substituting ‘2024’ for ‘2022’.” in the flush matter at the end and inserting “substituting ‘2025’ for ‘2023’.”.

(2) CARES ACT.—

(A) SPECIAL RULES FOR USE OF RETIREMENT FUNDS.—Section 2202(c)(2)(A) of the CARES Act is amended by striking “January 1, 2022” in clause (ii) and inserting “January 1, 2023”.

(B) TEMPORARY WAIVER OF REQUIRED MINIMUM DISTRIBUTIONS RULES FOR CERTAIN RETIREMENT PLANS AND ACCOUNTS.—Section 2203(c)(2)(B)(i) of the CARES Act is amended—

(i) by striking “January 1, 2022” in subclause (II) and inserting “January 1, 2023”, and

(ii) by striking “substituting ‘2024’ for ‘2022’.” in the flush matter at the end and inserting “substituting ‘2025’ for ‘2023’.”.

(C) TAXPAYER CERTAINTY AND DISASTER TAX RELIEF ACT OF 2020.—Section 302(d)(2)(A) of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 is amended by striking “January 1, 2022” in clause (ii) and inserting “January 1, 2023”.

## TITLE VI—REVENUE PROVISIONS

### SEC. 601. SIMPLE AND SEP ROTH IRAS.

(a) IN GENERAL.—Section 408A of the Internal Revenue Code of 1986 is amended by striking subsection (f).

(b) RULES RELATING TO SIMPLIFIED EMPLOYEE PENSIONS.—

(1) CONTRIBUTIONS.—Section 402(h)(1) of such Code is amended by striking “and” at the end of subparagraph (A), by striking the period at the end of subparagraph (B) and inserting “, and”, and by adding at the end the following new subparagraph:

“(C) in the case of any contributions pursuant to a simplified employer pension which are made to an individual retirement plan designated as a Roth IRA, such contribution shall not be excludable from gross income.”

(2) DISTRIBUTIONS.—Section 402(h)(3) of such Code is amended by inserting “, or section 408A(d) in the case of an individual retirement plan designated as a Roth IRA” before the period at the end.

(3) ELECTION REQUIRED.—Section 408(k) of such Code is amended by redesignating paragraphs (7), (8), and (9) as paragraphs (8), (9), and (10), respectively, and by inserting the after paragraph (6) the following new paragraph:

“(7) ROTH CONTRIBUTION ELECTION.—An individual retirement plan which is designated as a Roth IRA shall not be treated as a simplified employee pension under this subsection unless the employee elects for such plan to be so treated (at such time and in such manner as the Secretary may provide).”

(c) RULES RELATING TO SIMPLE RETIREMENT ACCOUNTS.—

(1) ELECTION REQUIRED.—Section 408(p) of such Code is amended by adding at the end the following new paragraph:

“(11) ROTH CONTRIBUTION ELECTION.—An individual retirement plan which is designated as a Roth IRA shall not be treated as a simple retirement account under this subsection unless the employee elects for such plan to be so treated (at such time and in such manner as the Secretary may provide).”

(2) ROLLOVERS.—Section 408A(e) of such Code is amended by adding at the end the following new paragraph:

“(3) SIMPLE RETIREMENT ACCOUNTS.—In the case of any payment or distribution out of a simple retirement account (as defined in section 408(p)) with respect to which an election has been made under section 408(p)(11) and to which 72(t)(6) applies, the term ‘qualified rollover contribution’ shall not include any payment or distribution paid into an account other than another simple retirement account (as so defined).”

(d) COORDINATION WITH ROTH CONTRIBUTION LIMITATION.—Section 408A(c) of such Code is amended by adding at the end the following new paragraph:

“(7) COORDINATION WITH LIMITATION FOR SIMPLE RETIREMENT PLANS AND SEPS.—In the case of an individual on whose behalf contributions are made to a simple retirement account or a simplified employee pension, the amount described in paragraph (2)(A) shall be increased by an amount equal to the contributions made on the individual’s behalf to such account or pension for the taxable year, but only to the extent such contributions—

“(A) in the case of a simplified retirement account—

“(i) do not exceed the sum of the dollar amount in effect for the taxable year under section 408(p)(2)(A)(ii) and the employer contribution required under subparagraph (A)(iii) or (B)(i), as the case may be, of section 408(p)(2), and

“(ii) do not cause the elective deferrals (as defined in section 402(g)(3)) on behalf of such individual to exceed the limitation under section 402(g)(1) (taking into account any additional elective deferrals permitted under section 414(v)), or

“(B) in the case of a simplified employee pension, do not exceed the limitation in effect under section 408(j).”

(e) CONFORMING AMENDMENT.—Section 408A(d)(2)(B) of such Code is amended by inserting “, or employer in the case of a simple retirement account (as defined in section 408(p)) or simplified employee pension (as defined in section 408(k)),” after “individual’s spouse”.

(f) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2021.

#### SEC. 602. HARDSHIP WITHDRAWAL RULES FOR 403(b) PLANS.

(a) IN GENERAL.—Section 403(b) of the Internal Revenue Code of 1986, as amended by the preceding provisions of this Act, is amended by adding at the end the following new paragraph:

“(16) SPECIAL RULES RELATING TO HARDSHIP WITHDRAWALS.—For purposes of paragraphs (7) and (11)—

“(A) AMOUNTS WHICH MAY BE WITHDRAWN.—The following amounts may be distributed upon hardship of the employee:

“(i) Contributions made pursuant to a salary reduction agreement (within the meaning of section 3121(a)(5)(D)).

“(ii) Qualified nonelective contributions (as defined in section 401(m)(4)(C)).

“(iii) Qualified matching contributions described in section 401(k)(3)(D)(ii)(I).

“(iv) Earnings on any contributions described in clause (i), (ii), or (iii).

“(B) NO REQUIREMENT TO TAKE AVAILABLE LOAN.—A distribution shall not be treated as failing to be made upon the hardship of an employee solely because the employee does not take any available loan under the plan.”.

(b) CONFORMING AMENDMENTS.—

(1) Section 403(b)(7)(A)(i)(V) of such Code is amended by striking “in the case of contributions made pursuant to a salary reduction agreement (within the meaning of section 3121(a)(5)(D))” and inserting “subject to the provisions of paragraph (16)”.

(2) Paragraph (11) of section 403(b) of such Code, as amended by the preceding provisions of this Act, is amended—

(A) by striking “in” in subparagraph (B) and inserting “subject to the provisions of paragraph (16), in”, and

(B) by striking the penultimate sentence.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2021.

**SEC. 603. ELECTIVE DEFERRALS GENERALLY LIMITED TO REGULAR CONTRIBUTION LIMIT.**

(a) APPLICABLE EMPLOYER PLANS.—Section 414(v)(1) of the Internal Revenue Code of 1986 is amended by adding at the end the following: “Except in the case of an applicable employer plan described in paragraph (6)(iv), the preceding sentence shall only apply if contributions are designated Roth contributions (as defined in section 402A(c)(1)).”.

(b) CONFORMING AMENDMENTS.—

(1) Section 402(g)(1) of such Code is amended by striking subparagraph (C).

(2) Section 457(e)(18)(A)(ii) of such Code is amended by inserting “the lesser of any designated Roth contributions made by the participant to the plan or” before “the applicable dollar amount”.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2021.

**SEC. 604. OPTIONAL TREATMENT OF EMPLOYER MATCHING CONTRIBUTIONS AS ROTH CONTRIBUTIONS.**

(a) IN GENERAL.—Section 402A(a) of the Internal Revenue Code of 1986 is amended by redesignating paragraph (2) as paragraph (3), by striking “and” at the end of paragraph (1), and by inserting after paragraph (1) the following new paragraph:

“(2) any designated Roth contribution which is made by the employer to the program on the employee’s behalf, and on account of the employee’s contribution or elective deferral, shall be treated as a matching contribution for purposes of this chapter, except that such contribution shall not be excludable from gross income, and”.

(b) MATCHING INCLUDED IN QUALIFIED ROTH CONTRIBUTION PROGRAM.—Section 402A(b)(1) of such Code is amended—

(1) by inserting “, or to have made on the employee’s behalf,” after “elect to make”, and

(2) by inserting “, or of matching contributions which may otherwise be made on the employee’s behalf,” after “otherwise eligible to make”.

(c) DESIGNATED ROTH MATCHING CONTRIBUTIONS.—Section 402A(c)(1) of such Code is amended by inserting “or matching contribution” after “elective deferral”.

(d) MATCHING CONTRIBUTION DEFINED.—Section 402A(e) of such Code is amended by adding at the end the following:

“(3) MATCHING CONTRIBUTION.—The term ‘matching contribution’ means—

“(A) any matching contribution described in section 401(m)(4)(A), and

“(B) any contribution to an eligible deferred compensation plan (as defined in section 457(b)) by an eligible employer described in section 457(e)(1)(A) on behalf of an employee and on account of such employee’s elective deferral under such plan.”.

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to contributions made after the date of the enactment of this Act.



## I. SUMMARY AND BACKGROUND

### A. PURPOSE AND SUMMARY

The bill, H.R. 2954, the “Securing a Strong Retirement Act of 2021” as amended and ordered reported by the Committee on Ways and Means on May 5, 2021, amends the Internal Revenue Code of 1986 to encourage retirement savings, and for other purposes.

### B. BACKGROUND AND NEED FOR LEGISLATION

Employer-sponsored retirement plans and Individual Retirement Arrangements (IRAs) are valuable tools successfully used by millions of Americans to help save for retirement. The Committee believes that it should be easier for Americans to use these accounts to save. The Committee also believes that it should be easier for employers to offer retirement plans to their employees.

H.R. 2954 addresses these issues by expanding opportunities for Americans to increase their savings and making administrative simplifications to the retirement system. Specifically, H.R. 2954, as amended, requires new 401(k) and 403(b) plans to automatically enroll participants in the plans upon becoming eligible and expands and increases the startup credit to encourage small businesses to establish retirement plans. H.R. 2954 also increases the required minimum distribution age from age 72 to age 75, reduces the maximum service requirement for long-term part-time workers to make elective deferrals to 401(k) plans from 3 years to 2 years, establishes a retirement lost and found to reconnect former employees with their benefits, and makes various other changes.

### C. LEGISLATIVE HISTORY

#### *Background*

H.R. 2954 was introduced on May 4, 2021 and was referred to the Committee on Ways and Means, and additionally to the Committees on Financial Services, and Education and Labor.

The legislation builds upon several different bills. One of those bills, H.R. 4524, the Retirement Plan Simplification and Enhancement Act of 2017, was introduced December 1, 2017, in the 115th Congress and was referred to the Committee on Ways and Means and to the Committee on Education and the Workforce.

H.R. 2954 largely incorporates the text of H.R. 2741, which was introduced April 21, 2021 in the 117th Congress and referred to the Committee on Financial Services, and in addition to the Committee on Ways and Means. H.R. 2741, as included in H.R. 2954, eliminates the requirement that a section 403(b)(7) custodial account be invested solely in regulated investment company stock, allowing investment in collective investment trusts. H.R. 2954 also includes provisions from H.R. 2796, introduced April 22, 2021 in the 117th Congress and referred to the House Committee on Ways and Means, to modernize family attribution rules for determining ownership of a business in community property states and when spouses share a minor child.

H.R. 2954 also incorporates provisions from several bills introduced and referred to the Committee on Ways and Means April 30, 2021 in the 117th Congress. It includes provisions from H.R. 2913,

which increase public awareness of the Saver's Credit, a non-refundable income tax credit for taxpayers who make qualified retirement savings contributions, and from H.R. 2933 to increase the required minimum distribution age from age 72 to age 75. It includes provisions from H.R. 2927, also introduced on April 30 and additionally referred to the Committee on Education and Labor, to provide that a section 403(b) plan may be established and maintained as a multiple employer plan. There are included provisions from H.R. 2917, permitting retirement plan sponsors to make matching contributions on account of student loan payments and from H.R. 2944 to reduce the maximum service requirement for long-term part-time workers to make elective deferrals to 401(k) plans from 3 years to 2 years. H.R. 2954 also incorporates H.R. 2951 which directs the Secretary of the Treasury to revise regulations to facilitate the use of exchanged traded funds in variable insurance contracts and H.R. 2909 to index the limit on qualified charitable distributions (QCDs) and allow for a one-time election for QCDs to split-interest entities.

The bill also includes provisions directing the Secretary of Labor to modify its regulations so that an investment that uses a mix of asset classes can be benchmarked against a blend of broad-based securities market indices per H.R. 8660, introduced October, 32, 2020, in the 116th Congress and referred to the Committee on Education and Labor. H.R. 2954 also includes H.R. 2953, introduced May 4, 2021, in the 117th Congress and referred to the Committee on Ways and Means, to allow a victim of domestic violence to withdraw retirement funds without penalty.

#### *Committee hearings*

The Committee on Ways and Means has held numerous hearings on retirement security in multiple Congresses. In the 113th Congress, the Subcommittee on Select Revenue Measures of the Committee on Ways and Means held a hearing on "Private Employer Defined Benefit Pension Plans" on September 17, 2014. Witnesses included Deborah Tully, Director of Compensation and Benefits Finance and Accounting Analysis, Raytheon; R. Dale Hall, Managing Director of Research, Society of Actuaries; Scott Henderson, Vice President of Pension Investment and Strategy, The Kroger Co.; Jeremy Gold, FSA, MAAA, Jeremy Gold Pensions; and Diane Oakley, Executive Director, National Institute on Retirement Security.

In the 114th Congress, the Subcommittee on Oversight of the Committee on Ways and Means held a hearing on the "Department of Labor's Proposed Fiduciary Rule" on September 17, 2014. Witnesses included Bradford Campbell, Counsel, Drinker Biddle & Reath LLP, Washington, D.C.; Paul Schott Stevens, President and CEO, Investment Company Institute, Washington, D.C.; Judy VanArsdale, LPL Financial, Deer Park, IL; Kenneth Specht, Financial Services Professional, Agent, New York Life Insurance Company, Kenosha, WI; Patricia Owen, President, FACES DaySpa, Hilton Head Island, SC; and Damon Silvers, Director of Policy and Special Counsel, AFL-CIO, Washington, D.C.

In the 115th Congress, the Tax Policy Subcommittee of the Committee on Ways & Means held a hearing on "How Tax Reform Will Simplify Our Broken Tax Code and Help Individuals and Families" on July 18, 2017. Witnesses included the Honorable Bill Archer,

Former Chairman, Committee on Ways and Means; Bernard F. McKay, Chairman of the Board of Directors, Council for Electronic Revenue Communication Advancement; Jania Stout, Practice Leader and Co-Founder, Fiduciary Plan Advisors at HighTower; and Eric Rodriguez, Vice President—Office of Research, Advocacy, and Legislation, UnidosUS.

Most recently, in the 116th Congress, on February 6, 2019, the Committee on Ways and Means held a hearing on “Improving Retirement Security for America’s Workers.” Witnesses included Nancy Altman, President, Social Security Works; Andrew Biggs, Resident Scholar, American Enterprise Institute; Roger J. Crandall, Chairman, President & CEO, MassMutual; Robin Diamonte, Corporate Vice President, Pension Investments, United Technologies; Luke Huffstutter, Owner, Annastasia Salon and Summit Salon Academy, Portland, OR; Cindy McDaniel, Co-director, Missouri-Kansas City Committee to Protect Pensions; and Diane Oakley Executive Director, National Institute on Retirement Security.

#### *Committee action*

The Committee on Ways and Means met to consider H.R. 2954 on May 5, 2021, and ordered the bill, as amended, favorably reported by a voice vote (with a quorum being present).

## **II. EXPLANATION OF THE BILL**

### **TITLE I—EXPANDING COVERAGE AND INCREASING RETIREMENT SAVINGS**

#### **1. EXPANDING AUTOMATIC ENROLLMENT IN RETIREMENT PLANS (SEC. 101 OF THE BILL AND SEC. 414 OF THE CODE)**

##### **PRESENT LAW**

#### *Section 401(k) plans*

A section 401(k) plan is a type of profit-sharing or stock bonus plan that contains a qualified cash or deferred arrangement. Such arrangements are subject to the rules generally applicable to qualified defined contribution plans. In addition, special rules apply to such arrangements. Employees who participate in a section 401(k) plan may elect to have contributions made to the plan (referred to as “elective deferrals”) rather than receive the same amount as current compensation.<sup>1</sup> The maximum annual amount of elective deferrals that can be made by an employee for a year is \$19,500 (for 2021) or, if less, the employee’s compensation.<sup>2</sup> For an employee who attains age 50 by the end of the year, the dollar limit on elective deferrals is increased by \$6,500 (for 2021) (called “catch-up contributions”).<sup>3</sup> An employee’s elective deferrals must be fully

<sup>1</sup> Elective deferrals generally are made on a pre-tax 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.

<sup>2</sup> Sec. 402(g).

<sup>3</sup> Sec. 414(v).

vested. A section 401(k) plan may also provide for employer matching and nonelective contributions.

#### *Section 403(b) plans*

Tax-deferred annuity plans (referred to as section 403(b) plans) are generally similar to qualified defined contribution plans, but may be maintained only by (1) tax-exempt charitable organizations,<sup>4</sup> and (2) educational institutions of State or local governments (that is, public schools, including colleges and universities).<sup>5</sup> Section 403(b) plans may provide for employees to make elective deferrals (in pre-tax or designated Roth form), including catch-up contributions, or other after-tax employee contributions, and employers may make nonelective or matching contributions on behalf of employees. Contributions to a section 403(b) plan are generally subject to the same contribution limits applicable to qualified defined contribution plans, including the limits on elective deferrals.

#### *Automatic enrollment*

Section 401(k) plans and section 403(b) plans 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.<sup>6</sup> 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, and section 403(b) plans that have salary reduction arrangements, are generally designed so that an employee will receive cash compensation unless the employee affirmatively elects to make elective deferrals to the plan. Alternatively, such plans may provide that elective deferrals are made at a specified rate (when the employee becomes eligible to participate) unless the employee elects otherwise (*i.e.*, affirmatively elects not to make contributions or to make contributions at a different rate). This alternative plan design is referred to as automatic enrollment.

#### *Nondiscrimination test and automatic enrollment safe harbor*

An annual nondiscrimination test, called the actual deferral percentage test (the “ADP” test) applies to elective deferrals under a section 401(k) plan.<sup>7</sup> The ADP test generally compares the average rate of deferral for highly compensated employees to the average rate of deferral for non-highly compensated employees and requires that the average deferral rate for highly compensated employees not exceed the average rate for non-highly 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 ex-

<sup>4</sup>These are organizations exempt from tax under section 501(c)(3). Section 403(b) plans of private, tax-exempt employers may be subject to ERISA as well as the requirements of section 403(b).

<sup>5</sup>Sec. 403(b).

<sup>6</sup>Treas. Reg. secs. 1.401(k)-1(e)(2)(ii); 1.403(b)-5(b)(2).

<sup>7</sup>Sec. 401(k)(3).

cess deferrals must be made by the close of the following plan year.<sup>8</sup>

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 (a “section 401(k) safe harbor plan”), as well as certain required rights and features, and satisfies a notice requirement.<sup>9</sup> One type of section 401(k) safe harbor plan includes automatic enrollment.

An automatic enrollment section 401(k) safe harbor plan must provide that, unless an employee elects otherwise, the employee is treated as electing to make elective deferrals at a default rate equal to a percentage of compensation as stated in the plan 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. Although an automatic enrollment section 401(k) safe harbor plan generally may provide for default rates higher than these minimum rates, the default rate cannot exceed 15 percent for any year.

#### *Eligible automatic contribution arrangements*

Plans that include eligible automatic contribution arrangements may allow participants to withdraw certain elective contributions (“permissive withdrawals”).<sup>10</sup> For this purpose, an eligible automatic contribution arrangement is an arrangement under an employer plan<sup>11</sup> that meets the following conditions: (1) a participant under the arrangement may elect to have the employer make payments as contributions under the plan on behalf of the participant, or to the participant directly in cash; (2) the participant is treated as having elected to have the employer make such contributions in an amount equal to a uniform percentage of compensation provided under the plan until the participant specifically elects not to have such contributions made (or specifically elects to have such contributions made at a different percentage); and (3) the administrator of the plan meets certain notice requirements described below.<sup>12</sup>

A permissive withdrawal is an election by the employee to withdraw elective contributions described in clause (2) above (and earnings attributable thereto). Such withdrawals are excludable from the employee’s gross income for that taxable year and are not subject to the 10-percent additional tax<sup>13</sup> on early distributions from a retirement plan. The employee’s election to make a permissive withdrawal must be made no later than 90 days after the date of the employee’s first elective contribution under the arrangement.

<sup>8</sup>Sec. 401(k)(8).

<sup>9</sup>Sec. 401(k)(12) and (13). If certain additional requirements are met, matching contributions under a section 401(k) safe harbor plan may also satisfy a nondiscrimination test applicable under section 401(m).

<sup>10</sup>For this purpose, elective contributions are elective deferrals under section 402(g) or contributions to certain governmental plans (as described in Treas. Reg. sec. 1.457-2(f)) that would be elective contributions if they were made under a qualified plan. Treas. Reg. sec. 1.414(w)-1(e)(4).

<sup>11</sup>The employer plan must be one of the following: a plan qualified under section 401(a); a section 403(b) plan; a governmental section 457(b) plan; a simplified employer pension (“SEP”) under section 408(k)(6) that provides for a salary reduction arrangement; or a SIMPLE IRA, as defined in section 408(p).

<sup>12</sup>Sec. 414(w)(3).

<sup>13</sup>Under section 72(t).

Under the notice requirements, the administrator must, within a reasonable period before each plan year, give to each employee to whom the eligible automatic contribution arrangement applies a notice of the employee's rights and obligations under the arrangement which (1) is sufficiently accurate and comprehensive to apprise the employee of such rights and obligations, and (2) is written in a manner calculated to be understood by the average employee to whom the arrangement applies. The notice must describe the level of the default electronic contributions that will be made on the employee's behalf if the employee does not make an affirmative election.<sup>14</sup> It also must include an explanation of the employee's right under the arrangement to elect not to have elective contributions made on the employee's behalf (or to elect to have a different percentage of compensation or a different amount of contribution made to the plan on his or her behalf),<sup>15</sup> as well as an explanation of how contributions made under the arrangement will be invested in the absence of any investment election by the employee. If the plan allows permissive withdrawals, it must explain the employee's right to make such a withdrawal and describe the procedures to elect such withdrawal. In addition, the employee must have a reasonable period of time after receipt of the notice and before the first elective contribution is made to make an election with respect to such contributions.<sup>16</sup>

#### REASONS FOR CHANGE

The Committee recognizes that one of the main reasons many Americans reach retirement age with little or no savings is that too few workers are offered an opportunity to save for retirement through their employers. However, even for those employees who are offered a retirement plan at work, many do not participate. Automatic enrollment in section 401(k) plans significantly increases participation. Since first defined and approved by Treasury in 1998, automatic enrollment has boosted participation by eligible employees generally, and particularly for Black, Latinx, and lower-wage employees. For these reasons, the Committee believes it is appropriate to generally require section 401(k) plans and section 403(b) plans established after the date of enactment to automatically enroll participants in their plans.

#### EXPLANATION OF PROVISION

The provision generally requires newly established section 401(k) plans and section 403(b) plans with salary reduction agreements to provide for automatic enrollment.<sup>17</sup> Such plans must include an eligible automatic contribution arrangement that allows employees to make permissive withdrawals,<sup>18</sup> and that meets requirements relating to the minimum contribution percentage and the investment of the employee's contributions.

Under the minimum contribution percentage requirements, the eligible automatic contribution arrangement must provide that the

<sup>14</sup> Treas. Reg. sec. 1.414(w)-1(b)(3)(ii).

<sup>15</sup> Treas. Reg. sec. 1.414(w)-1(b)(3)(ii)(B).

<sup>16</sup> Sec. 414(w)(4).

<sup>17</sup> SIMPLE section 401(k) plans (section 401(k)(11)) are not subject to the requirements of this provision.

<sup>18</sup> As defined in section 414(w)(2).

uniform percentage of compensation contributed by the participant during the first year of participation is at least three percent, and that such percentage increases by one percentage point each year to at least 10 percent (but no more than 15 percent), unless the participant specifically elects not to have such contributions made or to have them made at a different percentage. For a plan other than a section 401(k) safe harbor plan, the percentage of compensation contributed under the eligible automatic contribution arrangement (other than due to a participant's election to change such percentage) may not be greater than 10 percent in any plan year ending before January 1, 2025.

The percentage increase under the eligible automatic contribution arrangement must be effective as of the first day of the first plan year commencing after the completion of each year of participation. In addition, under the investment requirements, amounts contributed pursuant to such arrangement for which no investment is elected by the participant must be invested consistent with certain Department of Labor ("DOL") regulations under which a participant is treated as exercising control over the assets in the participant's account with respect to certain default investments.<sup>19</sup>

Certain plans are exempt from the requirements of the provision. First, the provision does not apply to plans established before the date of enactment. However, this grandfathering rule does not apply in the case of an employer adopting a multiple employer plan after the date of enactment. Second, governmental plans<sup>20</sup> and church plans<sup>21</sup> are exempt from the provision. Third, the provision does not apply to a plan while the employer maintaining the plan has been in existence for less than three years. And fourth, the provision does not apply to a plan earlier than the date that is one year after the close of the first taxable year with respect to which the employer maintaining the plan normally employed more than 10 employees. In the case of a multiple employer plan, the exemptions relating to new employers and to small employers apply separately with respect to each employer.

#### EFFECTIVE DATE

The provision is effective for plan years beginning after December 31, 2022.

#### 2. MODIFICATION OF CREDIT FOR SMALL EMPLOYER PENSION PLAN START-UP COSTS (SEC. 102 OF THE BILL AND SEC. 45E OF THE CODE)

##### PRESENT LAW

Present law provides a nonrefundable income tax credit equal to 50 percent of the qualified start-up costs paid or incurred during the taxable year by an eligible employer<sup>22</sup> that adopts a new eligible employer plan,<sup>23</sup> provided that the plan covers at least one non-

<sup>19</sup> 29 C.F.R. sec. 2550.404c-5, or any successor regulations.

<sup>20</sup> Within the meaning of section 414(d).

<sup>21</sup> Within the meaning of section 414(e).

<sup>22</sup> An eligible employer has the meaning given such term by section 408(p)(2)(C)(i).

<sup>23</sup> An eligible employer plan means a qualified employer plan within the meaning of section 4972(d) and includes a section 401(a) qualified retirement plan, a section 403 annuity, any simplified employee pension ("SEP") within the meaning of section 408(k), and any simple retirement account ("SIMPLE") within the meaning of section 408(p). An eligible employer plan does

Continued

highly compensated employee.<sup>24</sup> Qualified start-up costs are expenses connected with the establishment or administration of the plan and retirement-related education of employees with respect to the plan. The amount of the credit for any taxable year is limited to the greater of (1) \$500 or (2) the lesser of (a) \$250 multiplied by the number of non-highly compensated employees of the eligible employer who are eligible to participate in the plan or (b) \$5,000. The credit applies for up to three consecutive taxable years beginning with the taxable year the plan is first effective, or, at the election of the employer, with the year preceding the first plan year.

An eligible employer is an employer that, for the preceding year, had no more than 100 employees, each with compensation of \$5,000 or more.<sup>25</sup> In addition, the employer must not have had a qualified employer plan covering substantially the same employees as the new plan with respect to which contributions were made or benefits were accrued during the three years preceding the first year for which the credit would apply. Members of controlled groups and affiliated service groups are treated as a single employer for purposes of these requirements.<sup>26</sup> All eligible employer plans of an employer are treated as a single plan.

No deduction is allowed for the portion of qualified start-up costs paid or incurred for the taxable year equal to the amount of the credit.

#### REASONS FOR CHANGE

The credit for small employer pension plan start-up costs serves to encourage small employers to provide retirement benefits to their employees. The Committee believes the modifications to this credit will further encourage small employers to provide these benefits.

#### EXPLANATION OF PROVISION

The provision increases from 50 percent to 100 percent of qualified start-up costs, the amount of the nonrefundable income tax credit allowed to an eligible employer with no more than 50 employees.

The provision also increases by an additional amount up to \$1,000 per employee the credit allowed to any employer who is eligible, as determined in the first taxable year in which the plan is established. The additional amount of the credit is equal to the applicable percentage of employer contributions (not including any elective deferrals) by the employer to an eligible employer plan (not including a defined benefit plan). The applicable percentages are as follow:

Taxable Year	Applicable Percentage
Taxable year in which the plan is established .....	100
1st taxable year after the taxable year in which the plan is established .....	100
2nd taxable year after the taxable year in which the plan is established .....	75
3rd taxable year after the taxable year in which the plan is established .....	50

not include a plan maintained by a tax-exempt employer or a governmental plan, as defined in section 414(d).

<sup>24</sup> A non-highly compensated employee is an employee who is not a highly compensated employee as defined under section 414(q).

<sup>25</sup> As defined in section 408(p)(2)(C).

<sup>26</sup> Sec. 52(a) or (b) and 414(m) or (o).



Taxable Year	Applicable Percentage
4th taxable year after the taxable year in which the plan is established .....	25
Any taxable years thereafter .....	0

In the case of an eligible employer which had more than 50 employees in the year preceding the taxable year in which the plan is established, the amount of the additional credit is reduced by an amount equal to two percent for each employee above 50 employees and is zero for eligible employers with 100 employees.

No deduction is allowed for the portion of qualified start-up costs paid or incurred or for the portion of employer contributions for the taxable year equal to the increased amounts of the credit.

#### EFFECTIVE DATE

The provision applies to taxable years beginning after December 31, 2021.

### 3. PROMOTION OF THE SAVER'S CREDIT (SEC. 103 OF THE BILL AND SEC. 25B OF THE CODE)

#### PRESENT LAW

Present law provides a nonrefundable income tax credit for eligible taxpayers who make qualified retirement savings contributions.<sup>27</sup> Subject to AGI limits, the credit is available to individuals who are 18 or older, other than individuals who are full-time students or claimed as a dependent on another taxpayer's return. The AGI limits for 2021 (as indexed for inflation) are \$66,000 for married taxpayers filing joint returns, \$49,500 for head of household taxpayers, and \$33,000 for single taxpayers and married taxpayers filing separate returns.

For purposes of the credit, qualified retirement savings contributions include (1) elective deferrals to a section 401(k) plan, a section 403(b) plan, a governmental section 457 plan, a SIMPLE IRA, or a SEP; (2) contributions to a traditional or Roth IRA; (3) voluntary after-tax employee contributions to a qualified retirement plan or annuity or a section 403(b) plan; (4) contributions to a 501(c)(18)(D) plan; and (6) contributions made to an ABLE account for which the taxpayer is the designated beneficiary. The maximum amount of qualified retirement savings contributions taken into account for purposes of the credit is \$2,000. The amount of any contribution eligible for the credit is reduced by distributions received by the taxpayer (or by the taxpayer's spouse if the taxpayer files a joint return with the spouse) from any plan or IRA to which eligible contributions can be made during the taxable year for which the credit is claimed, the two taxable years prior to the year the credit is claimed, and during the period after the end of the taxable year for which the credit is claimed and prior to the due date for filing the taxpayer's return for the year. Distributions that are rolled over to another retirement plan do not affect the credit.

The credit is a percentage of the taxpayer's qualified retirement savings contributions up to \$2,000. The credit percentage may be 10 percent, 20 percent, or 50 percent, depending on the AGI of the taxpayer, as shown in the table below. The credit is in addition to

<sup>27</sup> Sec. 25B.

any deduction or exclusion that would otherwise apply with respect to the contribution. The credit offsets minimum tax liability as well as regular tax liability.

TABLE 1.—CREDIT RATES FOR SAVER’S CREDIT (FOR 2021)

Joint Filers	Heads of Households	All Other Filers	Credit Rate
\$0–\$39,500 .....	\$0–\$29,625	\$0–\$19,750	50 percent
\$39,501–\$43,000 .....	\$29,626–\$32,250	\$19,751–\$21,500	20 percent
\$43,001–\$66,000 .....	\$32,251–\$49,500	\$21,501–\$33,000	10 percent

## REASONS FOR CHANGE

Many low- and middle-income individuals have inadequate savings for retirement. The Committee believes that the saver’s credit provides an incentive for low- and middle-income individuals to save for retirement. The principal criticisms of the effectiveness of the credit focus on the low use of the credit owing, in part, to the lack of awareness of the credit by taxpayers. The Committee believes that increased promotion of the credit in a variety of commonly spoken languages to increase public awareness of the benefits will improve the effectiveness of the credit.

## EXPLANATION OF PROVISION

Under the provision, the Secretary shall take steps to increase public awareness of the benefits provided under this section and not later than 90 days after the date of enactment provide a report to Congress summarizing anticipated promotion efforts. The report will include a description of plan for the development and distribution of digital and print materials as well as the translation of such materials into the five most commonly spoken languages as determined by data from the U.S. Census Bureau, American Community Survey.

## EFFECTIVE DATE

The provision applies to taxable years beginning after the date of enactment.

## 4. ENHANCEMENT OF 403(b) PLANS (SEC. 104 OF THE BILL AND SEC. 403(b) OF THE CODE)

## PRESENT LAW

*Tax-sheltered annuities (“section 403(b) plans”)*

Section 403(b) plans are a form of tax-favored employer-sponsored plan that provides 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.

### *Contributions to 403(b) 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)<sup>28</sup> or other after-tax contributions.

### *Annuity contracts*

Generally, section 403(b) plans provide for contributions toward the purchase of annuity contracts. The employee's rights under the annuity contract are nonforfeitable, except for a failure to pay future premiums.<sup>29</sup> Amounts contributed by an employer for an annuity contract are excluded from the gross income of the employee for the taxable year if certain requirements are satisfied.

### *Section 403(b) custodial accounts*

Alternatively, such contributions may be held in custodial accounts established for each employee if those accounts satisfy certain requirements.

Contributions to a section 403(b) plan that are held in a custodial account are treated as contributions to an annuity contract<sup>30</sup> if the assets are (1) held by a bank<sup>31</sup> or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which the assets will be held is consistent with the requirements for a qualified retirement plan<sup>32</sup> and (2) invested only in regulated investment company stock.<sup>33</sup>

In addition, assets of a section 403(b) custodial account cannot be commingled in a group trust with any assets other than those of a regulated investment company.<sup>34</sup> Contributions to a custodial account are not permitted to be distributed before the employee dies, attains age 59½, has a severance from employment, becomes disabled,<sup>35</sup> or, in the case of elective deferrals, encounters financial hardship; or, with respect to lifetime income options, the date that is 90 days prior to the date such lifetime income investment no longer is held as an investment option and is distributed in the form of a qualified distribution.<sup>36</sup> Finally, a custodial account must contain a written statement that the assets held in a custodial account cannot be used for, or diverted to, purposes other than for the exclusive benefit of plan participants and their beneficiaries.<sup>37</sup>

<sup>28</sup> Sec. 402A.

<sup>29</sup> Sec. 403(b)(1)(C).

<sup>30</sup> Sec. 403(b)(7).

<sup>31</sup> A "bank" is defined as any bank as defined in section 581, an insured credit union within the meaning of section 101, paragraph (6) or (7) of the Federal Credit Union Act, and a corporation which, under the laws of the State of its incorporation, is subject to supervision and examination by the Commissioner of Banking or other officer of such State in charge of the administration of the banking laws of such State. Sec. 408(n).

<sup>32</sup> Sec. 401(f)(2) and Treas. Reg. sec. 1.401(f)-1. A custodial account that satisfies the requirements of section 401(f)(2) is treated as an organization described in section 401(a) solely for purposes of subchapter F of chapter 1 of Subtitle A (secs. 501-530) and subtitle F (pertaining to procedure and administration) with respect to amounts received by the account and with respect to any income from the investment of those amounts.

<sup>33</sup> Sec. 403(b)(7) and Treas. Reg. sec. 1.403(b)-8(d)(2)(i).

<sup>34</sup> Treas. Reg. sec. 1.403(b)-8(d)(2)(ii).

<sup>35</sup> Within the meaning of section 72(m)(7).

<sup>36</sup> In accordance with section 401(a)(38).

<sup>37</sup> Treas. Reg. sec. 1.403(b)-8(d)(2)(iii).

## GROUP TRUST

Under the Code, a trust created or organized in the United States and forming a part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of its employees or their beneficiaries constitutes a qualified trust if it provides that:

- Contributions made to the trust by the applicable employer or employers, or both, are used for the purpose of distributing the corpus and income of the trust, in accordance with the terms of the plan, to such employees or their beneficiaries;<sup>38</sup>
- A trust described in section 401(a) is exempt from income tax;<sup>39</sup> and
- Under each trust instrument, it must be impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the plan and trust, for any part of the corpus or income of the trust to be used for or diverted to purposes other than for the exclusive benefit of the employees or their beneficiaries.

A group trust is an arrangement under which individual retirement plan trusts pool their assets in a group trust (usually created for the purpose of providing diversification of investments), where the trust is declared to be part of each participating retirement plan and the trust instruments creating both the participating and group trusts provide that amounts are transferred from one trust to the other at the direction of the trustee of the participating trust.<sup>40</sup>

The tax status of the group trust is derived from the tax status of the entities participating in the group trust to the extent of the entities' equitable interests in such trust if the following requirements are satisfied:

- The group trust is itself adopted as a part of each adopting group trust retiree benefit plan;
- The group trust instrument expressly limits participation to pension, profit-sharing, and stock bonus trusts or custodial accounts qualifying under section 401(a) that are exempt under section 501(a); individual retirement accounts that are exempt under section 408(e); eligible governmental plan trusts or custodial accounts under section 457(b) that are exempt under section 457(g); custodial accounts under section 403(b)(7); retirement income accounts under section 403(b)(9); and section 401(a)(24) governmental plans;
- The group trust instrument expressly prohibits any part of its corpus or income that equitably belongs to any adopting group trust retiree benefit plan from being used for, or diverted to, any purpose other than for the exclusive benefit of the participants and beneficiaries of the group trust retiree benefit plan;

<sup>38</sup> Sec. 401(a)(1).

<sup>39</sup> Sec. 501(a).

<sup>40</sup> See Rev. Rul. 81-100, 1981-1 C.B. 326, as modified by Rev. Rul. 2004-67, 2004-2 C.B. 28; Rev. Rul. 2008-40, 2008-2 C.B. 166; Rev. Rul. 2011-1, 2011-2 I.R.B. 251 which was modified by Notice 2012-6, 2012-3 I.R.B. 293, January 17, 2012; and Rev. Rul. 2014-24, 2014-37 I.R.B. 529.

- Each group trust retiree benefit plan that adopts the group trust is itself a trust, a custodial account, or a similar entity that is tax-exempt under section 408(e) or section 501(a) (or is treated as exempt under section 501(a));
- Each group trust retiree benefit plan that adopts the group trust expressly provides in its governing document that it is impossible for any part of the corpus or income of the group trust retiree benefit plan to be used for, or diverted to, purposes other than for the exclusive benefit of the plan participants and their beneficiaries;
- The group trust instrument expressly limits the assets that may be held by the group trust to assets that are contributed by, or transferred from, a group trust retiree benefit plan to the group trust (and the earnings thereon), and the group trust instrument expressly provides for separate accounting to reflect the interest that each adopting group trust retiree benefit plan has in the group trust, including separate accounting for contributions to the group trust from the adopting plan, disbursements made from the adopting plan's account in the group trust, and investment experience of the group trust allocable to that account;
- The group trust instrument expressly prohibits an assignment by an adopting group trust retiree benefit plan of any part of its equity or interest in the group trust; and
- The group trust is created or organized in the United States and is maintained at all times as a domestic trust in the United States.

With respect to section 403(b)(7) custodial accounts, under Internal Revenue Service ("IRS") guidance, such an account fails to satisfy the requirements for a group trust if the assets of the account are invested other than in the stock of a regulated investment company, and any group trust in which the assets of a section 403(b)(7) custodial account is invested must comply with this restriction.<sup>41</sup> As a result of this investment restriction, the assets of a custodial account under section 403(b)(7) generally will be commingled in a group trust that solely contains the assets of other section 403(b)(7) custodial accounts.

#### REASONS FOR CHANGE

Under present law, group trusts permit certain retirement plans and IRAs to pool their assets for investment purposes if certain specified requirements are satisfied providing certain cost savings and broader investment options to such plans than might otherwise be available. Section 403(b) investments are generally limited to annuity contracts and mutual funds. This limitation restricts 403(b) plan participants who are generally employees of charities and public educational organizations from access to collective investment trusts, which are often used by 401(a) plans due to their lower fees.

The Committee believes that section 403(b) custodial accounts would benefit from participating in a group trust.

<sup>41</sup> Rev. Rul. 2011-1, 2011-2 I.R.B. 251.

## EXPLANATION OF PROVISION

The provision provides that contributions to a section 403(b) plan that are held in a custodial account are treated as contributions to an annuity contract if the assets are to be held in that custodial account and invested in regulated investment company stock or a group trust intended to satisfy the requirements of IRS Revenue Ruling 81-100 (or any successor guidance).

## EFFECTIVE DATE

The provision is applicable to amounts invested after December 31, 2021.

5. INCREASE IN AGE FOR REQUIRED BEGINNING DATE FOR MANDATORY DISTRIBUTIONS (SEC. 105 OF THE BILL AND SEC. 401(a)(9) OF THE CODE)

## PRESENT LAW

*Required minimum distributions*

Employer-provided qualified retirement plans and IRAs are subject to required minimum distribution rules.<sup>42</sup> 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), an employee retirement annuity described in section 403(a), a tax-sheltered annuity described in section 403(b), and a plan described in section 457(b) that is maintained by a governmental employer.<sup>43</sup> An employer-provided qualified retirement plan that is a defined contribution plan is a plan that 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.<sup>44</sup>

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 72. Prior to January 1, 2020, the age after which required minimum distributions were required to begin was 70½.<sup>45</sup> In the case of an employer-provided qualified retirement plan, the required minimum distribution date for an individual who is not a five-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.

For IRAs and defined contribution 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 the number of

<sup>42</sup> Secs. 401(a)(9) and 408(a)(6).

<sup>43</sup> The required minimum distribution rules also apply to section 457(b) plans maintained by tax-exempt employers other than governmental employers.

<sup>44</sup> Sec. 414(i).

<sup>45</sup> The SECURE Act, enacted as part of the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Div. O, sec. 114, increased the age after which required minimum distributions must begin from 70½ to 72, effective for distributions required to be made after December 31, 2019, with respect to individuals who attain age 70½ after that date.

years in the distribution period.<sup>46</sup> The distribution period is generally derived from the Uniform Lifetime Table.<sup>47</sup> This table is based on the 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, the joint life expectancy of the couple is used (because the couple's remaining joint life expectancy is longer than the length provided in the Uniform Lifetime Table). There are special rules in the case of annuity payments from an insurance contract.

If an individual dies before the individual's entire interest is distributed, and the individual has a designated beneficiary, unless the designated beneficiary is an eligible designated beneficiary, the individual's entire account must be distributed within 10 years after the individual's death. This rule applies regardless of whether the individual dies before or after the individual's required beginning date.

In the case of an eligible designated beneficiary, the remaining required minimum distributions are distributed over the life of the beneficiary (or over a period not extending beyond the life expectancy of such beneficiary). Such distributions must begin no later than December 31 of the calendar year immediately following the calendar year in which the individual dies. An eligible designated beneficiary is a designated beneficiary who is (1) the surviving spouse of the individual; (2) a child of the individual who has not reached majority; (3) disabled; (4) chronically ill; or (5) not more than 10 years younger than the individual.<sup>48</sup> If the eligible designated beneficiary is the individual's spouse, commencement of distributions is permitted to be delayed until December 31 of the calendar year in which the deceased individual would have attained age 72. The required minimum distribution for each year is 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.<sup>49</sup> Special rules apply in the case of trusts for disabled or chronically ill beneficiaries.<sup>50</sup>

In the case of an individual who does not have a designated beneficiary, if an individual dies on or after the individual's required beginning date, the distribution period for the remaining required minimum distributions is 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.<sup>51</sup> If an individual dies before the required beginning date, the individual's entire account must be distributed no later than December 31 of the calendar year that includes the fifth anniversary of the individual's death.<sup>52</sup>

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 both while

<sup>46</sup>Treas. Reg. sec. 1.401(a)(9)-5.

<sup>47</sup>Treas. Reg. sec. 1.401(a)(9)-9.

<sup>48</sup>Sec. 401(a)(9)(E)(ii).

<sup>49</sup>Treas. Reg. sec. 1.401(a)(9)-5, A-5.

<sup>50</sup>Sec. 401(a)(9)(H)(iv).

<sup>51</sup>Treas. Reg. sec. 1.401(a)(9)-5, A-5(a).

<sup>52</sup>Treas. Reg. sec. 1.401(a)(9)-3, Q&As 1, 2.

the surviving spouse is alive and after death as though the surviving spouse is the IRA owner, rather than a beneficiary.<sup>53</sup>

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.

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.<sup>54</sup> The tax may be waived if the failure to distribute is reasonable error and reasonable steps are taken to remedy the violation.<sup>55</sup>

#### *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 a shorter period for distributions made for certain life expectancies), and (ii) any distribution to the extent that the distribution is a required minimum distribution.<sup>56</sup>

For any distribution that is eligible for rollover, an employer-provided qualified retirement plan must offer the distributee the right to have the distribution made in a direct rollover.<sup>57</sup> Before making the distribution, the plan administrator must provide the distributee with a written explanation of the direct rollover right and related tax consequences.<sup>58</sup> Unless a distributee elects to have the distribution made in a direct rollover, the distribution is generally subject to mandatory 20-percent income tax withholding.<sup>59</sup>

#### REASONS FOR CHANGE

When mandatory distributions from qualified retirement plans based on age were added to the Code in 1962,<sup>60</sup> the life expectancy of Americans was shorter. In addition, increasing numbers of Americans are continuing to work past traditional retirement ages. For these reasons, the Setting Every Community Up for Retirement ("SECURE") Act<sup>61</sup> increased the age at which required minimum distributions generally must be made from age 70½ to age

<sup>53</sup> Treas. Reg. sec. 1.408-8, Q&A 5.

<sup>54</sup> Sec. 4974(a).

<sup>55</sup> Sec. 4974(d).

<sup>56</sup> Sec. 402(c)(4). Distributions that are not eligible rollover distributions also include distributions made upon hardship of the employee.

<sup>57</sup> Sec. 401(a)(31).

<sup>58</sup> Sec. 402(f).

<sup>59</sup> Sec. 3405(c). This mandatory withholding does not apply to a distributee that is a beneficiary other than a surviving spouse of an employee.

<sup>60</sup> Sec. 2(2) of the Self-Employed Individuals Tax Retirement Act of 1962, Pub. L. No. 87-792.

<sup>61</sup> Pub. L. No. 116-94.



72. The Committee believes it is appropriate to further increase this age to more accurately reflect present-day circumstances.

#### EXPLANATION OF PROVISION

The provision changes the age on which the required beginning date for required minimum distributions is based, from the calendar year in which the employee or IRA owner attains age 72 to the calendar year in which the employee or IRA owner attains age 73, for individuals who attain age 72 after December 31, 2021, and who attain age 73 before January 1, 2029. In addition, the provision changes such age from 73 years to 74 years, for individuals who attain age 73 after December 31, 2028, and who attain age 74 before January 1, 2032. Such age is further increased to age 75 for individuals who attain age 74 after December 31, 2031.

#### EFFECTIVE DATE

The provision is effective for distributions required to be made after December 31, 2021, for employees and IRA owners who attain age 72 after such date.

#### 6. INDEXING IRA CATCH-UP LIMIT (SEC. 106 OF THE BILL AND SEC. 219 OF THE CODE)

##### PRESENT LAW

There are two general types of individual retirement arrangements (“IRAs”): traditional IRAs and Roth IRAs.<sup>62</sup> 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 (\$6,000 for 2021); and (2) the amount of the individual’s compensation that is includible in gross income for the year.<sup>63</sup> In the case of an individual who has attained age 50 by the end of the taxable year, the dollar amount is increased by \$1,000 (referred to as a “catch-up contribution”). In the case of 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.<sup>64</sup>

Individuals with adjusted gross income below certain levels may make contributions to a Roth IRA (up to the contribution limit).<sup>65</sup> Contributions to a Roth IRA are not deductible.

<sup>62</sup> Secs. 408 and 408A.

<sup>63</sup> Sec. 219(b)(2) 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.

<sup>64</sup> Sec. 219(g).

<sup>65</sup> Sec. 408A(c)(3).

## REASONS FOR CHANGE

The Committee wishes to enhance an individual's ability to save for retirement, and therefore believes it is appropriate to increase the amount of catch-up contributions that an individual may contribute to an IRA based on increases in cost of living.

## EXPLANATION OF PROVISION

Under the provision, the \$1,000 amount that may be contributed as a catch-up contribution by individuals who attain age 50 by the end of the taxable year is increased for cost-of-living adjustments for taxable years beginning in 2023 or later.

## EFFECTIVE DATE

The provision applies to taxable years beginning after December 31, 2022.

7. HIGHER CATCH-UP LIMIT TO APPLY AT AGE 62, 63, AND 64 (SEC. 107 OF THE BILL AND SEC. 414(v) OF THE CODE)

## PRESENT LAW

Under certain types of employer-sponsored retirement plans, including section 401(k) plans, section 403(b) plans, SIMPLE IRAs,<sup>66</sup> and governmental section 457(b) plans, an employee may elect to have contributions (elective deferrals) made to the plan, rather than receive the same amount in cash. The maximum annual amount of elective deferrals that can be made by an employee for a year is \$19,500 for 2021 (\$13,500 in the case of a SIMPLE IRA or SIMPLE section 401(k) plan<sup>67</sup>) or, if less, the employee's compensation.<sup>68</sup> For individuals who will attain age 50 by the end of the taxable year, this limit is increased to allow additional "catch-up contributions."<sup>69</sup>

A section 401(k) plan, section 403(b) plan, and governmental section 457(b) plan may generally permit catch-up contributions up to \$6,500 in 2021 (indexed for inflation). A SIMPLE IRA or SIMPLE section 401(k) plan may permit catch-up contributions up to \$3,000 in 2021. If elective deferral and catch-up contributions are made to both a section 401(k) plan and a section 403(b) plan for the same employee, a single limit applies to the elective deferrals under both plans. Special contribution limits apply to certain employees under a section 403(b) plan maintained by a church. In addition, under a special catch-up rule, an increased elective deferral limit applies under a plan maintained by an educational organization, hospital, home health service agency, health and welfare service agency, church, or convention or association of churches in the case of employees who have completed 15 years of service. In this case, the limit is increased by the least of (1) \$3,000, (2) \$15,000, reduced by the employee's total elective deferrals in prior years, and (3) \$5,000 times the employee's years of service, reduced by the employee's total elective deferrals in prior years.

<sup>66</sup> Sec. 408(p).

<sup>67</sup> Sec. 401(k)(11).

<sup>68</sup> Secs. 402(g); 457(c). This limit applies to total elective deferrals under all of a participant's section 401(k) plans and section 403(b) plans but applies separately to any governmental section 457(b) plan. Sec. 414(v).

<sup>69</sup> Sec. 414(v).

The section 457(b) plan limits apply separately from the combined limit applicable to section 401(k) and section 403(b) plan contributions, so that an employee covered by a governmental section 457(b) plan and a section 401(k) or section 403(b) plan can contribute the full amount to each plan. In addition, under a special catch-up rule, for one or more of the participant's last three years before normal retirement age, the otherwise applicable limit is increased to the lesser of (1) two times the normal annual limit (\$39,000 for 2021) or (2) the sum of the otherwise applicable limit for the year plus the amount by which the limit applicable in preceding years of participation exceeded the deferrals for that year.

Catch-up contributions are not subject to any other contribution limits and are not taken into account in applying other contribution limits. In addition, such contributions are not subject to applicable nondiscrimination rules. However, a plan fails to meet the applicable nondiscrimination requirements under section 401(a)(4) with respect to benefits, rights, and features unless the plan allows all eligible individuals participating in the plan to make the same election with respect to catch-up contributions. For purposes of this rule, all plans of related employers are treated as a single plan. In addition, the special nondiscrimination rule for mergers and acquisitions applies for this purpose.<sup>70</sup>

An employer is permitted to make matching contributions with respect to catch-up contributions. Any such matching contributions are subject to the normally applicable rules.

#### REASONS FOR CHANGE

Under present law, the Code permits catch-up contributions at a time when individuals are typically more advanced in their careers and in a better financial position to contribute additional funds to their retirement plans. In order to increase such individuals' ability to grow their retirement savings, the Committee believes it is appropriate to increase the limit on catch-up contributions in the three years before the individual attains age 65 (a typical normal retirement age under a plan).

#### EXPLANATION OF PROVISION

Under the provision, the limit on catch-up contributions is increased for individuals who have attained age 62, 63, or 64 (but who are not older than 64) by the end of the taxable year. A section 401(k) plan (other than a SIMPLE section 401(k) plan), section 403(b) plan, or governmental section 457(b) plan may increase the limit on catch-up contributions for such individuals to the lesser of (1) \$10,000 or (2) the participant's compensation for the year reduced by any other elective deferrals of the participant for the year.<sup>71</sup> A SIMPLE section 401(k) plan or a SIMPLE IRA may increase the limit on catch-up contributions for such individuals to the lesser of (1) \$5,000 or (2) the participant's compensation for the year reduced by any other elective deferrals of the participant for the year. Both the \$10,000 amount and the \$5,000 amount are indexed for inflation beginning in 2023.

<sup>70</sup> Secs. 410(b)(6)(C); 414(v)(4)(B).

<sup>71</sup> This increase also applies to catch-up contributions under a simplified employee pension under section 408(k) that includes a salary reduction arrangement.

## EFFECTIVE DATE

The provision applies to taxable years beginning after December 31, 2022.

8. MULTIPLE EMPLOYER 403(b) PLANS (SEC. 108 OF THE BILL AND SECS. 403(b), 6057, 6058 OF THE CODE AND SECS. 3(43) AND 3(44) OF ERISA)

## PRESENT LAW

*Retirement savings under the Code and ERISA*

The Code provides tax-favored treatment for various types of retirement plans, including employer-sponsored plans and IRAs. Code provisions are generally within the jurisdiction of the Secretary of the Treasury (the “Secretary”), through his or her delegate, the IRS.

The most common type of tax-favored employer-sponsored retirement plan is a qualified retirement plan,<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> Besides qualified retirement plans, certain tax-exempt employers and public schools may maintain tax-deferred annuity plans.<sup>75</sup>

An IRA is generally established by the individual for whom the IRA is maintained.<sup>76</sup> However, in some cases, an employer may establish IRAs on behalf of employees and provide retirement contributions to the IRAs.<sup>77</sup> 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”).<sup>78</sup> In that case, the assets of the trust

<sup>72</sup>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.

<sup>73</sup>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.

<sup>74</sup>Sec. 414(j).

<sup>75</sup>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 (discussed further below). State and local governmental employers may maintain another type of tax-favored retirement plan, an eligible deferred compensation plan under section 457(b).

<sup>76</sup>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.

<sup>77</sup>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.

<sup>78</sup>Sec. 408(c).

may be held in a common fund for the account of all individuals who have an interest in the trust.

*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. Section 403(b) plans are generally subject to the minimum coverage and nondiscrimination rules that apply to qualified defined contribution plans. However, as in the case of a qualified retirement plan, a governmental section 403(b) plan is not subject to the nondiscrimination rules.

*Contributions to section 403(b) 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)<sup>79</sup> or other after-tax contributions.

*Annuity contracts*

Generally, section 403(b) plans provide for contributions toward the purchase of annuity contracts for providing retirement benefits for their employees. The employee’s rights under the annuity contract are nonforfeitable, except for a failure to pay future premiums.<sup>80</sup> Section 403(b) generally provides that amounts contributed by an employer for an annuity contract are excluded from the gross income of the employee for the taxable year if certain requirements are satisfied.

*403(b) Custodial accounts*

Alternatively, such contributions may be held in custodial accounts established for each employee if those accounts satisfy certain requirements.

Contributions to a section 403(b) plan that are held in a custodial account are treated as contributions to an annuity contract<sup>81</sup> if the assets (1) are held by a bank<sup>82</sup> or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which the assets will be held is consistent with the requirements

<sup>79</sup> Sec. 402A.

<sup>80</sup> Sec. 403(b)(1)(C).

<sup>81</sup> Sec. 403(b)(7).

<sup>82</sup> A “bank” is defined as any bank as defined in section 581, an insured credit union within the meaning of section 101, paragraph (6) or (7) of the Federal Credit Union Act, and a corporation which, under the laws of the State of its incorporation, is subject to supervision and examination by the Commissioner of Banking or other officer of such State in charge of the administration of the banking laws of such State. Sec. 408(n).

for a qualified retirement plan<sup>83</sup> and (2) are invested only in regulated investment company stock.<sup>84</sup>

#### *Retirement income accounts*

Assets of a section 403(b) plan generally must be invested in annuity contracts or mutual funds.<sup>85</sup> However, the restrictions on investments do not apply to a retirement income account, which is a type of section 403(b) plan that 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.<sup>86</sup>

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.<sup>87</sup> 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.”

#### *Church plans*

A church plan is a plan established and maintained for employees (or their beneficiaries) by the church or by a convention or association of churches that is exempt from tax.<sup>88</sup> Church plans include plans maintained by an organization, whether a corporation or otherwise, that has as its principal purpose or function the administration or funding of a plan or program for providing retirement or

<sup>83</sup> Sec. 401(f)(2) and Treas. Reg. sec. 1.401(f)-1. A custodial account that satisfies the requirements of section 401(f)(2) is treated as an organization described in section 401(a) solely for purposes of subchapter F of chapter 1 of Subtitle A (secs. 501-530) and subtitle F (pertaining to procedure and administration) with respect to amounts received by the account and with respect to any income from the investment of those amounts.

<sup>84</sup> Sec. 403(b)(7) and Treas. Reg. sec. 1.403(b)-8(d)(2)(i).

<sup>85</sup> Sec. 403(b)(1)(A) and (7).

<sup>86</sup> 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.

<sup>87</sup> Sec. 403(b)(1)(D) and (12).

<sup>88</sup> Sec. 414(e). The plan is exempt from tax under section 501.

welfare benefits for the employees of the church or convention or association of churches.<sup>89</sup>

### *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”).<sup>90</sup> A plan covering only business owners (or business owners and their spouses)—that is, it covers no other employees—is exempt from ERISA.<sup>91</sup> 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.<sup>92</sup> IRAs are generally exempt from ERISA.

The provisions of Title I of ERISA are under the jurisdiction of the Secretary of Labor.<sup>93</sup> 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 that, 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.<sup>94</sup> In addition, interpretive jurisdiction over parallel Code and ERISA provisions relating to retirement plans is divided between the two Secretaries by an Executive Order, referred to as the Reorganization Plan No. 4 of 1978.<sup>95</sup>

Certain church plans are exempt from the coverage, vesting, funding, and fiduciary requirements of ERISA (“non-electing” churches). Church plans may waive this exemption by election.<sup>96</sup> Electing plans become subject to all section 401(a) qualification requirements, Title I of ERISA, and the excise tax on prohibited transactions.<sup>97</sup> Such plans participate in the termination insurance program administered by the Pension Benefit Guaranty Corporation (“PBGC”).

### *Fiduciary and bonding requirements*

Among other requirements, ERISA requires a plan to be established and maintained pursuant to a written instrument (that is,

<sup>89</sup> Sec. 414(e)(3)(A). With respect to certain provisions (*e.g.*, the exemption for church plans from nondiscrimination rules applicable for tax-sheltered annuities), the more limited definition of church under the employment-tax rules applies (secs. 3121(w)(3)(A) and (B)).

<sup>90</sup> 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.

<sup>91</sup> 29 C.F.R. sec. 2510.3–3(b)–(c).

<sup>92</sup> 29 C.F.R. sec. 2510.3–2(f).

<sup>93</sup> The provisions of Title I of ERISA are codified at 29 U.S.C.1001–1191c. Under Title IV of ERISA, defined benefit plans of private employers are generally covered by the PBGC’s pension insurance program.

<sup>94</sup> ERISA sec. 3004.

<sup>95</sup> 43 Fed. Reg. 47713 (October 17, 1978).

<sup>96</sup> Section 4(b)(2) of ERISA excepts a church plan (as defined in section 3(3) of ERISA) with respect to which no election has been made under Code section 410(d) from the provisions of Title I of ERISA (including the fiduciary, participation and vesting, and funding rules).

<sup>97</sup> Sec. 4975.

a plan document) that contains certain terms.<sup>98</sup> 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.<sup>99</sup> 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, a special rule applies in the case of a defined contribution plan that permits participants to direct the investment of their individual accounts.<sup>100</sup> 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.<sup>101</sup> In some cases, the maximum bond amount is \$1 million, rather than \$500,000.

#### *Tax-sheltered annuity plans under ERISA*

ERISA generally applies to section 403(b) plans maintained by tax-exempt organizations.

However, there is an exception from ERISA for certain tax-sheltered annuity programs established by tax-exempt entities which consist of a program for the purchase of an annuity contract or the establishment of a custodial account pursuant to salary reduction agreements or agreements to forego an increase in salary where the tax-exempt entity has very limited involvement. Under the program: (1) participation is completely voluntary for employees, (2) all rights under the annuity contract or custodial account are enforceable solely by the employee, and (3) the employer's sole involvement in the program is limited to the following, for example: (a) permitting annuity contractors to publicize their products to employees, (b) requesting information concerning proposed funding, media, products, or annuity contracts, (c) summarizing or otherwise compiling information provided, (d) collecting annuity or custodial account contributions, or (e) holding in the employer's name, one or

<sup>98</sup> ERISA sec. 402.

<sup>99</sup> Fiduciary is defined in ERISA section 3(21), and named fiduciary is defined in ERISA section 402(a)(2).

<sup>100</sup> ERISA sec. 404(c). Under ERISA, a defined contribution plan is also referred to as an individual account plan.

<sup>101</sup> ERISA sec. 412.



more group annuity contracts covering the employees; and (4) for which the employer receives no direct or indirect consideration or compensation.<sup>102</sup>

Section 403(b) plans sponsored by governmental and public education employers are generally not subject to ERISA.

Similarly, non-electing church plans funded through section 403(b) annuities are generally not subject to ERISA.<sup>103</sup>

#### *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 (“MEPs”). 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”).<sup>104</sup>

A MEP 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).<sup>105</sup> MEPs 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.<sup>106</sup>

There is no specific provision in the Code that provides for section 403(b) plans maintained by more than one employer.<sup>107</sup>

##### *Application of Code requirements to MEPs*

Some requirements are applied to a MEP on a plan-wide basis.<sup>108</sup> 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.<sup>109</sup> Other requirements are applied separately, including the minimum coverage requirements, nondiscrimination requirements

<sup>102</sup> 29 C.F.R. sec. 2510.3–2(f).

<sup>103</sup> However, whether or not they are maintained by a church, plans that are funded through tax-deferred custodial accounts are subject to annual reporting requirements and to the duty to report distributions of \$600 or more. This is because such an account constitutes a “funded plan of deferred compensation described in part I of subchapter D of chapter 1.” Sec. 6058, 6041; Treas. Reg. sec. 301.6058–1(a)(2).

<sup>104</sup> Sec. 414(b), (c), (m) and (o).

<sup>105</sup> 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 MEPs. A multiemployer plan is defined under section 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.

<sup>106</sup> Rev. Proc. 2003–86, 2003–2 C.B. 1211, and Rev. Proc. 2002–21, 2002–1 C.B. 911, address the application of the MEP rules to qualified defined contribution plans maintained by PEOs.

<sup>107</sup> Section 413(c) provides rules governing MEPs subject to sections 401(a), 410(a) and 411, in other words tax-qualified retirement plans, but does not apply those rules to section 403(b) plans.

<sup>108</sup> Sec. 413(c).

<sup>109</sup> Treas. Reg. sec. 1.415(a)–1(e).

(both the general requirements and the special tests for section 401(k) plans), and the top-heavy rules.<sup>110</sup>

*“One bad apple” rule*

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).<sup>111</sup>

The SECURE Act provided relief from the “one bad apple” rule under the Code for certain MEPs.<sup>112</sup> MEPs that satisfy certain requirements (referred to herein as a “covered MEP”) may avoid the consequences of the “one bad apple rule.” A “covered MEP” is a multiple employer qualified defined contribution plan<sup>113</sup> or a plan that consists of IRAs (referred to herein as an “IRA plan”), including under an IRA trust,<sup>114</sup> 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”),<sup>115</sup> and which meets certain other requirements as described below.

Relief from the “one bad apple” rule 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,<sup>116</sup> 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

<sup>110</sup>Treas. Reg. secs. 1.413-2(a)(3)(ii)-(iii) and 1.416-1, G-2.

<sup>111</sup>Treas. Reg. sec. 1.413-2(a)(3)(iv).

<sup>112</sup>Sec. 101 of Div. O. of Pub. L. No. 116-94, the Further Consolidated Appropriations Act, 2020, December 20, 2019. With respect to plans described under 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 provision generally did not change present law and related guidance applicable to such MEPs under the Code or ERISA.

<sup>113</sup>To which section 413(c) applies.

<sup>114</sup>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.

<sup>115</sup>Sec. 413(e)(1).

<sup>116</sup>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).

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 provision.

#### *MEP status under ERISA*

Like the Code, ERISA contains rules for multiple employer retirement plans.<sup>117</sup> However, a different concept of MEP applies under ERISA.

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.<sup>118</sup> 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.<sup>119</sup>

Historically, these definitional provisions of ERISA have been interpreted as only permitting a MEP 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.<sup>120</sup> 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.<sup>121</sup> 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 MEP.

#### *DOL MEP regulations*

On July 31, 2019, the DOL issued final regulations<sup>122</sup> pursuant to Executive Order 13847<sup>123</sup> which had directed the DOL to consider within 180 days whether to issue a notice of proposed rule-making, other guidance, or both, that would clarify when a group or association of employers or other appropriate business or organi-

<sup>117</sup> ERISA sec. 210(a).

<sup>118</sup> ERISA secs. 3(1) and (2).

<sup>119</sup> ERISA sec. 3(5).

<sup>120</sup> See, e.g., Department of Labor Advisory Opinions 2012–04A, 2003–17A, 2001–04A, and 1994–07A, and other authorities cited therein.

<sup>121</sup> See, e.g., Department of Labor Advisory Opinion 2017–02AC.

<sup>122</sup> 84 Fed. Reg. 37508, July 31, 2019. DOL noted in the preamble to the final regulations that these final regulations differ significantly from the legislative proposals introduced in Congress, including the SECURE Act which “makes comprehensive changes to ERISA and the Code to facilitate open MEPs.” DOL indicates that the final rule is significantly more limited in scope because it relies solely on the Department’s authority to promulgate regulations administering title I of ERISA and unlike Congress, DOL does not have the authority to make statutory changes to ERISA and other areas of law that govern retirement savings such as the Code.

<sup>123</sup> 83 Fed. Reg. 45321, September 6, 2018. The Executive Order was issued on August 31, 2018.

zation could be an “employer” under ERISA.<sup>124</sup> The final regulation focuses its scope on MEPs sponsored by either a group or association of employers or by a PEO and is limited to defined contribution plans.<sup>125</sup> The final regulation does not deal with pooled employer plans.

The final regulation recognizes that a bona fide group or association of employers may establish a MEP if such group or association meets the following requirements: (1) the primary purpose of the group or association may be to provide MEP coverage to its employer members and their employees, but there must also be at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits to the employer members and their employees; (2) each employer member of the group or association is a person acting directly as an employer of at least one employee who is a participant covered under the plan; (3) the group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality; (4) the functions and activities of the group or association are controlled by its employer members, and the group’s or association’s employer members that participate in the plan control (in form and in substance) the plan; (5) the employer members have a commonality of interest; (6) plan participation is only permitted to employees and former employees of employer members, and their beneficiaries; and (7) the group or association is not a bank or trust company, insurance issuer, broker-dealer or other similar financial services firm. Under the final regulation, a bona fide PEO may establish a MEP. Certain “working owners” may also establish a MEP.

#### *Section 403(b) Plans under ERISA*

There is no specific provision in ERISA that provides for section 403(b) plans maintained by more than one employer.<sup>126</sup>

#### *“Pooled” MEPs under the Code and ERISA*

As described above, the SECURE Act provided relief from the “one bad apple” rule under the Code for certain MEPs. The SECURE Act also introduced the concept of a “pooled” MEP for purposes of the Code and ERISA. Various requirements apply to a “pooled provider plan” under the Code, with similar, but not identical, requirements applying under ERISA.

#### *Pooled provider plan*

A “pooled provider plan” is a qualified defined contribution plan that is established or maintained for the purpose of providing benefits to the employees of a MEP administered by a “pooled plan provider.” A pooled provider plan does not include a plan maintained by employers that have a common interest other than having adopted the plan.

In the case of a pooled provider plan, if the pooled plan provider does not perform substantially all the administrative duties re-

<sup>124</sup> Within the meaning of ERISA sec. 3(5).

<sup>125</sup> As defined in section 3(34) of ERISA.

<sup>126</sup> ERISA section 210 provides rules related to MEPs. Section 29 C.F.R. sec. 2530.210(c) defines the term “multiple employer plan” to mean a MEP within the meaning of sections 413(b) and (c) of the Code and the regulations thereafter, and as previously noted, those rules are applicable to plans subject to sections 401(a), 410(a) and 411.

quired 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 provision.

*Pooled plan provider*

A “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,<sup>127</sup> 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 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 Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of the statute.

In addition, 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<sup>128</sup> are treated as one person.

*Plan sponsor*

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 is 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 Secretary is directed to issue guidance (that the Secretary determines appropriate) (1) to identify the administrative duties

<sup>127</sup> Within the meaning of ERISA section 402(a)(2).

<sup>128</sup> Under subsection (b), (c), (m), or (o) of section 414.

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 MEP, 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 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. An employer or pooled plan provider is not treated as failing to meet a requirement of guidance issued by the Secretary if, before the issuance of such guidance, the employer or pooled plan provider complies in good faith with a reasonable interpretation of the provisions to which the guidance relates.

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

The Secretary (or the Secretary's delegate) has the authority to provide for the proper treatment of a failure to meet any Code requirement with respect to any employer (and its employees) in a MEP.

#### *Pooled employer plans under ERISA*

##### *In general*

A pooled employer plan is treated for purposes of ERISA as a single plan that is a MEP. A "pooled employer plan" is a qualified defined contribution plan that is established or maintained for the purpose of providing benefits to the employees of two or more employers, that meets certain requirements in order to be treated for purposes of ERISA as a single plan. A pooled employer plan does not include a plan maintained by employers that 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)<sup>129</sup> 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

<sup>129</sup> Any trustee must meet the requirements under the Code to be an IRA trustee.

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 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 SECURE Act 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, described above.<sup>130</sup> 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 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 statute.

#### *Plan sponsor*

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

<sup>130</sup> 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.

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).

### *Guidance*

The Secretary of Labor is to issue guidance that he or she determines appropriate (1) to identify the administrative duties and other actions required to be performed by a pooled plan provider,<sup>131</sup> 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,<sup>132</sup> 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. An employer or pooled plan provider is not treated as failing to meet a requirement of guidance issued by the Secretary if, before the issuance of such guidance, the employer or pooled plan provider complies in good faith with a reasonable interpretation of the provisions to which the guidance relates.

### *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.<sup>133</sup> ERISA requires the plan administrator of certain pension and welfare benefit plans to file annual reports disclosing certain

<sup>131</sup>The DOL has issued guidance on registering as a pooled plan provider. See 85 Fed. Reg. 72934, November 16, 2020. (29 C.F.R. sec. 2510.3–44).

<sup>132</sup>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.

<sup>133</sup>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 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 DOL.<sup>134</sup> 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.<sup>135</sup>

In the case of a MEP (including a pooled employer plan), the Form 5500 filing must include a list of participating employers in the plan; a good faith estimate of the percentage of total contributions made by the participating 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. The Secretary of Labor may prescribe simplified reporting for a MEP 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.

#### REASONS FOR CHANGE

Under present law, employers eligible to sponsor section 401(a) tax-qualified defined contribution retirement plans may maintain a multiple employer plan if the employers either (1) have a common interest (other than having adopted the plan) or (2) have a pooled plan provider. Multiple employer plans afford an opportunity to small employers to band together to obtain more favorable retirement plan investment results and more efficient and less expensive management services. However, the ability of employers eligible to sponsor section 403(b) arrangements to sponsor and maintain multiple employer plans is uncertain under the Code and ERISA.

The Committee believes that employers eligible to maintain section 403(b) tax sheltered annuity arrangements should have the same access to multiple employer plans as is provided to sponsors of section 401(a) tax-qualified retirement plans.

#### EXPLANATION OF PROVISION

##### *Section 403(b) MEPs under the Code*

###### *In general*

The provision clarifies that a section 403(b) plan may be established and maintained as a MEP. Specifically, it provides that, except in the case of a church plan, section 403(b) annuity contracts and 403(b) custodial accounts<sup>136</sup> do not fail to qualify as section 403(b) plans solely by reason of such contracts being purchased or accounts being established under a plan maintained by more than one employer.

For purposes of this provision, a section 403(b) plan includes such a plan sponsored by (1) tax-exempt entities (described in sec-

<sup>134</sup> ERISA secs. 103 and 104. Under ERISA section 4065, the plan administrator of certain defined benefit plans must provide information to the PBGC.

<sup>135</sup> 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 sections 104(a)(1) and 106(a).

<sup>136</sup> Sec. 403(b)(7) provides that amounts paid by a tax-exempt employer to a custodial account which satisfies the requirements of section 401(f)(2) are treated as amounts contributed by him for an annuity contract for his employee if the amounts are to be invested in regulated investment company stock to be held in that custodial account.

tion 501(c)(3) which is exempt from tax under section 501(a)) and (2) public schools (including state colleges and universities).

*Relief from “one bad apple” rule*

Under the provision, as long as such a section 403(b) plan maintained by more than one employer satisfies rules similar to certain rules that apply to qualified retirement MEPs,<sup>137</sup> the section 403(b) plan will not fail to be treated as such merely because one or more employers of employees covered by the plan fail to meet the requirements of section 403(b). The rules applicable to qualified retirement MEPs require that where one or more employers of employees covered by the MEP fails to meet the applicable qualification requirements:

- the assets of the plan attributable to employees of such employer (or beneficiaries of such employees) will be transferred to a plan maintained only by such employer (or its successor), to an eligible retirement plan<sup>138</sup> for each individual whose account is transferred, 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 such employer (and the beneficiaries of such employees) to retain the assets in the plan, and
- such employer (and not the plan with respect to which the failure occurred or any other employer in such plan) will, except to the extent provided by the Secretary, be liable for any liabilities with respect to such plan attributable to employees of such employer (or beneficiaries of such employees).

In addition, in the case of a section 403(b) plan maintained by tax-exempt entities, such plans must also meet either the commonality rule<sup>139</sup> or have a pooled plan provider. This requirement does not apply to plans maintained by governmental employers.

*Section 403(b) MEPs under ERISA*

The provision:

- Amends the definition of pooled employer plan under ERISA<sup>140</sup> to include a section 403(b) MEP that meets the applicable requirements under the Code (as added by this provision).<sup>141</sup>
- It also amends the requirements relating to plan terms for pooled employer plans to permit, in the case of section 403(b) plans, fiduciaries other than trustees to hold certain responsibilities relating to plan assets.<sup>142</sup>

*Disclosure Rules*

*Special disclosure rules for tax-exempt employers joining a section 403(b) MEP*

As noted above, there is an exception from ERISA for certain tax-sheltered annuity programs established by tax-exempt entities which consist of a program for the purchase of annuity contracts

<sup>137</sup> Under section 413(e)(2).

<sup>138</sup> As defined in section 402(c)(8)(B).

<sup>139</sup> Sec. 413(e)(1)(A).

<sup>140</sup> ERISA sec. 3(43)(A).

<sup>141</sup> Under section 403(b)(15), as added by this provision.

<sup>142</sup> ERISA sec. 3(43)(B)(ii).

or the establishment of custodial accounts pursuant to salary reduction agreements or agreements to forego an increase in salary where the tax-exempt entity has very limited involvement in the program. However, if a tax-exempt employer who had participated in such a non-ERISA program decides to become a participating employer in a section 403(b) MEP, that employer will become subject to ERISA because of the fiduciary responsibilities imposed on each employer in a section 403(b) MEP.

To ensure that such tax-exempt employers are aware of their ERISA fiduciary duties, the provision imposes additional disclosure to such employers. First, the provision directs the Secretary (or the Secretary's delegate) to modify the model plan language applicable to qualified retirement MEPs<sup>143</sup> to include language which notifies participating tax-exempt employers that the plan is subject to ERISA and that each such employer is a plan sponsor with respect to its employees participating in the MEP, and, as such, has certain fiduciary duties with respect to the plan and the employees. Second, Treasury must undertake necessary education and outreach efforts to increase awareness to tax-exempt employers that MEPs are subject to ERISA, that such employers are plan sponsors with respect to their employees participating in the MEP and, as such, have certain fiduciary duties with respect to the plan and to its employees.

#### *Other disclosures*

The provision also provides that the Secretary also publish model plan language similar to the model plan language published for qualified plan MEPs<sup>144</sup> for section 403(b) MEPs sponsored by non-governmental employers.

#### *Reporting requirements for section 403(b) MEPs*

In the case of any annuity contract described in section 403(b) that is a MEP, such plan is treated as a single plan for purposes of the reporting requirements under the Code relating to the annual registration statement and the annual return for certain plans<sup>145</sup>. As a result, the plan can file a single Form 8955-SSA, Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits, and a single Form 5500, Annual Return/Report of Employee Benefit Plan, rather than having each participating employer in the section 403(b) MEP file their own form. These filing requirements only apply to tax-exempt employers because governmental employers are not subject to ERISA.

#### *Regulations*

The Secretary (or the Secretary's designee) must prescribe such regulations as may be necessary to clarify the treatment of a plan termination by an employer in the case of section 403(b) MEPs.<sup>146</sup>

<sup>143</sup> Sec. 413(e)(5).

<sup>144</sup> Under section 413(e)(5).

<sup>145</sup> The reporting requirement relating to the annual registration statement is under section 6057, and the requirement relating to the annual return is under 6058. These requirements only apply in the case of a section 403(b) plan that is otherwise subject to such requirements.

<sup>146</sup> As described in section 403(b)(15).

*No inference with respect to church plans*

The provision provides that regarding any application of section 403(b) to an annuity contract purchased under a church plan,<sup>147</sup> maintained by more than one employer, or to any application of rules similar to the rules that apply to qualified retirement MEPs<sup>148</sup> to such a plan, no inference is to be made from the rules applicable to section 403(b) MEPs not applying to such plans.

## EFFECTIVE DATE

The provision is generally effective for plan years beginning after December 31, 2021.

Nothing in the amendments made by the general rule is to be construed as limiting the authority of the Secretary or the Secretary's delegate (determined without regard to such amendment) to provide for the proper treatment of a failure to meet any requirement applicable under such Code with respect to one employer (and its employees) in the case of a section 403(b) MEP.<sup>149</sup>

9. TREATMENT OF STUDENT LOAN PAYMENTS AS ELECTIVE DEFERRALS FOR PURPOSES OF MATCHING CONTRIBUTIONS (SEC. 109 OF THE BILL AND SECS. 401(m), 403(b), 408(p), AND 457(b) OF THE CODE)

## PRESENT LAW

*Section 401(k) plans*

A section 401(k) plan is a type of profit-sharing or stock bonus plan that contains a qualified cash or deferred arrangement. Such arrangements are subject to the rules generally applicable to qualified defined contribution plans. In addition, special rules apply to such arrangements. Employees who participate in a section 401(k) plan may elect to have contributions made to the plan (referred to as "elective deferrals") rather than receive the same amount as current compensation.<sup>150</sup> The maximum annual amount of elective deferrals that can be made by an employee for a year is \$19,500 (for 2021) or, if less, the employee's compensation.<sup>151</sup> For an employee who attains age 50 by the end of the year, the dollar limit on elective deferrals is increased by \$6,500 (for 2021) (called "catch-up contributions").<sup>152</sup> An employee's elective deferrals must be fully vested. A section 401(k) plan may also provide for employer matching and nonelective contributions.

In order to constitute a qualified cash or deferred arrangement, no benefit under the arrangement may be conditioned, directly or indirectly, on the employee electing to have the employer make or not make contributions under the arrangement in lieu of receiving

<sup>147</sup> As defined in section 414(e).

<sup>148</sup> Sec. 413(e).

<sup>149</sup> As described in section 403(b)(15).

<sup>150</sup> Elective deferrals generally are made on a pre-tax 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.

<sup>151</sup> Sec. 402(g).

<sup>152</sup> Sec. 414(v).

cash.<sup>153</sup> However, matching contributions are exempt from this rule.

*Nondiscrimination test*

*Actual deferral percentage test*

An annual nondiscrimination test, called the actual deferral percentage test (the “ADP” test) applies to elective deferrals under a section 401(k) plan.<sup>154</sup> The ADP test generally compares the average rate of deferral for highly compensated employees to the average rate of deferral for non-highly compensated employees and requires that the average deferral rate for highly compensated employees not exceed the average rate for non-highly 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.<sup>155</sup>

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 the plan satisfies a notice requirement.<sup>156</sup>

*Section 401(k) safe harbor contributions*

Under one type of section 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 the employer to make a nonelective contribution to a defined contribution plan of at least three percent of an employee’s compensation on behalf of each non-highly 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 non-forfeitable (that is, 100 percent vested) when made.

Another safe harbor applies for a section 401(k) plan that includes 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

<sup>153</sup> Sec. 401(k)(4)(A).

<sup>154</sup> Sec. 401(k)(3). Long-term part-time workers may be excluded from this and other nondiscrimination tests. Sec. 401(k)(2)(D).

<sup>155</sup> Sec. 401(k)(8).

<sup>156</sup> Sec. 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).

to make elective deferrals equal to a percentage of compensation as stated in the plan, not in excess of 15 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.<sup>157</sup> The matching contribution requirement under this safe harbor 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”). Alternatively, the plan can provide that the employer will make a nonelective contribution of 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 allowed to become 100 percent vested after two years of service (rather than being required to be immediately vested when made).

#### *Matching contribution nondiscrimination test*

Employer matching contributions are also subject to a special nondiscrimination test, the “ACP test,” which compares the average actual contribution percentages (“ACPs”) of matching contributions for the highly compensated employee group and the non-highly compensated employee group. The plan generally satisfies the ACP test if the ACP of the highly compensated employee group for the current plan year is either (1) not more than 125 percent of the ACP of the non-highly compensated employee group for the prior plan year, or (2) not more than 200 percent of the ACP of the non-highly compensated employee group for the prior plan year and not more than two percentage points greater than the ACP of the non-highly compensated employee group for the prior plan year.

A safe harbor section 401(k) plan that provides for matching contributions is deemed to satisfy the ACP test (“401(m) safe harbor”) if, in addition to meeting the safe harbor contribution and notice requirements under section 401(k), (1) matching contributions are not provided with respect to elective deferrals in excess of six percent of compensation, (2) the rate of matching contribution does not increase as the rate of an employee’s elective deferrals increases, and (3) the rate of matching contribution with respect to any rate of elective deferral of a highly compensated employee is no greater than the rate of matching contribution with respect to the same rate of deferral of a non-highly compensated employee.<sup>158</sup>

#### *SIMPLE IRA plan*

A small employer that employs no more than 100 employees who earned \$5,000 or more during the prior calendar year can establish a simplified tax-favored retirement plan, which is called the SIM-

<sup>157</sup> 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.

<sup>158</sup> Sec. 401(m)(11); 401(m)(12).

PLE IRA plan. A SIMPLE IRA plan is generally a plan under which contributions are made to an IRA for each employee (a “SIMPLE IRA”).<sup>159</sup> A SIMPLE IRA plan allows employees to make elective deferrals to a SIMPLE IRA, subject to a limit of \$13,500 (for 2021). An individual who has attained age 50 before the end of the taxable year may also make catch-up contributions under a SIMPLE IRA plan up to a limit of \$3,000 (for 2021).

In the case of a SIMPLE IRA plan, the group of eligible employees generally must include any employee who has received at least \$5,000 in compensation from the employer in any two preceding years and is reasonably expected to receive \$5,000 in the current year. A SIMPLE IRA plan is not subject to the nondiscrimination rules generally applicable to qualified retirement plans.

Employer contributions to a SIMPLE IRA must satisfy one of two contribution formulas. Under the matching contribution formula, the employer generally is required to match employee elective contributions on a dollar-for-dollar basis up to three percent of the employee’s compensation. The employer can elect a lower percentage matching contribution for all employees (but not less than one percent of each employee’s compensation); however, a lower percentage cannot be elected for more than two years out of any five-year period. Alternatively, for any year, an employer is permitted to elect, in lieu of making matching contributions, to make a nonelective contribution of two percent of compensation on behalf of each eligible employee with at least \$5,000 in compensation for such year, whether or not the employee makes an elective contribution.

The employer must provide each employee eligible to make elective deferrals under a SIMPLE IRA plan a 60-day election period before the beginning of the calendar year and a notice at the beginning of the 60-day period explaining the employee’s choices under the plan.<sup>160</sup>

No contributions other than employee elective contributions, required employer matching contributions, or employer nonelective contributions can be made to a SIMPLE IRA plan, and the employer may not maintain any other qualified retirement plan.

#### *Section 403(b) and governmental 457(b) plans*

Tax-deferred annuity plans (referred to as section 403(b) plans) are generally similar to qualified defined contribution plans, but may be maintained only by (1) tax-exempt charitable organizations,<sup>161</sup> and (2) educational institutions of State or local governments (that is, public schools, including colleges and universities).<sup>162</sup> Section 403(b) plans may provide for employees to make elective deferrals (in pre-tax or designated Roth form), including catch-up contributions, or other after-tax employee contributions, and employers may make nonelective or matching contributions on behalf of employees. Contributions to a section 403(b) plan are generally subject to the same contribution limits applicable to qualified

<sup>159</sup> Sec. 408(p). Employer may also establish SIMPLE section 401(k) plans. Sec. 401(k)(11).

<sup>160</sup> Notice 98-4, 1998-1 C.B. 269.

<sup>161</sup> These are organizations exempt from tax under section 501(c)(3). Section 403(b) plans of private, tax-exempt employers may be subject to ERISA as well as the requirements of section 403(b).

<sup>162</sup> Sec. 403(b).

defined contribution plans, including the limits on elective deferrals.

Contributions to a section 403(b) plan must be fully vested. The minimum coverage and general nondiscrimination requirements applicable to a qualified retirement plan generally apply to a section 403(b) plan and to employer matching and nonelective contributions and after-tax employee contributions to the plan.<sup>163</sup> If a section 403(b) plan provides for elective deferrals, the plan is subject to a “universal availability” requirement under which all employees must be given the opportunity to make deferrals of more than \$200.<sup>164</sup> In applying this requirement, nonresident aliens, students, and employees who normally work less than 20 hours per week may be excluded.<sup>165</sup>

An eligible deferred compensation plan of a governmental employer (referred to as a governmental section 457(b) plan) is generally similar to a qualified cash or deferred arrangement under a section 401(k) plan in that it consists of elective deferrals, that is, contributions (in pre-tax or designated Roth form) made at the election of an employee, including catch-up contributions. Deferrals under a governmental section 457(b) plan are generally subject to the same limits as elective deferrals under a section 401(k) plan or a section 403(b) plan.

#### REASONS FOR CHANGE

The Committee wishes to assist employees who may not be able to save for retirement because they are overwhelmed with student debt, and thus are missing out on available matching contributions under retirement plans. Thus, this provision allows a plan to provide such employees with matching contributions based on student loan repayments.

#### EXPLANATION OF PROVISION

The provision modifies the definition of matching contribution<sup>166</sup> for purposes of defined contribution plans, including section 401(k) plans, to include employer contributions made to the plan on behalf of an employee on account of a qualified student loan payment. For this purpose, a qualified student loan payment is a payment made by an employee in repayment of a qualified education loan<sup>167</sup> and incurred by the employee to pay qualified higher education expenses, but only to the extent such payments in the aggregate for the year do not exceed the amount of elective deferrals that the employee would be permitted to contribute under the Code<sup>168</sup> (re-

<sup>163</sup> These requirements do not apply to a governmental section 403(b) plan or a section 403(b) plan maintained by a church or a qualified church-controlled organization as defined in section 3121(w).

<sup>164</sup> Sec. 403(b)(12)(A)(ii).

<sup>165</sup> For this purpose, nonresident alien has the meaning in section 410(b)(3)(C), and student has the meaning in section 3121(b)(10). The universal availability requirement does not apply to a section 403(b) plan maintained by a church or a qualified church-controlled organization.

<sup>166</sup> Under section 401(m)(4)(A)(iii), as added by this provision.

<sup>167</sup> As defined in section 221(d)(1), a qualified education loan is generally any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses (1) which are incurred on behalf of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred; (2) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred; and (3) which are attributable to education furnished during a period during which the recipient was an eligible student.

<sup>168</sup> The limitation applicable under section 402(g) for the year (\$19,500 for 2021), or, if less, the employee's compensation as defined in section 415(c)(3) for the year.



duced by elective deferrals made by the employee for the year). Qualified higher education expenses are defined as the cost of attendance at an eligible educational institution.<sup>169</sup> In addition, in order for the student loan payment to qualify, the employee must certify to the employer making the matching contribution that the loan payment has been made. The employer is permitted to rely on this certification.

In order for an employer contribution made on account of a qualified student loan payment to be treated as a matching contribution under the provision, the plan must satisfy certain requirements. The plan must provide matching contributions on account of elective deferrals at the same rate as contributions on account of qualified student loan payments. The plan must provide matching contributions on account of qualified student loan payments only on behalf of employees otherwise eligible to receive matching contributions on account of elective deferrals (and, similarly, must provide matching contributions on account of elective deferrals only on behalf of employees eligible to receive matching contributions on account of qualified student loan payments). The plan must also provide that matching contributions on account of qualified student loan payments vest in the same manner as matching contributions on account of elective deferrals.

Under the provision, for purposes of certain nondiscrimination rules and minimum coverage requirements,<sup>170</sup> matching contributions on account of qualified student loan payments do not fail to be treated as available to an employee solely because such employee does not have debt incurred under a qualified education loan. In addition, the provision provides that a qualified student loan payment is generally not treated as a plan contribution. However, a plan may treat a qualified student loan payment as an elective deferral or an elective contribution (as applicable) for purposes of the matching contribution requirement under a basic safe harbor 401(k) plan or an automatic enrollment safe harbor 401(k) plan, as well as for purposes of the section 401(m) safe harbors.<sup>171</sup> A plan is also permitted to apply the ADP test separately to employees who receive matching contributions on account of qualified student loan payments.

The provision also contains similar rules allowing matching contributions to be made on account of qualified student loan payments in the case of SIMPLE IRAs, section 403(b) plans, and section 457(b) plans. In the case of SIMPLE IRAs, the provision provides that a SIMPLE IRA does not fail to meet the matching contribution requirement applicable to such arrangements solely because the arrangement treats qualified student loan payments as elective employer contributions to the extent such payments do not exceed the amount of elective employer contributions the employee

<sup>169</sup> “Cost of attendance” for this purpose is defined in section 472 of the Higher Education Act of 1965, as in effect on the day before the enactment of the Taxpayer Relief Act of 1997. “Eligible educational institution” is defined in section 221(d)(2) of the Code.

<sup>170</sup> This rule applies for purposes of section 401(a)(4), section 410(b), and the rule under the provision that all employees eligible to receive matching contributions on account of elective deferrals be eligible to receive matching contributions on account of qualified student loan payments.

<sup>171</sup> This rule applies for purposes of sections 401(k)(12)(B) and (13)(B), and sections 401(m)(11)(B) and (12). It also applies to SIMPLE section 401(k) plans under section 401(11)(B)(i)(II).

is permitted to contribute under the Code<sup>172</sup> (reduced by elective employer contributions contributed by the employee for the year). As under a section 401(k) plan, in order for the student loan payment to qualify, the employee must certify to the employer making the matching contribution that the loan payment has been made. In addition, matching contributions on account of qualified student loan payments must be provided only on behalf of employees otherwise eligible to make elective employer contributions, and all employees otherwise eligible to participate in the arrangement must be eligible to receive matching contributions on account of qualified student loan payments.

In the case of a section 403(b) plan, under the provision, the fact that the employer offers matching contributions on account of qualified student loan payments<sup>173</sup> is not taken into account in determining whether the plan satisfies the universal availability requirement.<sup>174</sup> Similarly, in the case of a governmental 457(b) plan, the provision provides that a plan is not treated as failing to meet the requirements applicable to such plans<sup>175</sup> solely because the plan, or another qualified plan<sup>176</sup> or section 403(b) plan maintained by the employer provides for matching contributions on account of qualified student loan payments.<sup>177</sup>

The provision directs the Secretary to prescribe regulations for purposes of implementing the provision, including regulations:

- Permitting a plan to make matching contributions for qualified student loan payments<sup>178</sup> at a different frequency than matching contributions are otherwise made under the plan, provided that the frequency is not less than annually;
- Permitting employers to establish reasonable procedures to claim matching contributions for such qualified student loan payments under the plan, including an annual deadline (not earlier than three months after the close of each plan year) by which a claim must be made; and
- Promulgating model amendments which plans may adopt to implement matching contributions on qualified student loan payments.<sup>179</sup>

#### EFFECTIVE DATE

The provision is effective for contributions made for plan years beginning after December 31, 2021.

#### 10. APPLICATION OF CREDIT FOR SMALL EMPLOYER PENSION PLAN START-UP COSTS TO EMPLOYERS WHICH JOIN AN EXISTING PLAN (SEC. 110 OF THE BILL AND SEC. 45E OF THE CODE)

##### PRESENT LAW

Present law provides a nonrefundable income tax credit equal to 50 percent of the qualified start-up costs paid or incurred during

<sup>172</sup> The limitation applicable under section 408(p)(2)(E) for the year, including permitted catch-up contributions under section 414(v), or, if less, the employee's compensation as defined in section 415(c)(3) for the year.

<sup>173</sup> As described in section 401(m)(13), as added by this provision.

<sup>174</sup> Sec. 403(b)(12)(A)(ii).

<sup>175</sup> Under section 457(b).

<sup>176</sup> Under section 401(a).

<sup>177</sup> As described in section 401(m)(13), as added by this provision.

<sup>178</sup> As defined in sections 401(m)(4)(D) and 408(p)(2)(F), as added by this provision.

<sup>179</sup> For purposes of sections 401(m), 408(p), 403(b), and 457(b).

the taxable year by an eligible employer<sup>180</sup> that adopts a new eligible employer plan<sup>181</sup>, provided that the plan covers at least one non-highly compensated employee.<sup>182</sup> Qualified start-up costs are expenses connected with the establishment or administration of the plan and retirement-related education of employees with respect to the plan. The amount of the credit for any taxable year is limited to the greater of (1) \$500 or (2) the lesser of (a) \$250 multiplied by the number of non-highly compensated employees of the eligible employer who are eligible to participate in the plan or (b) \$5,000. The credit applies for up to three consecutive taxable years beginning with the taxable year the plan is first effective, or, at the election of the employer, with the year preceding the first plan year.

An eligible employer is an employer that, for the preceding year, had no more than 100 employees, each with compensation of \$5,000 or more.<sup>183</sup> In addition, the employer must not have had a qualified employer plan covering substantially the same employees as the new plan with respect to which contributions were made or benefits were accrued during the three years preceding the first year for which the credit would apply. Members of controlled groups and affiliated service groups are treated as a single employer for purposes of these requirements.<sup>184</sup> All eligible employer plans of an employer are treated as a single plan.

No deduction is allowed for the portion of qualified start-up costs paid or incurred for the taxable year equal to the amount of the credit.

#### REASONS FOR CHANGE

The credit for small employer pension plan start-up costs serves to encourage small employers to provide retirement benefits to their employees. The Committee believes the modifications to this credit will clarify the application of the credit to certain small employers who join an existing plan.

#### EXPLANATION OF PROVISION

The provision clarifies that the first credit year is the taxable year which includes the date that the eligible employer plan to which such costs relate becomes effective with respect to the eligible employer.

#### EFFECTIVE DATE

The provision applies to eligible employer plans which become effective with respect to the eligible employer after the date of enactment.

<sup>180</sup> An eligible employer has the meaning given such term by section 408(p)(2)(C)(i).

<sup>181</sup> An eligible employer plan means a qualified employer plan within the meaning of section 4972(d) and includes a section 401(a) qualified retirement plan, a section 403 annuity, any simplified employee pension ("SEP") within the meaning of section 408(k), and any simple retirement account ("SIMPLE") within the meaning of section 408(p). An eligible employer plan does not include a plan maintained by a tax-exempt employer or a governmental plan, as defined in section 414(d).

<sup>182</sup> A non-highly compensated employee is an employee who is not a highly compensated employee as defined under section 414(q).

<sup>183</sup> As defined in section 408(p)(2)(C).

<sup>184</sup> Sec. 52(a) or (b) and 414(m) or (o).

11. MILITARY SPOUSE RETIREMENT PLAN ELIGIBILITY CREDIT FOR SMALL EMPLOYERS (SEC. 111 OF THE BILL AND NEW SEC. 45U OF THE CODE)

PRESENT LAW

Currently, there are no special credits for small employers that provide retirement benefits to military spouses.

REASONS FOR CHANGE

The credit for military spouse retirement plan eligibility serves to encourage small employers to offer employees who are married to members of the uniformed services access to defined contribution plans. The Committee believes the credit will improve the ability of military families to save for retirement.

EXPLANATION OF PROVISION

The provision allows eligible small employers to take a new non-refundable income tax credit with respect to each individual who is married to a member of the uniformed services and self-certifies as such (referred to as a military spouse), who is an employee of the employer, who is eligible to participate in an eligible defined contribution plan of the employer, and who is a non-highly compensated employee.<sup>185</sup> The credit is determined to be the sum of \$250 for each such employee plus the amount of the contributions made to all eligible defined contribution plans by the employer with respect to the employee up to a maximum of \$250 for each such employee. The credit applies for up to three consecutive years beginning with the first taxable year in which the individual begins participating in the plan.

An eligible small employer is an employer that, for the preceding year, had no more than 100 employees, each with compensation of \$5,000 or more. In addition, the employer must not have had a plan covering substantially the same employees as the new plan during the three years preceding the first year for which the credit would apply. Members of controlled groups and affiliated service groups are treated as a single employer for purposes of these requirements.<sup>186</sup>

An eligible defined contribution plan is a plan in which military spouses are eligible to participate within two months of beginning employment, and in which military spouses who are eligible to participate, (1) are immediately eligible to receive employer contributions in amounts not less than that received by similarly situated nonmilitary spouses with two years of service, and (2) have an immediate, nonforfeitable right to accrued benefits derived from employer contributions under the plan.

EFFECTIVE DATE

The provision applies to taxable years beginning after the date of enactment.

<sup>185</sup> A non-highly compensated employee is an employee who is not a highly compensated employee as defined under section 414(q).

<sup>186</sup> Sec. 52(a) or (b) and 414(m) or (o).

## 12. SMALL IMMEDIATE FINANCIAL INCENTIVES FOR CONTRIBUTING TO A PLAN (SEC. 112 OF THE BILL AND SECS. 401(k), 403(b), AND 4975 OF THE CODE)

### PRESENT LAW

#### *Section 401(k) plans*

A section 401(k) plan is a type of profit-sharing or stock bonus plan that contains a qualified cash or deferred arrangement. Such arrangements are subject to the rules generally applicable to qualified defined contribution plans. In addition, special rules apply to such arrangements. Employees who participate in a section 401(k) plan may elect to have contributions made to the plan (elective deferrals) rather than receive the same amount as current compensation.<sup>187</sup> The maximum annual amount of elective deferrals that can be made by an employee for a year is \$19,500 (for 2021) or, if less, the employee's compensation.<sup>188</sup> For an employee who attains age 50 by the end of the year, the dollar limit on elective deferrals is increased by \$6,500 (for 2021) (called "catch-up contributions").<sup>189</sup> An employee's elective deferrals must be fully vested. A section 401(k) plan may also provide for employer matching and nonelective contributions.

In order to constitute a qualified cash or deferred arrangement, no benefit under the arrangement may be conditioned, directly or indirectly, on the employee electing to have the employer make or not make contributions under the arrangement in lieu of receiving cash.<sup>190</sup> However, matching contributions are exempt from this rule.

#### *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)<sup>191</sup> 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

<sup>187</sup> Elective deferrals generally are made on a pre-tax 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.

<sup>188</sup> Sec. 402(g).

<sup>189</sup> Sec. 414(v).

<sup>190</sup> Sec. 401(k)(4)(A).

<sup>191</sup> Sec. 402A.

amounts must be invested only in regulated investment company stock.<sup>192</sup>

Contributions to a section 403(b) plan must be fully vested. The minimum coverage and general nondiscrimination requirements applicable to a qualified retirement plan generally apply to a section 403(b) plan and to employer matching and nonelective contributions and after-tax employee contributions to the plan.<sup>193</sup> If a section 403(b) plan provides for elective deferrals, the plan is subject to a “universal availability” requirement under which all employees must be given the opportunity to make deferrals of more than \$200. In applying this requirement, nonresident aliens, students, and employees who normally work less than 20 hours per week may be excluded.<sup>194</sup>

### *Prohibited transactions*

#### *In general*

The Code and ERISA prohibit certain transactions (“prohibited transaction”) between a qualified retirement plan and a disqualified person (referred to as a “party in interest” under ERISA).<sup>195</sup> The prohibited transaction rules under the Code apply also to IRAs, Archer MSAs, HSAs, and Coverdell ESAs.<sup>196</sup>

Disqualified persons include a fiduciary of the plan; a person providing services to the plan; an employer with employees covered by the plan; an employee organization any of whose members are covered by the plan; certain owners, officers, directors, highly compensated employees, family members, and related entities.<sup>197</sup> A fiduciary includes any person who (1) exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of the plan’s assets, (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so, or (3) has any discretionary authority or discretionary responsibility in the administration of the plan.<sup>198</sup>

Prohibited transactions include the following transactions, whether direct or indirect, between a plan and a disqualified person:

<sup>192</sup> Sec. 403(b)(7).

<sup>193</sup> These requirements do not apply to a governmental section 403(b) plan or a section 403(b) plan maintained by a church or a qualified church-controlled organization as defined in section 3121(w).

<sup>194</sup> For this purpose, nonresident has the meaning in section 410(b)(3)(C), and student has the meaning in section 3121(b)(10). The universal availability requirement does not apply to a section 403(b) plan maintained by a church or a qualified church-controlled organization.

<sup>195</sup> Sec. 4975; ERISA sec. 406. The prohibited transaction rules of the Code and ERISA are very similar; however, some differences exist between the two sets of rules. As mentioned above, ERISA generally does not apply to governmental plans or church plans. The prohibited transaction rules under the Code also generally do not apply to governmental plans or church plans. However, under section 503, the trust holding assets of a governmental or church plan may lose its tax-exempt status in the case of a prohibited transaction listed in section 503(b). Before the enactment of ERISA in 1974, section 503 applied to qualified retirement plans generally. In connection with the enactment of section 4975 by ERISA, section 503 was amended to apply only to governmental and church plans.

<sup>196</sup> These are included in the definition of “plan” under section 4975(e)(1).

<sup>197</sup> Sec. 4975(e)(2). Party in interest is defined similarly under ERISA section 3(14) with respect to an employee benefit plan. Under ERISA, employee benefit plans, defined in ERISA section 3(3), consist of two types: pension plans (that is, retirement plans), defined in ERISA section 3(2), and welfare plans, defined in ERISA section 3(1).

<sup>198</sup> Sec. 4975(d)(3); ERISA sec. 3(21)(A). Under ERISA, fiduciary also includes any person designated under ERISA section 405(c)(1)(B) by a named fiduciary (that is, a fiduciary named in the plan document) to carry out fiduciary responsibilities.

1. The sale or exchange or leasing of property,
2. The lending of money or other extension of credit,
3. The furnishing of goods, services, or facilities,
4. The transfer to, or use by or for the benefit of, the income or assets of the plan,
5. In the case of a fiduciary, an act dealing with the plan's income or assets in the fiduciary's own interest or for the fiduciary's own account, and
6. The receipt by a fiduciary of any consideration for the fiduciary's own personal account from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.<sup>199</sup>

*Exemptions from prohibited transaction treatment*

Certain transactions are statutorily exempt from prohibited transaction treatment, for example, certain loans to plan participants and arrangements with a disqualified person for legal, accounting or other services necessary for the establishment or operation of a plan if no more than reasonable compensation is paid for the services.<sup>200</sup>

*Sanctions for violations*

Under the Code, if a prohibited transaction occurs, the disqualified person who participated in the transaction is generally subject to a two-tiered excise tax. The first tier tax is 15 percent of the amount involved in the transaction. The second tier tax, imposed if the prohibited transaction is not corrected within a certain period, is 100 percent of the amount involved. In the case of an IRA, HSA, Archer MSA or Coverdell ESA, the sanction for some prohibited transactions is the loss of tax favored status, rather than an excise tax. A private right of action is not available for a Code violation.

Under ERISA, DOL may assess a civil penalty against a person who engages in a prohibited transaction, other than a transaction with a plan covered by the prohibited transaction rules of the Code.<sup>201</sup> The penalty may not exceed five percent of the amount involved in the transaction for each year or part of a year that the prohibited transaction continues. If the prohibited transaction is not corrected within 90 days after notice from DOL, the penalty can be up to 100 percent of the amount involved in the transaction. A prohibited transaction by a fiduciary may also be the basis for an action for a breach of fiduciary responsibility by DOL, a plan participant or beneficiary, or another plan fiduciary (as discussed above).

<sup>199</sup>Sec. 4975(c)(1)(A)–(F) and ERISA sec. 406(a)(1)(A)–(D) and (b)(1) and (3). Under ERISA section 406(a)(1), a plan fiduciary is prohibited from causing the plan to engage in a transaction described in paragraphs (A)–(D). ERISA section 406(b)(2) also prohibits a plan fiduciary, in the fiduciary's individual capacity or any other capacity, from acting in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of plan participants or beneficiaries. ERISA section 406(a)(1)(E) and (a)(2) relate to limitations under ERISA section 407 on a plan's acquisition or holding of employer securities and real property.

<sup>200</sup>Sec. 4975(d) and ERISA sec. 408. The Code and ERISA also provide for the grant of administrative exemptions, on either an individual or class basis, subject to a finding that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan.

<sup>201</sup>ERISA sec. 502(i).

## REASONS FOR CHANGE

The Committee recognizes that individuals can be especially motivated by immediate financial incentives. Thus, in addition to providing matching contributions as a long-term incentive for employees to contribute to a section 401(k) plan or section 403(b) plan, the Committee wishes to provide employers the flexibility to be able to offer small immediate financial incentives, such as gift cards in small amounts, to employees who participate in the plan.

## EXPLANATION OF PROVISION

The provision modifies the rule applicable to section 401(k) plans that prohibits the conditioning of benefits (other than matching contributions) on an employee's election to defer. As modified, the rule exempts de minimis financial incentives in addition to matching contributions. Thus, a section 401(k) plan will not fail to include a qualified cash or deferred arrangement merely because it conditions a de minimis financial incentive on an employee's election to defer.

Similarly, in the case of a section 403(b) plan, the provision provides that a plan does not fail to satisfy the universal availability requirement<sup>202</sup> solely by reason of offering a de minimis financial incentive to employees to elect to have the employer make contributions pursuant to a salary reduction agreement.

In addition, under the provision, the provision of such de minimis financial incentives under a section 401(k) plan or a section 403(b) plan is not treated as a prohibited transaction under the Code or ERISA.<sup>203</sup>

## EFFECTIVE DATE

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

### 13. SAFE HARBOR FOR CORRECTIONS OF EMPLOYEE ELECTIVE DEFERRAL FAILURES (SEC. 113 OF THE BILL AND SEC. 414 OF THE CODE)

## PRESENT LAW

Background on automatic enrollment features in retirement plans may be found in section I.1 of this document.

#### *Employee Plans Compliance Resolution System*

A retirement plan that is intended to be a tax-qualified plan provides retirement benefits on a tax-favored basis if the plan satisfies all of the qualification requirements under the Code.<sup>204</sup> Similarly, an annuity that is intended to be a tax-sheltered annuity provides retirement benefits on a tax-favored basis if the program satisfies all of the requirements under the Code applicable to section 403(b) plans. Failure to satisfy all of the applicable requirements may disqualify a plan or annuity for the intended tax-favored treatment.

The IRS has established the Employee Plans Compliance Resolution System ("EPCRS"), which is a comprehensive system of correc-

<sup>202</sup> Sec. 403(b)(12)(A)(ii).

<sup>203</sup> Under section 4975 and section 408 of ERISA.

<sup>204</sup> Sec. 401(a).



tion programs for sponsors of retirement plans and annuities that are intended, but have failed, to satisfy the applicable requirements under the Code.<sup>205</sup> EPCRS permits employers to correct compliance failures and continue to provide their employees with retirement benefits on a tax-favored basis.

The IRS designed EPCRS to (1) encourage operational and formal compliance, (2) promote voluntary and timely correction of compliance failures, (3) provide sanctions for compliance failures identified on audit that are reasonable in light of the nature, extent, and severity of the violation, (4) provide consistent and uniform administration of the correction programs, and (5) permit employers to rely on the availability of EPCRS in taking corrective actions to maintain the tax-favored status of their retirement plans and annuities.

The basic elements of the programs that comprise EPCRS are self-correction, voluntary correction with IRS approval, and correction on audit. The Self-Correction Program (“SCP”) generally permits a plan sponsor that has established practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance in form and operation with applicable Code requirements to correct certain insignificant failures at any time (including during an audit), and certain significant failures 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.

SCP, VCP and Audit CAP are not available to correct failures relating to the diversion or misuses of plan assets.<sup>206</sup> With respect to the SCP program, in the event that the plan or the plan sponsor has been a party to an abusive tax avoidance transaction, SCP is not available to correct any operational failure that is directly or indirectly related to the abusive tax avoidance transaction.<sup>207</sup>

#### *SEP and SIMPLE plans*

SCP and VCP<sup>208</sup> under EPCRS are available to a SEP or SIMPLE plan.<sup>209</sup> SCP is only available to such a plan to correct insignificant operational failures,<sup>210</sup> and only if the SEP or SIMPLE plan is established and maintained on a document approved by the IRS.

#### *Section 457(b) plans*

EPCRS does not apply to section 457(b) plans. However, the IRS will accept submissions relating to section 457(b) plans on a provi-

<sup>205</sup> The requirements under sections 401(a), 403(a), or 403(b), as applicable. Rev. Proc. 2019–19, 2019–19 I.R.B. 1086.

<sup>206</sup> Sec. 4.11 of Rev. Proc. 2019–19.

<sup>207</sup> Sec. 4.12 of Rev. Proc. 2019–19.

<sup>208</sup> Sec. 6.11 of Rev. Proc. 2019–9.

<sup>209</sup> Secs. 1.01 and 1.02 of Rev. Proc. 2019–19. A SEP is a plan intended to satisfy the requirements of Code section 408(k); a SIMPLE plan is a plan intended to satisfy the requirements of Code section 408(p). Secs. 5.06 and 5.07 of Rev. Proc. 2019–19.

<sup>210</sup> Sec. 4.01(c) of Rev. Proc. 2019–19.

sional basis outside of EPCRS through standards that are similar to those that apply to VCP filings.<sup>211</sup>

*Special safe harbor correction method for failures related to automatic contribution features in a section 401(k) or 403(b) plan*

*Employee elective deferral failures*

A safe harbor correction method is available for certain employee elective deferral failures associated with missed elective deferrals for eligible employees who are subject to an automatic contribution feature in a section 401(k) or 403(b) plan (including employees who made affirmative elections in lieu of automatic contributions but whose elections were not implemented correctly).<sup>212</sup>

An “employee elective deferral failure”<sup>213</sup> is a failure to implement elective deferrals correctly in a section 401(k) plan or 403(b) plan, including elective deferrals pursuant to an affirmative election or pursuant to an automatic contribution feature under such a plan, and a failure to afford an employee the opportunity to make an affirmative election because the employee was improperly excluded from the plan. Automatic contribution features include automatic enrollment and automatic escalation features that are affirmatively elected.<sup>214</sup>

If the failure to implement an automatic contribution feature for an affected eligible employee or the failure to implement an affirmative election of an eligible employee who is otherwise subject to an automatic contribution feature does not extend beyond the end of the nine and one-half month period after the end of the plan year of the failure (which is generally the filing deadline of the Form 5500 series return, including automatic extensions), no qualified nonelective contribution (“QNEC”)<sup>215</sup> for the missed elective deferrals is required, provided that the following conditions are satisfied:

1. Correct deferrals begin no later than the earlier of the first payment of compensation made on or after the last day of the nine and one-half month period after the end of the plan year in which the failure first occurred for the affected eligible employee or, if the plan sponsor was notified of the failure by the affected eligible employee, the first payment of compensation made on or after the end of the month after the month of notification;
2. Notice of the failure, that satisfies the content requirements described below, is given to the affected eligible employee not later than 45 days after the date on which correct deferrals begin; and
3. If the eligible employee would have been entitled to additional matching contributions had the missed deferrals been

<sup>211</sup> Sec. 4.09 of Rev. Proc. 2019–19.

<sup>212</sup> Sec. 05(8) of Appendix A of Rev. Proc. 2019–19.

<sup>213</sup> Sec. 05(10) of Appendix A of Rev. Proc. 2019–19.

<sup>214</sup> Sec. 05(10) of Appendix A of Rev. Proc. 2019–19.

<sup>215</sup> A QNEC, as defined in Treas. Reg. sec. 1.401(k)–6 means “employer contributions, other than elective contributions or matching contributions, that, except as provided otherwise in § 1.401(k)–1(c) and (d), satisfy the requirements of § 1.401(k)–1(c) and (d) as though the contributions were elective contributions, without regard to whether the contributions are actually taken into account under the ADP test under § 1.401(k)–2(a)(6) or the ACP test under § 1.401(m)–2(a)(6). Thus, the nonelective contributions must satisfy the nonforfeiture requirements of § 1.401(k)–1(c) and be subject to the distribution limitations of § 1.401(k)–1(d) when they are allocated to participants’ accounts.”

made, the plan sponsor makes a corrective allocation (adjusted for earnings) on behalf of the employee equal to the matching contributions that would have been required under the terms of the plan as if the missed deferrals had been contributed to the plan in accordance with the timing requirements under SCP for significant operational failures. This correction method provides an alternative safe harbor method for calculating earnings for Employee Elective Deferral Failures under section 401(k) plans or 403(b) plans.<sup>216</sup>

*Content of notice requirement*

The required notice must include the following information:

1. General information relating to the failure, such as the percentage of eligible compensation that should have been deferred, and the approximate date that the compensation should have begun to be deferred. The general information need not include a statement of the dollar amounts that should have been deferred;
2. A statement that appropriate amounts have begun to be deducted from compensation and contributed to the plan (or that appropriate deductions and contributions will begin shortly);
3. A statement that corrective allocations relating to missed matching contributions have been made (or that corrective allocations will be made). Information relating to the date and the amount of corrective allocations need not be provided;
4. An explanation that the affected participant may increase his or her deferral percentage in order to make up for the missed deferral opportunity, subject to applicable limits for elective deferrals;<sup>217</sup> and
5. The name of the plan and plan contact information (including name, street address, email address, and telephone number of a plan contact).

*Sunset of safe harbor correction method*

The safe harbor correction method is available for plans only with respect to failures that begin on or before December 31, 2020.

REASONS FOR CHANGE

Automatic enrollment and automatic escalation features in defined contribution plans enhance the opportunity for individuals to increase their retirement savings. However, inadvertent errors in the implementation and administration of such features may subject the plan sponsor to expensive corrections and the potential for significant penalties when even honest mistakes are made.

The Committee believes that providing a grace period to correct, without penalty, reasonable errors in administering these features will encourage plan sponsors to include such features in their plans.

<sup>216</sup>The plan may also use the earnings adjustment methods set forth in section 3 of Appendix B of Rev. Proc. 2019-19.

<sup>217</sup>Under sec. 402(g).

## EXPLANATION OF PROVISION

Under the provision, a plan will not fail to be treated as a qualified plan, a section 403(b) tax sheltered annuity, an IRA or a section 457(b) plan solely by reason of a “corrected error.”

For purposes of this provision, a “corrected error” means a reasonable administrative error in implementing an automatic enrollment or automatic escalation feature in accordance with the terms of an eligible automatic contribution arrangement,<sup>218</sup> provided that such implementation error:

1. Is corrected by the date that is nine and one-half months after the end of the plan year during which the failure occurred;
2. Is corrected in a manner that is favorable to the participant; and
3. Is of a type which is so corrected for all similarly situated participants in a nondiscriminatory manner.

The correction may occur before or after the participant has terminated employment and may occur without regard to whether the error is identified by the Secretary.

The Secretary must issue regulations or other guidance of general applicability specifying the methods that are “in a manner favorable to the participant.”

## EFFECTIVE DATE

The provision applies to any errors with respect to which the date that is nine and one-half months after the end of the plan year during which the error occurred is after the date of enactment of this Act.

#### 14. ONE-YEAR REDUCTION IN PERIOD OF SERVICE REQUIREMENT FOR LONG-TERM, PART-TIME WORKERS (SEC. 114 OF THE BILL AND SEC. 401(k) OF THE CODE)

## PRESENT LAW

Background on section 401(k) plans may be found in section I.9 of this document.

#### *General participation requirements*

A qualified retirement plan generally can delay participation in the plan based on attainment of age or completion of years of service but not beyond the later of completion of one year of service (that is, a 12-month period with at least 1,000 hours of service) or attainment of age 21.<sup>219</sup> A plan also cannot exclude an employee from participation (on the basis of age) when that employee has attained a specified age.<sup>220</sup> Employees can be excluded from plan participation on other bases, such as job classification, as long as the other basis is not an indirect age or service requirement. A plan can provide that an employee is not entitled to an allocation of employer nonelective or matching contributions for a plan year unless the employee completes either 1,000 hours of service during

<sup>218</sup> As defined in section 414(w)(3).

<sup>219</sup> Secs. 401(a)(3) and 410(a)(1). Parallel requirements generally apply to plans of private employers under section 202 of ERISA. Governmental plans under section 414(d) and church plans under section 414(e) are generally exempt from these Code requirements and from ERISA.

<sup>220</sup> Sec. 410(a)(2).

the plan year or is employed on the last day of the year even if the employee previously completed 1,000 hours of service in a prior year.

*Long-term part-time workers*

Section 401(k) plans generally must permit an employee to make elective deferrals if the employee has worked at least 500 hours per year with the employer for at least three consecutive years and has met the minimum age requirement (age 21) by the end of the three-consecutive-year period (for this provision, an employee is referred to as a “long-term part-time employee” after having completed this period of service).<sup>221</sup> Thus, a long-term part-time employee may not be excluded from the plan merely because the employee has not completed a year of service. Once a long-term part-time employee meets the age and service requirements, such employee must be able to commence participation no later than the earlier of (1) the first day of the first plan year beginning after the date on which the employee satisfied the age and service requirements or (2) the date six months after the date on which the individual satisfied those requirements.

The plan is not required to provide that a long-term part-time employee is otherwise eligible to participate in the plan. Thus, the plan can continue to treat a long-term part-time employee as ineligible under the plan for employer nonelective and matching contributions based on not having completed a year of service. However, for a plan that does provide employer contributions for long-term part-time employees, the plan must credit, for each year in which such an employee worked at least 500 hours, a year of service for purposes of vesting in any employer contributions. If a long-term part-time employee under such a plan becomes a full-time employee, the plan must continue to credit the employee with any years of service earned under the special rule for long-term part-time employees.

Employers are permitted to exclude long-term part-time employees from nondiscrimination testing,<sup>222</sup> including top-heavy vesting and top-heavy benefit requirements. However, the relief from the nondiscrimination rules ceases to apply to any employee who becomes a full-time employee (as of the first plan year beginning after the plan year in which the employee completes a 12-month period with at least 1,000 hours of service).

The long-term part-time employee rules are effective for plan years beginning after December 31, 2020, except that for determining whether the three-consecutive-year period has been met, 12-month periods beginning before January 1, 2021 are not taken into account.

REASONS FOR CHANGE

The SECURE Act <sup>223</sup> requires employers to allow long-term, part-time workers to participate in their section 401(k) plans after the worker has completed three consecutive years of part-time service. As women are more likely to work part-time than men, this provi-

<sup>221</sup> Sec. 401(k)(2)(D). This rule does not apply to collectively bargained plans.

<sup>222</sup> Nondiscrimination testing relief applies to sections 401(a)(4), 401(k)(3), 401(k)(12), 401(k)(13), 401(m)(2), and 410(b).

<sup>223</sup> Pub. L. No. 116–94, Division O.

sion is particularly important for women in the workforce. The Committee wishes to make it easier for part-time workers to save for retirement by requiring section 401(k) plans to allow part-time workers to participate after two consecutive years of part-time service.

#### EXPLANATION OF PROVISION

The provision modifies the rules that apply to long-time part-time employees under a section 401(k) plan to reduce the service requirement for such employees from three years to two years. Thus, under the provision, a section 401(k) plan generally must permit an employee to make elective deferrals if the employee has worked at least 500 hours per year with the employer for at least two consecutive years and has met the minimum age requirement (age 21) by the end of the two-consecutive-year period.

In addition, the provision clarifies the effective date of the long-term part-time employee rules. Under the provision, 12-month periods beginning before January 1, 2021 (which, under the SECURE Act, are not taken into account in determining the consecutive 12-month periods of part-time service) are also not taken into account in determining a year of service for purposes of the rules applicable to the vesting of employer contributions.

#### EFFECTIVE DATE

The provision is effective as if included in the enactment of section 112 of the SECURE Act.

### TITLE II—PRESERVATION OF INCOME

#### 1. REMOVE REQUIRED MINIMUM DISTRIBUTION BARRIERS FOR LIFE ANNUITIES (SEC. 201 OF THE BILL AND SEC. 401 OF THE CODE)

##### PRESENT LAW

##### *Required minimum distributions*

Background on required minimum distributions under qualified retirement plans may be found in section I.5 of this document.

##### *Annuities*

A plan will not fail to satisfy the minimum required distribution rules merely because distributions are made from an annuity contract which is purchased with the employee's benefit by the plan from an insurance company.<sup>224</sup> Prior to the date that an annuity contract under an individual account plan commences benefits under the contract, the interest of the employee or beneficiary under that contract is treated as an individual account for purposes of the required minimum distribution requirements.<sup>225</sup> Once distributions are required to begin (on the required beginning date), payments under the annuity contract will satisfy the required minimum distribution rules if distributions of the employee's entire interest are paid in the form of periodic annuity payments for the

<sup>224</sup> Treas. Reg. sec. 1.401(a)(9)-6, A-4.

<sup>225</sup> Treas. Reg. sec. 1.401(a)(9)-6, A-12(a).

employee's life (or the joint lives of the employee and beneficiary) or over a period certain as defined in the regulations.<sup>226</sup>

All annuity payments (whether paid over an employee's life, joint lives, or a period certain) must be nonincreasing, or only increase in accordance with certain exceptions.<sup>227</sup>

There are additional increases permitted for annuity payments under annuity contracts purchased from insurance companies. If the total future payments expected to be made under the annuity contract ("future expected payments") exceed the "total value being annuitized," the payments under the annuity contract will not fail to satisfy the nonincreasing payment requirement merely because the payments (1) are increased by a constant percentage, applied not less frequently than annually; (2) provide for a final payment upon the death of the employee that does not exceed the excess of the total value being annuitized over the total of payments before the death of the employee; (3) are increased as a result of dividend payments or other payments that result from actuarial gains but only if actuarial gain is measured no less frequently than annually and the resulting payments are either paid no later than the year following the year for which the actuarial experience is measured or paid in the same form as the payment of the annuity over the remaining period of the annuity; and (4) are increased for certain accelerations of payment.<sup>228</sup> However, in operation, this actuarial test does not permit certain guarantees in life annuities such as certain guaranteed annual increases, return of premium death benefits and period certain guarantees for participating annuities.

#### REASONS FOR CHANGE

The required minimum distribution rules contain an actuarial test, intended to limit tax deferral by precluding commercial annuities from providing payments that increase excessively over time. In operation, however, the test commonly prohibits many important guarantees and features of commercial annuities that provide only modest benefit increases that make these annuities attractive to individuals participating in defined contribution plans. For example, guaranteed annual increases of only one or two percent, return of premium death benefits, and period certain guarantees for participating annuities are commonly prohibited by this test. Without these types of guarantees, many individuals are unwilling to elect a life annuity under a defined contribution plan or IRA.

Such annuities also provide individuals in defined contribution plans with protection against outliving their assets in retirement. The Committee believes that making it easier for commercial annuities to offer these types of benefits will encourage individuals participating in defined contribution plans to purchase such annuities.

<sup>226</sup>Treas. Reg. sec. 1.401(a)(9)-6, A-1, -3 and -4. If the annuity contract is purchased after the required beginning date, the first payment must begin on or before the purchase date and the payment required must be made no later than the end of that required period.

<sup>227</sup>Treas. Reg. sec. 1.401(a)(9)-6, A-14(a). The exceptions include eligible cost of living increases, increased benefits resulting from a plan amendment, and lump sum distributions made to a beneficiary upon the death of the employee.

<sup>228</sup>Treas. Reg. sec. 1.401(a)(9)-6, A-14(c).

## EXPLANATION OF PROVISION

The provision amends the minimum required distribution rules to permit commercial annuities<sup>229</sup> that are issued in connection with any eligible retirement plan<sup>230</sup> to provide one or more of the following types of payments on or after the annuity starting date:

- Annuity payments that increase by a constant percentage, applied not less frequently than annually, at a rate that is less than five percent per year;
- A lump sum payment that results in a shortening of the payment period with respect to an annuity, or a full or partial commutation of the future annuity payments, provided that such a lump sum is determined using reasonable actuarial methods and assumptions, determined in good faith by the issuer of the contract;
- A lump sum payment that accelerates the receipt of annuity payments that are scheduled to be received within the ensuing 12 months, regardless of whether such acceleration shortens the payment period with respect to the annuity, reduces the dollar amount of benefits to be paid under the contract, or results in a suspension of annuity payments during the period being accelerated;
- Dividends or similar distributions determined in an actuarially reasonable manner; or
- A lump sum return of premium death benefits.

The provision also directs the Secretary, within one year after the date of enactment, to conform the regulations to the foregoing statutory amendments and thereby exempt the listed annuity benefits from the actuarial test in the regulations. The Secretary is also directed to provide that any commercial annuity that provides an initial payment that is at least equal to the initial payment that is required from an individual account is deemed to satisfy the actuarial test in the regulations. The Secretary is also directed to amend the actuarial test in the regulations to provide that the calculations under the test are made using the reasonable tables or other actuarial assumptions that the issuer of the contract actually uses in pricing the premiums and benefits under the contract, provided that such tables or other actuarial assumptions are reasonable, rather than using the life expectancy tables in the regulations.

The provision also directs the Secretary as of the date of enactment to administer and enforce the law in accordance with the requirements of this provision.

## EFFECTIVE DATE

The provision is effective as of the date of enactment.

<sup>229</sup> Within the meaning of section 3405(e)(6).

<sup>230</sup> Within the meaning of section 402(c)(8)(B), other than a defined benefit plan.



## 2. QUALIFYING LONGEVITY ANNUITY CONTRACTS (SEC. 202 OF THE BILL)

### PRESENT LAW

#### *Required minimum distributions*

Background on required minimum distributions under qualified retirement plans may be found in section I.5 of this document.

#### *Annuity distributions*

The regulations provide rules for the amount of annuity distributions from a defined benefit plan, or from an annuity purchased by the plan from an insurance company (including annuity contracts under a defined contribution plan), that are paid over life or life expectancy. Annuity distributions are generally required to be non-increasing with certain exceptions, which include, for example, (i) increases to the extent of certain specified cost-of-living indices, (ii) a constant percentage increase (for a qualified defined benefit plan, the constant percentage cannot exceed five percent per year), (iii) certain accelerations of payments, and (iv) increases to reflect when an annuity is converted to a single life annuity after the death of the beneficiary under a joint and survivor annuity or after termination of the survivor annuity under a qualified domestic relations order.<sup>231</sup> If distributions are in the form of a joint and survivor annuity and the survivor annuitant both is not the surviving spouse and is younger than the employee (or IRA owner), the survivor annuity benefit is limited to a percentage of the life annuity benefit for the employee (or IRA owner). The survivor benefit as a percentage of the benefit of the primary annuitant is required to be smaller (but not required to be less than 52 percent) as the difference in the ages of the primary annuitant and the survivor annuitant become greater.

If an annuity contract held under a defined contribution plan has not yet been annuitized, the interest of an employee or beneficiary under that contract is treated as an individual account for purposes of the minimum required distribution rules. Thus, the value of that contract is included in the account balance used to determine required minimum distributions from the employee's individual account.<sup>232</sup>

#### *Plan amendment and anti-cutback requirements*

Present law provides a remedial amendment period during which, under certain circumstances, a qualified retirement plan may be amended retroactively in order to comply with the qualification requirements.<sup>233</sup> In general, plan amendments to reflect changes in the law generally must be made by the time prescribed by law for filing the income tax return of the employer for the employer's taxable year in which the change in law occurs.<sup>234</sup> The Sec-

<sup>231</sup> Treas. Reg. sec. 1.401(a)(9)-6, A-14.

<sup>232</sup> Treas. Reg. sec. 1.401(a)(9)-6, A-12.

<sup>233</sup> Sec. 401(b).

<sup>234</sup> In addition, 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. See 401(b)(2), as enacted under section 201 of the SECURE Act. See also the description of the provision in section III.19 of this document.

retary may extend the time by which plan amendments need to be made.

The Code and ERISA generally prohibit plan amendments that reduce accrued benefits, including amendments that eliminate or reduce optional forms of benefit with respect to benefits already accrued except to the extent prescribed in regulations.<sup>235</sup> This prohibition on the reduction of accrued benefits is commonly referred to as the “anti-cutback rule.”

*Qualifying longevity annuity contracts*

A “qualifying longevity annuity contract” (“QLAC”) is a deferred annuity contract that is purchased from an insurance company for an employee that is generally scheduled to commence payments at an advanced age (but no later than age 85)<sup>236</sup> and which satisfies each of the following requirements:<sup>237</sup>

1. Premiums for the QLAC do not exceed the lesser of a dollar or percentage limitation. The dollar limitation is (1) \$125,000 (as adjusted) (\$135,000 for 2020 and 2021) over (2) the sum of (a) the premiums previously paid with respect to the contract and (b) the premiums previously paid with respect to any other QLAC that is purchased for the employee under the plan, or any other plan of the employer.<sup>238</sup> The percentage limitation is 25 percent of the employee’s account balance under the plan (including the value of any QLAC held under the plan for the employee) over the previously paid premiums with respect to the contract or with respect to any other QLAC that is purchased for the employee under the plan, or any other plan of the employer.
2. The QLAC provides that distributions under the contract must commence not later than the first day of the month following the individual’s attainment of age 85.
3. The QLAC provides that once distributions begin under the contract, the distributions satisfy the minimum required distribution rules, except for the rule that annuity payments commence on or before the required beginning date.
4. The contract does not make available any commutation benefit, cash surrender right, or other similar feature.
5. No benefits are provided under the contract after the death of the employee other than those provided for in the regulations.
6. When the contract is issued, the contract (or a rider or endorsement) states that it is intended to be a QLAC.
7. The contract is not a variable contract, an indexed contract, or a similar contract, except as provided in guidance.

Amendments to increase benefit accruals under plan for previous plan year allowed until employer tax return due date.

<sup>235</sup> Sec. 411(d)(6) and ERISA sec. 204(g).

<sup>236</sup> Because under section 401(a)(9), minimum required distributions must generally begin no later than the April 1 of the year following the year in which the individual attains age 72, without these special rules, QLACs would violate the requirements of section 401(a)(9). See the description of the provision in section I.5 of this document, which proposes an increase in the age for the required beginning date for mandatory distributions.

<sup>237</sup> Treas. Reg. sec. 401(a)(9)–6, A–17.

<sup>238</sup> Including any other plan, annuity, or account described in sections 401(a), 403(a), 403(b), or 408, or an eligible governmental plan under section 457(b).

## REASONS FOR CHANGE

QLACs are intended to be an inexpensive way for individuals to hedge the risk of outliving their savings in defined contribution plans and IRAs. In 2014, final regulations were published relating to QLACs.<sup>239</sup> However, the final regulations imposed certain limits on QLACs in order to comply with statutory requirements. These limits prevent QLACs from achieving their intended purpose in providing longevity protection by, for example, limiting the percentage of an individual's account that may be used to acquire such contracts.

The Committee believes that repealing that 25 percent limitation, clarifying that free-look periods up to 90 days are permitted, and facilitating the sales of such contracts with spousal survival rights, will eliminate certain barriers to the purchase of QLACs.

## EXPLANATION OF PROVISION

Under the provision, no later than one year after the date of enactment, the Secretary (or the Secretary's delegate) is directed to amend the minimum required distribution regulation which applies to QLACs:

- To eliminate the requirement that premiums for QLACs be limited to 25 percent (or any other percentage) of an individual's account balance;
- To provide that in the case of a QLAC purchased with joint and survivor annuity benefits for the individual and his or her spouse that were permissible under the regulations at the time the contract was originally purchased, a divorce occurring after the original purchase and before the annuity payments commence under the contract, will not affect the permissibility of the joint and survivor annuity benefits or other benefits under the contract, or require any adjustment to the amount or duration of benefits payable under the contract provided that any qualified domestic relations order<sup>240</sup> or any divorce or separation instrument (1) provides that the former spouse is entitled to the survivor benefits under the contract, (2) does not modify the treatment of the former spouse as beneficiary under the contract who is entitled to the survivor benefits, or (3) does not modify the treatment of the former spouse as the measuring life for the survivor benefits under the contract. For purposes of this provision, the term "divorce or separation instrument" means (1) a decree of divorce or separate maintenance or a written instrument incident to such a decree, (2) a written separation agreement, or (3) a decree (not described in (1)) requiring a spouse to make payments for the support or maintenance of the other spouse; and
- To ensure that the regulation does not preclude a contract from including a provision under which an employee may rescind the purchase of the contract within a period not exceeding 90 days from the date of purchase (the "short free look period.")

<sup>239</sup> 79 FR 37633.

<sup>240</sup> Within the meaning of section 414(p).

## EFFECTIVE DATE

The provision is generally effective with respect to contracts purchased or received in an exchange on or after the date of enactment. The changes with respect to joint and survivor annuities and the short free look period are effective with respect to contracts purchased or received in an exchange on or after July 2, 2014.

Prior to the date the Secretary issues final regulations, the Secretary must administer and enforce the law in accordance with the effective dates above, and taxpayers may rely upon their reasonable good faith interpretations of the law prior to this provision becoming effective.

### 3. INSURANCE-DEDICATED EXCHANGE-TRADED FUNDS (SEC. 203 OF THE BILL AND SEC. 817(h) OF THE CODE)

## PRESENT LAW

#### *Income exclusion and deferred tax treatment for life insurance and annuity contracts*

An exclusion from gross income is provided for amounts received under a life insurance contract paid by reason of the death of the insured.<sup>241</sup> Further, no Federal income tax generally is imposed on a policyholder with respect to the earnings under a life insurance contract (“inside buildup”). Distributions from a life insurance contract (other than a modified endowment contract<sup>242</sup>) that are made prior to the death of the insured generally are includible in income only to the extent that the amounts distributed exceed the taxpayer’s investment in the contract. Such distributions generally are treated first as a tax-free recovery of the investment in the contract, and then as income.<sup>243</sup> Present law provides a definition of life insurance designed to limit the investment orientation of the contract.<sup>244</sup>

No Federal income tax is generally imposed on a deferred annuity contract holder who is a natural person with respect to the earnings on the contract (inside buildup) in the absence of a distribution under the contract. Annuity distributions generally are treated as partially excludable return of basis and partially ordinary income under an “exclusion ratio” (the ratio of the investment in the contract to the expected return under the contract as of that date).<sup>245</sup> Other distributions (which for this purpose include loans) are treated as income first, then as a tax-free return of basis.<sup>246</sup> An additional 10-percent tax is imposed on the income portion of distributions made before age 59½, and in certain other circumstances.<sup>247</sup> An annuity contract must provide for certain required distributions if the holder dies before the entire interest in the contract has been distributed.<sup>248</sup> No dollar limit is imposed on

<sup>241</sup> Sec. 101(a).

<sup>242</sup> Sec. 7702A. A modified endowment contract is generally a life insurance contract funded more rapidly than in seven level annual premiums. Distributions (including loans) from a modified endowment contract are generally treated as income first, then as a tax-free return of basis. Sec. 72(e)(10).

<sup>243</sup> Sec. 72(e).

<sup>244</sup> Sec. 7702.

<sup>245</sup> Sec. 72(b).

<sup>246</sup> Sec. 72(e).

<sup>247</sup> Sec. 72(q).

<sup>248</sup> Sec. 72(s).

the amount that may be paid into an annuity contract (that is not a pension plan contract) for Federal income tax purposes.

#### *Variable contracts*

A variable contract is generally an annuity or life insurance contract whose death benefit, payout, or premium amounts are based on the return on and market value of underlying assets. For tax purposes, a variable contract is defined by statute.<sup>249</sup> Under the statutory criteria, all or part of the amounts received for the contract (premiums) must be allocated to a segregated asset account of the insurer. The contract must provide for the payment of annuities, must be a life insurance contract,<sup>250</sup> or must fund insurance on retired lives.<sup>251</sup> The contract must reflect the investment return and the market value of the segregated asset account, or in the case of a life insurance contract, the amount of the death benefit or period of coverage must be adjusted on the basis of the investment return and the market value of the segregated asset account. The segregated asset accounts for variable contracts generally are invested in a variety of investment funds.

#### *Diversification requirements*

The investment assets held in the segregated asset account for a variable contract must be adequately diversified.<sup>252</sup> If the assets are not adequately diversified, the variable contract is not treated as an annuity or life insurance contract.<sup>253</sup> As a result, otherwise tax-deferred or excluded income on the contract is treated as ordinary income received or accrued by the contract holder during the taxable year.<sup>254</sup>

When the diversification requirement for variable contracts was added in 1984, the Conference Report stated, “[i]n authorizing Treasury to prescribe diversification standards, the conferees intend that standards be designed to deny annuity or life insurance treatment for investments that are publicly available to investors and investments that are made, in effect, at the direction of the investor.”<sup>255</sup>

The regulatory diversification requirements impose investment concentration limits based on percentages of the total value of the

<sup>249</sup> Sec. 817(d).

<sup>250</sup> As defined for Federal tax purposes in section 7702.

<sup>251</sup> As described in section 807(c)(6) (governing life insurer reserve deductions).

<sup>252</sup> Sec. 817(h).

<sup>253</sup> The investor control doctrine can also apply in some fact situations. This two-pronged doctrine generally treats a contract as not a life insurance contract or not an annuity contract if the contract holder has significant incidents of ownership with respect to the investments in the insurer segregated asset account, or if segregated asset account assets are publicly available for purchase (*i.e.*, not exclusively available through purchase of the variable contract). See Rev. Rul. 81-225, 1981-2 C.B.12, as modified by Rev. Proc. 99-44 and as clarified and amplified by Rev. Rul. 2007-7; *Christofferson v. U.S.*, 749 F.2d 513 (8th Cir. 1984); *Webber v. Commissioner*, 144 T. C. 324 (2015).

<sup>254</sup> Secs. 72 and 7702, and Treas. Reg. sec. 1.817-5(a).

<sup>255</sup> H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. (1984), page 1055. Similarly, the Blue Book for the 1984 Act states that the diversification requirements were enacted “to discourage the use of tax-preferred variable annuities and variable life insurance primarily as investment vehicles. The Congress believed that a limitation on a customer’s ability to select specific investments underlying a variable contract will help ensure that a customer’s primary motivation in purchasing the contract is more likely to be the traditional economic protections provided by annuities and life insurance.” Joint Committee on Taxation, *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, Pub. L. No. 98-369, JCS-41-84, December 31, 1984, page 607.

assets in the segregated asset account.<sup>256</sup> A safe harbor is provided for a segregated asset account holding a regulated investment company (“RIC” or mutual fund) that is at least as diversified as is required under the RIC rules of section 851(b)(4) and no more than 55 percent of the value of whose assets is in cash, cash items, government securities, and securities of other RICs.<sup>257</sup>

The diversification requirements provide a lookthrough rule for assets held through a RIC, real estate investment trust (“REIT”), partnership, or certain trusts such as a grantor trust. This lookthrough rule provides that the RIC, REIT, partnership or trust is not treated as a single investment of the segregated asset account, but rather, a pro rata portion of each of its assets is treated as an asset of the account.<sup>258</sup>

However, the lookthrough rule imposes requirements.<sup>259</sup> All the beneficial interests in the RIC, REIT, partnership, or trust generally must be held by a segregated asset account. Public access to the RIC, REIT, partnership, or trust must generally be available exclusively through the purchase of a variable contract. For example, if an investment fund’s interests are held by a market maker or by a financial institution that, as a participant in a clearing agency, is permitted to purchase and redeem shares directly from the fund and sell them to third parties, then the fund does not satisfy this requirement of the lookthrough rule.

#### REASONS FOR CHANGE

The Committee has become aware of the growing acceptance of and increase in the number of exchange traded funds (“ETFs”), investment funds that are traded on national securities exchanges. The Committee finds it appropriate to allow ETFs to be held in life insurance companies’ segregated asset accounts for variable insurance contracts, provided that doing so does not violate the investor control doctrine limiting public availability of, and investor control over, investment funds held by such accounts.

So as to allow ETFs under the diversification requirements applicable to variable insurance contracts, the Committee directs the Secretary to amend regulations interpreting those diversification requirements. In particular, the Committee intends that under the amended regulatory interpretation of the diversification requirements, the look through rule available to other investment funds such as mutual funds also be available to ETFs notwithstanding that beneficial interests in the ETF are held by clearing agencies that are authorized participants, or held by market makers, as those terms are used in the context of the Securities Exchange Act of 1934. Due to the need for further development of market and tax regulatory mechanisms needed to implement this intent, the effective date of the amendment to the regulations is deferred.

<sup>256</sup> Treas. Reg. sec. 1.817-5(b).

<sup>257</sup> Treas. Reg. sec. 1.817-5(b)(2).

<sup>258</sup> Treas. Reg. sec. 1.817(f)(1).

<sup>259</sup> Treas. Reg. sec. 1.817(f)(2) and (3).

## EXPLANATION OF PROVISION

*Diversification requirements*

The provision directs the Secretary to revise the regulations setting forth diversification requirements with respect to variable contracts under section 817(h) to facilitate the use of ETFs under variable contracts. The provision directs that the lookthrough rule requirements in the regulations be amended so that satisfaction of those requirements with respect to an ETF is not prevented by reason of beneficial interests in an investment fund being held by one or more authorized participants or market makers.

Under the provision, an ETF means a RIC, partnership, or trust that is registered with the SEC as an open-end investment company or unit investment trust, and the shares of which can be purchased or redeemed directly from the fund only by an authorized participant, and the shares of which are traded throughout the day on a national stock exchange at market prices that may or may not be the same as the net asset value of the shares. An authorized participant means a financial institution that is a member or participant in a clearing agency registered under section 17A(b) of the Securities Exchange Act of 1934 that contracts with an ETF to permit the financial institution to purchase or redeem shares of the ETF and to sell the shares to third parties, provided that the financial institution is precluded from purchasing the shares for its own investment purposes and from selling the shares to persons that are not market makers. A market maker means a financial institution that is a registered broker or dealer under section 15(b) of the Securities Exchange Act of 1934 and that maintains liquidity for an ETF on a national stock exchange by always being ready to buy and sell shares, provided that the financial institution is precluded from buying or selling shares to or from persons who are not authorized participants or who are persons not permitted to buy or sell shares under the lookthrough rule in the regulations.

## EFFECTIVE DATE

The provision relating to the amendments to the regulatory diversification requirements is effective for segregated asset account investments made on or after the date that is seven years after the date of enactment.

TITLE III—SIMPLIFICATION AND CLARIFICATION OF  
RETIREMENT PLAN RULES

1. RECOVERY OF RETIREMENT PLAN OVERPAYMENTS (SEC. 301 OF THE BILL AND SECS. 402 AND 414 OF THE CODE, AND SEC. 206 OF ERISA)

## PRESENT LAW

*Employee Plans Compliance Resolution System*

A general description of the Employee Plans Compliance Resolution System that this provision modifies may be found in section I.13 of this document.

### *Recoupment of overpayments*

An overpayment is defined as a qualification failure due to a payment being made to a participant or beneficiary that exceeds the amount payable to such individual under the terms of the plan or that exceeds a limitation provided in the Code or regulations.<sup>260</sup> Overpayments include both payments from a defined benefit plan and from a defined contribution plan (either not made from the individual's account under the plan or not permitted to be paid under the Code, the regulations, or the terms of the plan).

An overpayment from a defined benefit plan generally is corrected either by having the plan sponsor take reasonable steps to have the overpayment (with appropriate interest) returned by the recipient to the plan and then reducing future benefit payments (if any) due to the employee or any other appropriate correction method.<sup>261</sup> Depending on the nature of the overpayment, an appropriate correction method may include having the employer or another person contribute the amount of the overpayment (with appropriate interest) to the plan instead of seeking recoupment from a plan participant or beneficiary. Another appropriate correction method may include a plan sponsor adopting a retroactive amendment to conform the plan document to the plan's operations.

An overpayment from a defined contribution plan or section 403(b) plan is generally corrected by having the employer take reasonable steps to have the overpayment repaid to the plan, adjusted for earnings at the plan's earnings rate from the date of the distribution to the date of the correction of the overpayment.<sup>262</sup> To the extent such a repayment is not made by the participant or beneficiary, the employer or another person must contribute the difference to the plan ("make-whole contribution method"). The make-whole contribution method does not apply when the failure arises solely because a payment was made from the plan to a participant or beneficiary in the absence of a distributable event (but was otherwise determined in accordance with the terms of the plan (for example, an impermissible in-service distribution)).

The employer must generally notify the employee that the overpayment is not eligible for favorable tax treatment accorded to distributions from an eligible retirement plan (and specifically, is not eligible for tax-free rollover).

<sup>260</sup> Sec. 5.01(3)(c) of Rev. Proc. 2019–19.

<sup>261</sup> Sec. 6.06(3) of Rev. Proc. 2019–19. Prior to 2015, the correction method for overpayments was solely for the employer to take reasonable steps to have the overpayment returned to the plan by the participant or beneficiary. The IRS was informed that some plans had demanded recoupment of large amounts from plan participants and beneficiaries on account of plan administration errors made over lengthy periods of time, and that those individuals, particularly older individuals, might have financial difficulty meeting those corrective actions including the return of overpayments with substantial accumulated interest. As a result, IRS and Treasury issued Revenue Procedure 2015–27, 2015–16 I.R.B. 914 providing more flexibility to plans, stating that depending on the facts and circumstances, correcting an overpayment under EPCRS may not need to include requesting that an overpayment be returned to the plan by plan participants and beneficiaries but could include such options as having the employer or another person contribute the amount of the overpayment (with appropriate interest) to the plan in lieu of seeking recoupment from plan participants and beneficiaries or having a plan sponsor adopt a retroactive amendment to conform the plan document to the plan's operations. Treasury and IRS requested comments on a number of issues, including whether, and under what circumstances, correction should require employer make-whole contributions rather than recouping overpayments from participants and beneficiaries and whether additional guidance was needed related to unusual circumstances in which full corrective payments to a plan should not be required. Treasury and IRS are continuing to review these comments and have indicated that they are in the process of developing further changes.

<sup>262</sup> Sec. 6.06(4) of Rev. Proc. 2019–19.



However, if the total amount of an overpayment to a participant or beneficiary is \$100 or less, the plan sponsor is not required to seek the return of the overpayment from the participant or beneficiary and the plan sponsor is not required to notify the participant or beneficiary that the overpayment is not eligible for favorable tax treatment accorded to distributions from the plan (and specifically, is not eligible for tax-free rollover).

*PBGC overpayment recoupment policy*

Private defined benefit plans are covered by the PBGC insurance program, under which the PBGC guarantees the payment of certain plan benefits, and plans are required to pay annual premiums to the PBGC.<sup>263</sup> Single-employer and multiple-employer plans, including CSEC plans, are subject to the same PBGC premium requirements, consisting of flat-rate, per participant premiums and variable rate premiums, based on the unfunded vested benefits under the plan. For 2021, flat-rate premiums are \$86 per participant, and variable rate premiums are \$46 for each \$1,000 of unfunded vested benefits, subject to a limit of \$582 multiplied by the number of plan participants.<sup>264</sup> For this purpose, unfunded vested benefits under a plan for a plan year is the excess (if any) of (1) the plan's funding target for the plan year, determined by taking into account only vested benefits and using specified interest rates, over (2) the fair market value of plan assets.

If at any time, the PBGC determines that net benefits paid to a participant in a PBGC-trusted plan exceed the total amount to which the participant or beneficiary is entitled up to that time under Title IV of ERISA, and the participant or beneficiary is, as of the plan termination date, entitled to receive future benefits, the PBGC will recoup the net overpayment by calculating a monthly account balance for each month ending after the termination date. The PBGC will subtract from the account balance the amount of overpayments made in that month. Only overpayments made on or after the latest of the proposed termination date, the termination date, or, if no notice of intent to terminate was issued, the date on which proceedings to terminate the plan are instituted by the PBGC.

The PBGC will recoup net overpayments of benefits by reducing the amount of each future benefit payment to which the participant or beneficiary is entitled by a fraction which is determined by dividing the amount of the net overpayment by the present value of the benefit payable with respect to the participant or beneficiary under Title IV of ERISA. The PBGC will reduce benefits to a participant or beneficiary by no more than the greater of (1) 10 percent per month; or (2) the amount of benefit per month in excess of the maximum guaranteed benefit payable under ERISA, determined without adjustment for age and benefit form. Before affecting a benefit reduction, the PBGC will notify the participant or beneficiary in writing of the amount of the net overpayment and of the amount of the reduced benefit. The PBGC may, in its discretion, decide not to recoup net overpayments that it determines to be de minimis.

<sup>263</sup> Title IV of ERISA.

<sup>264</sup> These premium rates have been increased several times by legislation since 2005 and are subject to automatic increases to reflect inflation (referred to as "indexing").

## REASONS FOR CHANGE

On occasion, individuals may mistakenly receive more money than they are entitled to under a retirement plan. These errors may persist over a number of years before being discovered, creating issues when plan fiduciaries later seek to recover these overpayments (plus interest), which may be substantial, from unsuspecting retirees. Even small overpayment amounts may create a hardship for a retiree living on a fixed income.

The Committee believes that allowing retirement plan fiduciaries the discretion to determine how to correct such inadvertent failures, for example, by making additional contributions to the plan rather than recouping such overpayments from the retiree, will alleviate undue burdens on unsuspecting retirees.

## EXPLANATION OF PROVISION

*Overpayments under the Code*

Under the provision, a plan will not fail to be treated as a qualified plan, section 403(a) annuity, section 403(b) tax sheltered annuity or a governmental plan<sup>265</sup> (and will not fail to be treated as satisfying the requirements of section 401 or 403) merely because (1) the plan fails to obtain payment from any participant, beneficiary, employer, plan sponsor, fiduciary, or other party on account of any inadvertent benefit overpayment made by the plan, or (2) the plan sponsor amends the plan to increase past or future benefit payments to affected participants and beneficiaries in order to adjust for prior inadvertent benefit overpayments. Notwithstanding the foregoing, the plan may instead reduce future benefit payments to the correct amount provided for under the terms of the plan or seek recovery from the person or persons responsible for the overpayment. If an employer decides not to recover an overpayment, nothing in this provision relieves that employer of any obligation imposed upon it to make contributions to a plan to satisfy the minimum funding requirements<sup>266</sup> or to prevent or restore an impermissible forfeiture.<sup>267</sup> In addition, the plan must observe any salary, compensation or benefit limitations imposed upon it,<sup>268</sup> and may enforce such limitations using any method approved by the Secretary for recouping benefits previously paid or allocations previously made in excess of such limitations.

The Secretary may issue regulations or other guidance of general applicability specifying how benefit overpayments and their recoupment or non-recoupment from a participant or beneficiary are to be taken into account for purposes of satisfying any requirement applicable to such a plan.

*Rollovers*

In the case of an inadvertent benefit overpayment from a plan which is transferred to an eligible retirement plan by or on behalf of a participant or beneficiary, (1) the portion of the overpayment with respect to which recoupment is not sought on behalf of the plan will be treated as having been paid in an eligible rollover dis-

<sup>265</sup> Under section 219(g)(5)(A)(i), (ii), (iii) or (iv).

<sup>266</sup> Under sections 412 and 430.

<sup>267</sup> In accordance with section 411.

<sup>268</sup> Secs. 401(a)(17) and 415.

tribution if the payment would have been an eligible rollover distribution but for being an overpayment, and (2) the portion of such overpayment with respect to which recoupment is sought on behalf of the plan will be permitted to be returned to the plan, and in such case, will be treated as an eligible rollover distribution transferred to such plan by the participant or beneficiary who received the overpayment (and the plans making and receiving such transfer will be treated as permitting such transfer).

In any case in which recoupment is sought on behalf of the plan, but is disputed by the participant or beneficiary who received the overpayment, where the recoupment has been transferred to another eligible retirement plan, the dispute will be subject to the claims and appeals procedures of the plan that made the overpayment, that plan will notify the plan receiving the rollover of the dispute, and the plan receiving the rollover will retain the overpayment on behalf of the participant or beneficiary (and will be entitled to treat the overpayment as plan assets) pending the outcome of the procedures.

#### *Overpayments under ERISA*

##### *Fiduciary duties*

Under the provision, in the case of an inadvertent benefit overpayment by any pension plan, the responsible plan fiduciary will not be considered to have failed to comply with its fiduciary responsibilities merely because such fiduciary determines, in the exercise of its fiduciary discretion, not to seek recovery of all or part of such overpayment from:

1. Any participant or beneficiary;
2. Any plan sponsor of, or contributing employer to, (a) an individual account plan, provided that the amount needed to prevent or restore any impermissible forfeiture from any participant's or beneficiary's account arising in connection with the overpayment is, separately from and independently of the overpayment, allocated to such account pursuant to the non-forfeiture requirements of ERISA<sup>269</sup> (for example, out of the plan's forfeiture account, additional employer contributions, or recoveries from those responsible for the overpayment), or (b) a defined benefit pension plan subject to the funding rules of ERISA,<sup>270</sup> unless the responsible plan fiduciary determines, in the exercise of its fiduciary discretion, that failure to recover all or a part of the overpayment faster than required under such funding rules would materially affect the plan's ability to pay benefits due to other participants and beneficiaries; or
3. Any fiduciary of the plan, other than a fiduciary (including a plan sponsor or contributing employer acting in a fiduciary capacity) whose breach of its fiduciary duties resulted in such overpayment, provided that if the plan has established prudent procedures to prevent and minimize overpayment of benefits and the relevant plan fiduciaries have followed such procedures, an inadvertent benefit overpayment will not give rise to a breach of fiduciary duty. Notwithstanding the foregoing, the responsible plan fiduciary may instead reduce future benefit

<sup>269</sup> Sec. 203 of ERISA.

<sup>270</sup> In part 3 of subtitle B of ERISA.

payments to the correct amount provided for under the terms of the plan or seek recovery from the person or persons responsible for the overpayment.

If an employer decides not to recover an overpayment, nothing in this provision relieves that employer of any obligation imposed upon it to make contributions to a plan to satisfy the minimum funding requirements<sup>271</sup> or to prevent or restore an impermissible forfeiture.<sup>272</sup>

*Conditions imposed upon recoupment*

If the responsible plan fiduciary, in the exercise of its fiduciary discretion, decides to seek recoupment from a participant or beneficiary of all or part of an inadvertent benefit overpayment made by the plan to such participant or beneficiary, it may do so, subject to the following conditions:

1. No interest or other additional amounts (such as collection costs or fees) are sought on overpaid accounts;
2. If the plan seeks to recoup past overpayments of a non-decreasing periodic benefit by reducing future benefit payments:
  - The reduction ceases after the plan has recovered the full dollar amount of the overpayment;
  - The amount recouped each calendar year does not exceed 10 percent of the full dollar amount of the overpayment; and
  - Future benefit payments are not reduced to below 90 percent of the periodic amount otherwise payable under the terms of the plan.
3. Alternatively, if the plan seeks to recoup past overpayments of a non-decreasing periodic benefit through one or more installment payments, the sum of such installment payments in any calendar year does not exceed the sum of the reductions that would be permitted in such year under the preceding sentence;
4. If the plan seeks to recoup past overpayments of a benefit other than a non-decreasing periodic benefit, the plan satisfies requirements developed by the Secretary;
5. Efforts to recoup overpayments are not made through a collection agency or similar third party and such efforts are not accompanied by threats of litigation, unless the responsible plan fiduciary reasonably believes it could prevail in a civil action brought in Federal or State court to recoup the overpayments;
6. Recoupment of past overpayments to a participant is not sought from any beneficiary of the participant, including a spouse, surviving spouse, former spouse or other beneficiary;
7. Recoupment may not be sought if the first overpayment occurred more than three years before the participant or beneficiary is first notified in writing of the error;
8. A participant or beneficiary from whom recoupment is sought is entitled to contest all or part of the recoupment pursuant to the plan's claims and appeals procedures; and

<sup>271</sup> Under part 3 of Subtitle B of Title I of ERISA.

<sup>272</sup> In accordance with section 203 of ERISA.

9. In determining the amount of recoupment to seek, the responsible plan fiduciary may take into account the hardship that recoupment likely would impose on the participant or beneficiary.

Conditions (1) through (6) do not apply to protect a participant or beneficiary who is culpable. For purposes of this rule, a participant or beneficiary is culpable if the individual bears responsibility for the overpayment (such as through misrepresentations or omissions that led to the overpayment), or if the individual knew, or had good reason to know under the circumstances, that the benefit payment or payments were materially in excess of the correct amount. Notwithstanding the preceding sentence, an individual is not culpable merely because the individual believed the benefit payment or payments were or might be in excess of the correct amount, if the individual raised that question with an authorized plan representative and was told the payment or payments were not in excess of the correct amount. With respect to a culpable participant or beneficiary, efforts to recoup overpayments must not be made through threats of litigation, unless a lawyer for the plan could make the representations required under Rule 11 of the Federal Rules of Civil Procedure if the litigation were brought in Federal court.

#### EFFECTIVE DATE

The provision applies on the date of enactment.

Plans, fiduciaries, employers, and plan sponsors are entitled to rely on (1) a good faith interpretation of then existing administrative guidance for inadvertent benefit overpayment recoupments and recoveries that commenced before the date of enactment and (2) determinations made before the date of enactment by the responsible plan fiduciary, in the exercise of its fiduciary discretion, not to seek recoupment or recovery of all or part of an inadvertent benefit overpayment.

In the case of a benefit overpayment that occurred prior to the date of enactment, any installment payments by the participant or beneficiary to the plan or any reduction in periodic benefit payments to the participant or beneficiary, which were made in recoupment of such overpayment and which commenced prior to such date, may continue after such date. Nothing in this subsection relieves a fiduciary from responsibility for an overpayment that resulted from a breach of its fiduciary duties.

## 2. REDUCTION IN EXCISE TAX ON CERTAIN ACCUMULATIONS IN QUALIFIED RETIREMENT PLANS (SEC. 302 OF THE BILL AND SEC. 4974 OF THE CODE)

#### PRESENT LAW

Background on required minimum distributions under qualified retirement plans may be found in section I.5 of this document.

The Code imposes an excise tax on an individual if the amount distributed to an individual during a taxable year is less than the required minimum distribution under the plan for that year.<sup>273</sup> The excise tax is equal to 50 percent of the shortfall (that is, 50

<sup>273</sup> Sec. 4974.

percent of the amount by which the required minimum distribution exceeds the actual distribution). However, the Secretary may waive the tax if the individual establishes that the shortfall was due to reasonable error and reasonable steps are being taken to remedy the error.

#### REASONS FOR CHANGE

The Committee recognizes that in many cases, failures to take a required minimum distribution are inadvertent. The Committee thus wishes to reduce the overall excise tax that applies to such failures, in particular in the case of an individual who discovers such a failure and takes steps to correct it.

#### EXPLANATION OF PROVISION

The provision reduces the excise tax that generally applies to the failure to take required minimum distributions from 50 percent of the shortfall to 25 percent.

In addition, the provision further reduces the excise tax to 10 percent in the case of an individual who, during the correction window, corrects the shortfall and submits a return reflecting the excise tax. The correction window is defined as the time period beginning on the date the excise tax is imposed on the shortfall and ending on the earlier of (1) the date the Secretary initiates an audit with respect to the shortfall or otherwise demands payment, and (2) the last day of the second taxable year that begins after the end of the taxable year in which the excise tax is imposed.

#### EFFECTIVE DATE

The provision applies to taxable years beginning after December 31, 2021.

### 3. PERFORMANCE BENCHMARKS FOR ASSET ALLOCATION FUNDS (SEC. 303 OF THE BILL)

#### PRESENT LAW

##### *Fiduciary rules under ERISA*

ERISA contains general fiduciary duty standards that apply to all fiduciary actions, including investment decisions. ERISA requires that a plan fiduciary generally discharge its duties solely in the interests of participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. With respect to plan assets, ERISA requires a fiduciary to diversify the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

##### *Special rule for participant control of assets*

ERISA provides a special rule in the case of a defined contribution plan that permits participants to exercise control over the assets in their individual accounts. Under the special rule, if a participant exercises control over the assets in his or her account (as determined under regulations), the participant is not deemed to be a

fiduciary by reason of such exercise, 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 exercise of control.

Regulations issued by the DOL describe the requirements that must be met in order for a participant to be treated as exercising control over the assets in his or her account. With respect to investment options, the regulations provide, in part, that:

- The plan must provide at least three different investment options, each of which is diversified and has materially different risk and return characteristics;
- The plan must allow participants to give investment instructions with respect to each investment option under the plan with a frequency that is appropriate in light of the reasonably expected market volatility of the investment option (the "general volatility rule");
- At a minimum, participants must be allowed to give investment instructions at least every three months with respect to at least three of the investment options, and those investment options must constitute a broad range of options (the "three-month minimum rule");
- Participants must be provided with detailed information about the investment options, information regarding fees, investment instructions and limitations, and copies of financial data and prospectuses; and
- Specific requirements must be satisfied with respect to investments in employer stock to ensure that employees' buying, selling, and voting decisions are confidential and free from employer influence.

Under the regulations,<sup>274</sup> the plan administrator (or person designated by the plan administrator to act on its behalf), based on the latest information available, must furnish to each participant or beneficiary on or before the date on which he or she can first direct his or her investments and at least annually thereafter, the following information (as well as certain other information), with respect to each designated investment alternative offered under the plan:

- *Identifying information* including the name of each designated investment alternative and the type or category of the investment (e.g., money market fund, balanced fund (stocks and bonds), large-cap stock fund, or employer securities);
- *Performance data* including:
  - For designated investment alternatives with respect to which the return is not fixed, the average annual total return of the investment for 1, 5, and 10 calendar year periods (or for the life of the alternative, if shorter) ending on the date of the most recently completed calendar year; as well as a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future; and
  - For designated investment alternatives with respect to which the return is fixed or stated for the term of the investment, both the fixed or stated annual rate of return and the term of the investment. If, with respect to such a

<sup>274</sup> 29 C.F.R. sec. 2550.404a-5(d).

designated investment alternative, the issuer reserves the right to adjust the fixed or stated rate of return prospectively during the term of the contract or agreement, the current rate of return, the minimum rate guaranteed under the contract, if any, and a statement advising participants and beneficiaries that the issuer may adjust the rate of return prospectively and how to obtain (e.g., telephone or website) the most recent rate of return required under this section.

- *Benchmarks.* For designated investment alternatives with respect to which the return is not fixed, the name and returns of an appropriate broad-based securities market index over the 1, 5, and 10 calendar year periods (or for the life of the alternative, if shorter) comparable to the performance data periods provided for designated investment alternatives with respect to which the return is not fixed, and which is not administered by an affiliate of the investment issuer, its investment adviser, or a principal underwriter, unless the index is widely recognized and used.

If these and the other requirements under the regulations are met, a plan fiduciary may be liable for the investment options made available under the plan, but not for the specific investment decisions made by participants. However, the regulations currently do not provide guidance as to a designated investment alternative which contains a mix of asset classes.

#### REASONS FOR CHANGE

As noted, DOL regulations require certain disclosures to participants for each designated investment alternative offered under a plan including a benchmark comparison of the historical performance of each alternative compared to an appropriate broad-based securities market index. Thus, for example, if the plan offers an equity fund, the plan will show participants the 1, 5 and 10 year returns of that fund compared to the returns on an appropriate index such as the S&P 500, which represents an index in the same asset class. However, the rules do not adequately address the benchmark to be used for increasingly popular investments, like target date funds which include a mix of asset classes rather than a single asset class.

The Committee believes that a modification of the regulations to permit a designated investment alternative that uses a mix of asset classes, such as a target date fund, to be benchmarked against a blend of broad-based securities market indices, provided that certain conditions are satisfied, will facilitate the ability of participants to compare and decide between investment alternatives, including those that use a mix of asset classes, offered under the plan.

#### EXPLANATION OF PROVISION

Not later than six months after the date of enactment, the provision requires that the Secretary of Labor (or the Secretary's delegate) modify the regulations on fiduciary duties<sup>275</sup> to provide that, in the case of a designated investment alternative which contains

<sup>275</sup> Under section 404 of ERISA.



a mix of asset classes, a plan administrator may, but is not required to, use a benchmark which is a blend of different broad-based securities market indices if:

1. The blend is reasonably representative of the asset class holdings of the designated investment alternative;
2. For purposes of determining the blend's returns for 1, 5, and 10 calendar-year periods (or for the life of the alternative, if shorter), the blend is modified at least once per year to reflect changes in the asset class holdings of the designated investment alternative;
3. The blend is furnished to participants and beneficiaries in a manner that is reasonably designed to be understandable and helpful; and
4. Each securities market index which is used for an associated asset class would separately satisfy the requirements of such regulations for such asset class.

Not later than December 31, 2022, the Secretary of Labor (or the Secretary's delegate) must deliver a report to the Committees on Ways and Means and Education and Labor of the House of Representatives and the Committees on Finance and Health, Education, Labor, and Pensions of the U.S. Senate regarding the effectiveness of the benchmarking requirements under the DOL regulations.<sup>276</sup>

#### EFFECTIVE DATE

The provision is effective on the date of enactment.

#### 4. REVIEW AND REPORT TO THE CONGRESS RELATING TO REPORTING AND DISCLOSURE REQUIREMENTS (SEC. 304 OF THE BILL)

##### PRESENT LAW

Under the Code and ERISA, plans must satisfy requirements relating to reporting and disclosure of plan information. These requirements include information required to be reported to the IRS, the DOL, and the PBGC, as well as to participants and beneficiaries.<sup>277</sup>

For example, plan administrators generally must file an annual return with the IRS, an annual report with the DOL, and certain information annually with the PBGC. Form 5500, which consists of a primary form and various schedules, includes the information required to be filed with all three agencies. The plan administrator satisfies the reporting requirement with respect to each agency by filing the Form 5500 with the DOL. Other information required to be reported to the IRS includes plan distributions, excise taxes imposed on the plan, and separated participants with deferred vested benefits.<sup>278</sup> Defined benefit plans must report certain information to the PBGC, including information relating funding, terminations, and reportable events.

With respect to participants and beneficiaries, the reporting and disclosure requirements include the provision of a summary plan

<sup>276</sup> 29 C.F.R. sec. 2550.404a-5.

<sup>277</sup> In certain cases, plan information also must be provided to other interested parties such as unions (in the case of multiemployer plans).

<sup>278</sup> This information is reported on the Form 1099-R (plan distributions), Form 5330 (excise tax), and Form 8955-SSA (separated participants with deferred vested benefits).

description, which describes the plan's eligibility requirements for participation and benefits, vesting provisions, procedures for claiming benefits under the plan, and other information.<sup>279</sup> Plans must also furnish participants and beneficiaries with periodic benefit statements that indicate the total benefits accrued and the non-forfeitable benefits (or the earliest date on which benefits become nonforfeitable).<sup>280</sup> Certain information is required to be provided upon certain events, such as termination of employment,<sup>281</sup> plan termination,<sup>282</sup> reduction in future benefit accruals,<sup>283</sup> or a plan distribution that is eligible for rollover treatment.<sup>284</sup> Certain requirements also apply depending on the type of plan. For example, section 401(k) plans and section 403(b) plans must advise employees of opportunities to make or change elective deferrals under the plan,<sup>285</sup> and section 401(k) safe harbor plans and plans with automatic enrollment features have special notice requirements.<sup>286</sup> Certain notices must be provided to participants and beneficiaries in individual account plans who are permitted to exercise control over account assets.<sup>287</sup> In the case of defined benefit plans, notices relating to plan funding, such as an annual funding notice, must be furnished to participants and beneficiaries.<sup>288</sup>

#### REASONS FOR CHANGE

The Committee wishes to consolidate, simplify, standardize, and improve the reporting and disclosure requirements applicable to retirement plans. Thus, the Committee believes that it is appropriate to gather information and recommendations on reporting and disclosure requirements from Treasury, the DOL, and the PBGC.

#### EXPLANATION OF PROVISION

The provision requires the Secretary, the Secretary of Labor, and the PBGC to review the reporting and disclosure requirements that apply to pension plans<sup>289</sup> under Title I of ERISA and that apply to qualified retirement plans<sup>290</sup> under the Code. Such review must take place as soon as practicable after the date of enactment, and, no later than 18 months after such date, the agencies must report on the effectiveness of the reporting and disclosure requirements and make certain recommendations, as described below, to the appropriate committees of the Congress. The agencies must conduct appropriate surveys and data collection to obtain any needed information.

The report must include the following:

<sup>279</sup> ERISA sec. 102; 29 C.F.R. sec. 2520.102-2 and -3. Plans must also provide summaries of material modifications to the plan. ERISA sec. 102.

<sup>280</sup> ERISA sec. 105.

<sup>281</sup> ERISA sec. 209.

<sup>282</sup> 29 C.F.R. sec. 2550.404a-3 (relating to termination of individual account plans); ERISA sec. 4041(a)(2) (relating to termination of single-employer defined benefits plans). Single employer defined benefit plans also must report plan termination to the PBGC.

<sup>283</sup> Sec. 4980F; ERISA sec. 204(h).

<sup>284</sup> Sec. 402(f).

<sup>285</sup> Treas. Reg. sec. 1.401(k)-1(e)(2)(ii); Treas. Reg. sec. 1.403(b)-5(b)(2). This requirement also applies to SIMPLE plans. Sec. 408(p)(5)(C).

<sup>286</sup> Sec. 401(k)(12)(D); sec. 401(k)(13)(E); sec. 414(w)(4).

<sup>287</sup> ERISA sec. 404(c).

<sup>288</sup> ERISA sec. 101. Certain notices related to plan funding also must be provided to the PBGC.

<sup>289</sup> ERISA sec. 3(2).

<sup>290</sup> For this purpose, qualified retirement plans include plans qualified under section 401(a), annuity plans described in section 403(a), and section 403(b) plans. Sec. 4974(c)(1), (2), and (3).

- Recommendations as may be appropriate to consolidate, simplify, standardize, and improve such requirements so as to simplify reporting for such plans and ensure that plans can simply furnish and participants and beneficiaries timely receive and better understand the information they need to monitor their plans, plan for retirement, and obtain the benefits they have earned;
- An assessment of the extent to which retirement plans are retaining disclosures, work records, and plan documents that are needed to ensure accurate calculation of future benefits; and
- To assess the effectiveness of the applicable reporting and disclosure requirements, an analysis, based on plan data, of how participants and beneficiaries are providing preferred contact information, the methods by which plan sponsors and plans are furnishing disclosures, and the rate at which participants and beneficiaries (grouped by key demographics) are receiving, accessing, and retaining disclosures.

## EFFECTIVE DATE

The provision is effective on date of enactment.

#### 5. ELIMINATING UNNECESSARY PLAN REQUIREMENTS RELATED TO UNENROLLED PARTICIPANTS (SEC. 305 OF THE BILL, SEC. 414 OF THE CODE, AND NEW SEC. 111 OF ERISA)

## PRESENT LAW

Background on the reporting and disclosure requirements that apply to plans under the Code and ERISA may be found in section III.4 of this document.

## REASONS FOR CHANGE

Under present law, employees eligible to participate in a retirement plan are required to receive a broad array of notices that are intended to inform them of their various options and rights under the plan. In the case of eligible employees who have not elected to participate in the plan (“unenrolled participants”), these notices, such as notices regarding the different investment options available under the plan, are generally unnecessary, and can even have adverse effects on savings and coverage. Thus, the Committee believes it is appropriate to cease to require defined contribution plans to provide many of these notices to unenrolled participants. However, to further encourage participation of unenrolled participants, such plans would still be required to send an annual reminder notice relating to the participant’s eligibility to participate in the plan and any otherwise required document requested by the participant.

## EXPLANATION OF PROVISION

The provision generally exempts defined contribution plans from requirements under the Code and ERISA to provide disclosures, notices, and other plan documents to unenrolled participants, provided that the unenrolled participant receives: (1) an annual reminder notice of the participant’s eligibility to participate in the

plan and any applicable election deadlines, and (2) any document the participant requests that the participant would be entitled to if not for this provision.

Under the provision, the annual reminder notice must be furnished in connection with the plan's annual open season election period (or, if there is no such period, within a reasonable period prior to the beginning of each plan year), and must notify the participant of (1) the participant's eligibility to participate in the plan, and (2) the key benefits under the plan and key rights and features under the plan affecting such benefits. The annual reminder notice must be provided in accordance with the DOL regulations relating to disclosure<sup>291</sup> and may be provided in paper or, if the participant consents, electronically. The notice must provide the required information in a prominent manner calculated to be understood by the average participant.

The provision defines "unenrolled participant" as an employee who (1) is eligible to participate in a defined contribution plan; (2) has received all required notices, disclosures, and other plan documents, including the summary plan description, required to be furnished under the Code or ERISA in connection with the participant's initial eligibility to participate in the plan; (3) is not participating the plan; and (4) does not have a balance in the plan. For this purpose, any eligibility to participate in the plan following any period of ineligibility is treated as initial eligibility.

#### EFFECTIVE DATE

The provision is effective for plan years beginning after December 31, 2021.

6. RETIREMENT SAVINGS LOST AND FOUND (SEC. 306 OF THE BILL, SECS. 401(a)(31)(B), 402, 408, 411, 6011, 6057, AND 6652 OF THE CODE, AND SECS. 404, 4005, AND NEW SEC. 4051 OF ERISA)

#### PRESENT LAW

##### *Pension Benefit Guaranty Corporation Missing Participants Program*

When a defined benefit pension plan (maintained by a single employer and subject to the plan termination insurance program under Title IV of ERISA) terminates under a standard termination, the plan administrator generally must purchase annuity contracts from a private insurer to provide the benefits to which participants are entitled and distribute the annuity contracts to the participants.

If the plan administrator of a terminating single employer plan cannot locate a participant after a diligent search (has a "missing participant"), the plan administrator may satisfy the distribution requirement only by purchasing an annuity from an insurer or transferring the participant's designated benefit to the PBGC. The PBGC holds the benefit of the missing participant as trustee until the PBGC locates the missing participant and distributes the benefit.<sup>292</sup>

<sup>291</sup> 29 C.F.R. sec. 2520.104(b)-1 (or any successor regulation).

<sup>292</sup> Sec. 4041(b)(3)(A); sec. 4050 of ERISA.

Pursuant to the Pension Protection Act of 2006,<sup>293</sup> the PBGC prescribed rules for terminating multiemployer plans similar to the missing participant rules applicable to terminating single employer plans subject to Title IV of ERISA. In addition, plan administrators of certain types of plans not otherwise subject to the PBGC termination insurance program are permitted, but not required, to elect to transfer missing participants' benefits to the PBGC upon plan termination. Specifically, the provision extends the missing participants program (in accordance with regulations) to defined contribution plans,<sup>294</sup> defined benefit pension plans that have no more than 25 active participants and are maintained by professional service employers, and the portion of defined benefit pension plans that provide benefits based upon the separate accounts of participants and therefore are treated as defined contribution plans under ERISA.

On December 22, 2017, the PBGC established the PBGC Defined Contribution Missing Participants Program ("Missing Participants Program") to hold retirement benefits for missing participants and beneficiaries in most terminated defined contribution plans and to help those participants and beneficiaries find and receive those benefits.<sup>295</sup>

#### *Department of Labor*

A fiduciary safe harbor<sup>296</sup> may apply with respect to distributions from terminated individual account plans<sup>297</sup> and abandoned plans<sup>298</sup> on behalf of participants and beneficiaries who fail to make an election regarding a form of benefit distribution, including "missing participants." The safe harbor generally requires that distributions be rolled over to an individual retirement account or annuity (IRA), although in limited circumstances fiduciaries may make distributions to certain bank accounts or to a state unclaimed property fund. If the conditions of the safe harbor are met, a fiduciary (including a Qualified Termination Administrator ("QTA") in the case of an abandoned plan) is deemed to have satisfied the requirements of section 404(a) of ERISA with respect to distributing benefits, selecting a transferee entity, and investing funds in connection with the distribution.

The DOL consulted with the PBGC during the PBGC's development of its Missing Participants Program. As noted in the preamble to the final rule adopting the Missing Participants Program, the DOL may revise its fiduciary safe harbor regulation so that transfers to the PBGC by terminating individual account plans would be eligible for relief under the safe harbor.

<sup>293</sup> Pub. L. No. 109-280, August 17, 2006.

<sup>294</sup> The Missing Participants program for Defined Contribution plans covers common types of defined contribution pension plans; specifically section 401(k) plans, profit sharing plans, money purchase plans, target benefit plans, employee stock ownership plans, stock bonus plans, and section 403(b)(7) plans subject to Title I of ERISA. Some examples of plans not covered are governmental plans, church plans, and plans that cannot pay benefits to the PBGC in cash. See 29 C.F.R. sec. 4050.201.

<sup>295</sup> 29 C.F.R. sec. 4050.201-207.1.

<sup>296</sup> 29 C.F.R. sec. 2550.404a-3.

<sup>297</sup> 297 Sec. 3(34) of ERISA.

<sup>298</sup> 298 As described in 29 C.F.R. sec. 2578.1.

On January 12, 2021, the DOL issued Field Assistance Bulletin 2021-01<sup>299</sup> in which it announced that pending further guidance, the DOL will not pursue fiduciary violations against either responsible plan fiduciaries of terminating defined contribution plans or QTAs of abandoned plans<sup>300</sup> in connection with the transfer of a missing or non-responsive participant's or beneficiary's account balance to the PBGC in accordance with the PBGC's missing participant regulations (rather than to an IRA, certain bank accounts, or to a state unclaimed property fund),<sup>301</sup> if the plan fiduciary or QTA complies with the guidance in the Bulletin and has acted in accordance with a good faith, reasonable interpretation of the fiduciary rules under ERISA<sup>302</sup> with respect to matters not specifically addressed in the guidance.

#### *Mandatory rollovers*

If a qualified retirement plan participant ceases to be employed by the employer that maintains the plan, the plan may distribute the participant's nonforfeitable accrued benefit without the consent of the participant and, if applicable, the participant's spouse, if the present value of the benefit does not exceed \$5,000. If such an involuntary distribution occurs and the participant subsequently returns to employment covered by the plan, then service taken into account in computing benefits payable under the plan after the return need not include service with respect to which a benefit was involuntarily distributed unless the employee repays the benefit.

Generally, a participant may roll over an involuntary distribution from a qualified plan to an IRA or to another qualified plan. Before making a distribution that is eligible for rollover, a plan administrator must provide the participant with a written explanation of the ability to have the distribution rolled over directly to an IRA or another qualified plan and the related tax consequences.

A direct rollover is the default option for involuntary distributions that exceed \$1,000 and that are eligible rollover distributions from qualified retirement plans. The distribution must be rolled over automatically to a designated IRA, unless the participant affirmatively elects to have the distribution transferred to a different IRA or a qualified plan or to receive it directly. The written explanation provided by the plan administrator is required to explain that an automatic direct rollover will be made unless the participant elects otherwise. The plan administrator is also required to notify the participant in writing (as part of the general written explanation or separately) that the distribution may be transferred without cost to another IRA.

Under the fiduciary rules of ERISA, in the case of an automatic direct rollover, the participant is treated as exercising control over the assets in the IRA upon the earlier of: (1) the rollover of any portion of the assets to another IRA, or (2) one year after the automatic rollover.

<sup>299</sup> Field Assistance Bulletin 2021-01 can be found at: <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2021-01>.

<sup>300</sup> As described in 29 C.F.R. sec. 2578.1.

<sup>301</sup> As specified in 29 C.F.R. sec. 2550.404a-3.

<sup>302</sup> Sec. 404 of ERISA.

### *Lost and Found*

Under present law, there is not a “Lost and Found” database to collect information on benefits owed to missing, lost or non-responsive participants and beneficiaries in tax-qualified retirement plans (other than terminated plans) and to assist such plan participants and beneficiaries in locating those benefits.

#### REASONS FOR CHANGE

Every year, thousands of people approach retirement, but may be unaware of, or are unable to locate and recover, benefits that they have earned (frequently with employers from whom they have separated service) for a number of reasons, including because that employer moved, changed its name, or merged with a different company. Similarly, every year there are employers around the country ready to pay these benefits to retirees, but they cannot locate those individuals.

The Committee believes that the creation of a national, online, lost and found dedicated to matching these individuals with their benefits would facilitate the recovery of such benefits by these individuals.

#### EXPLANATION OF PROVISION

Establishment of the Lost and Found Under the provision, not later than three years after the date of enactment, the Secretary of Labor, the Secretary of the Treasury, and the Secretary of Commerce, in cooperation, will establish an online searchable database to be managed by the PBGC,<sup>303</sup> to be known as the Retirement Savings Lost and Found (the “Lost and Found”), containing information on plans, subject to the vesting standards under ERISA,<sup>304</sup> as well as certain additional information related to the location of certain unclaimed vested benefits of missing, lost and non-responsive participants and beneficiaries in such plans.<sup>305</sup> The Lost and Found database will contain information: (1) provided by plan administrators that are required to periodically report to the Office of the Lost or Found each plan year;<sup>306</sup> (2) provided by plan administrators that transfer certain small benefits of non-responsive participants and beneficiaries to the Lost and Found; and (3) other relevant information obtained by the PBGC.

The collection of this information in the Lost and Found will allow the PBGC to assist participants and beneficiaries by providing contact information<sup>307</sup> on record for the plan administrator of any plan in which the participant or beneficiary may have an unclaimed benefit sufficient to allow that participant or beneficiary to locate the individual’s plan in order to recover any benefit owing to that individual under the plan. With respect to those plans which have transferred such benefits to the PBGC, the PBGC will

<sup>303</sup> The Office of the Retirement Savings Lost and Found (the “Office of the Lost and Found”) will be established within the PBGC to maintain the Retirement Savings Lost and Found.

<sup>304</sup> Sec. 203 of ERISA.

<sup>305</sup> Tax-qualified defined benefit and defined contribution plans (as set forth in 29 C.F.R. sec. 4050.201) that are subject to the vesting standards contained in section 203 of ERISA.

<sup>306</sup> In accordance with section 4051 of ERISA, as added by this provision. See also, discussion of *Annual Reporting Requirements* below.

<sup>307</sup> Such individuals will be provided only with the ability to view contact information for the plan administrator of any plan with respect to which the individual is or was a participant or beneficiary.

also be able to pay those benefits to such participants and beneficiaries. Because the PBGC would be provided additional and updated information from plan administrators through reporting requirements, the PBGC will also be able to make any necessary changes to the database reflecting updates to contact information on record for the plan administrator based on any changes to such plans including those arising from mergers or consolidations of the plan with any other plan, division of the plan into two or more plans, bankruptcy, termination, change in name of the plan, change in name or address of the plan administrator, transfers of such accounts to IRAs, purchase of annuities, or other causes.

*Safeguarding participant privacy and security*

In establishing the Lost and Found, the PBGC, in consultation with the Secretary of Labor, the Secretary of Treasury, and the Secretary of Commerce must take all necessary and proper precautions to ensure that individuals' plan information maintained by the Lost and Found is protected and that persons other than the individual cannot fraudulently claim the benefits to which any individual is entitled, and to allow any individual to opt out of inclusion in the Lost and Found at the election of the individual.

*Establishment and responsibilities of the Office of the Retirement Savings Lost and Found*

Not later than two years after the date of the enactment of this Act, the Secretary of Labor, the Secretary of Treasury, and the Secretary of Commerce must establish, within the PBGC, an Office of the Retirement Savings Lost and Found ("Office of the Lost and Found").

The "Office of the Lost and Found" will (1) maintain the Lost and Found database; (2) facilitate the transfer of small benefits of non-responsive participants and beneficiaries<sup>308</sup> to the Office of the Lost and Found by (a) collecting information, applicable fees, and benefits related to such individuals from the applicable plan; and (b) investing such benefits; (3) searching for and paying out benefits to those participants and beneficiaries for whom benefits have been transferred to the Office of the Lost and Found; and (4) performing an annual audit of plan information contained in the Lost and Found and ensuring that such information is current and accurate.

*Required transfer of small benefits of certain non-responsive participants by plans to the Office of the Lost and Found*

Under the provision, the administrator of a plan that is not terminated<sup>309</sup> must transfer a non-responsive participant's<sup>310</sup> benefit to the Office of the Lost and Found<sup>311</sup> if the nonforfeitable accrued benefit<sup>312</sup> is no greater than \$1,000.

<sup>308</sup> In defined benefit and defined contribution plans subject to the vesting requirements of section 203 of ERISA.

<sup>309</sup> And to which section 401(a)(31)(B) of the Code applies.

<sup>310</sup> For this provision, a non-responsive participant means a participant or beneficiary of a plan who is entitled to a benefit subject to a mandatory transfer under section 401(a)(31)(B)(iii) and for whom the plan has satisfied the conditions in section 401(a)(31)(B)(iv).

<sup>311</sup> Under sec. 401(a)(31)(B) and sec. 4051(b) of ERISA.

<sup>312</sup> Under sec. 401(a)(31)(B) and sec. 4051(b) of ERISA.



Upon making a transfer to the Office of the Lost and Found of small benefits of non-responsive participants, the plan administrator must provide such information and certifications as the Office of the Lost and Found specifies including with respect to the transferred amount of the benefit and the identification of the non-responsive participant. In the event that, after such a transfer, the relevant non-responsive participant contacts the plan administrator or the plan administrator discovers information that may assist the Office of the Lost and Found in locating the non-responsive participant, the plan administrator must notify and provide such information to the Office of the Lost and Found as such Office specifies.

A transfer of such benefits to the Office of the Lost and Found under this provision will be treated as a transfer to an individual retirement plan. Such benefits will be held in a new ninth fund<sup>313</sup> established for the payment of such benefits<sup>314</sup> which fund will also be credited with earnings on investments in the fund or on assets credited to the fund. Whenever the PBGC determines that the moneys of any fund are in excess of current needs, it may request the investment of such amounts as it determines advisable by the Secretary in obligations issued or guaranteed by the United States.

Following a transfer of such benefits to the Office of the Lost and Found, the Office of the Lost and Found will periodically, and upon receiving information from the plan administrator as described above, conduct a search for the non-responsive participant for whom the Office of the Lost and Found has received a transfer. Upon location of such a non-responsive participant who claims benefits, the Office of the Lost and Found will pay the non-responsive participant the amount transferred to it in a single sum (plus an amount reflecting the return on the investment attributable to such amount). The PBGC has the regulatory authority to prescribe regulations as are necessary to carry out the transfer of small benefits including rules relating to the amount payable to the Office of the Lost and Found by the plan administrator and the amount to be paid to the non-responsive participant or beneficiary by the Office of the Lost and Found when that individual is located.

#### *Annual reporting requirements*

Under the provision, within such period after the end of each plan year beginning after the second December 31 occurring after the date of enactment, as the Office of the Lost and Found may prescribe, the plan administrator of a plan to which the vesting standards of ERISA apply<sup>315</sup> will submit the following information, and such other information as the Office of the Lost and Found may require:<sup>316</sup>

- The name of the plan;
- The name and address of the plan administrator;
- Any change in the name of the plan;
- Any change in the name or address of the plan administrator;

<sup>313</sup>For amounts transferred to the Lost and Found under section 4051(b)(1)(A).

<sup>314</sup>Pursuant to section 4005(j) as set forth in this provision.

<sup>315</sup>Sec. 203 of ERISA.

<sup>316</sup>Because this reporting begins approximately two years after the date of enactment, unless the Office of the Lost and Found prescribes otherwise, this information will only be provided to the Office of the Lost and Found prospectively.

- The name and taxpayer identifying number of each participant or former participant in the plan:
  - Who, during the current plan year or any previous plan year, was reported to IRS<sup>317</sup> as a separated participant with a deferred vested benefit that had not been paid as of the end of the previous plan year, and with respect to whom such benefit was fully paid during the plan year;
  - With respect to whom any amount was distributed as a mandatory distribution during the plan year; or
  - With respect to whom a deferred annuity contract was distributed during the plan year;
- The termination of the plan;
- The merger or consolidation of the plan with any other plan or its division into two or more plans;
- In the case of a participant or former participant whose benefit was distributed as a mandatory distribution during the plan year, the name and address of the designated trustee or issuer and the account number of the individual retirement plan to which the amount was distributed; and
- In the case of a participant or former participant to whom a deferred annuity contract was distributed during the plan year, the name and address of the issuer of such annuity contract and the contract or certificate number.

#### *Guidance*

The Office of the Lost and Found will prescribe such regulations as are necessary to carry out the purposes of this provision, including rules relating to the amount payable to the Office of the Lost and Found and the amount to be paid by the Office of the Lost and Found.

#### *Option to contract*

Not later than two years after the date of enactment, the PBGC must conduct an analysis of the cost effectiveness of contracting with a third party to carry out the responsibilities of the Office of the Lost and Found. If the PBGC determines that it would be more cost effective to do so than to carry out such responsibilities within the Office of the Lost and Found, the PBGC may enter into such contracts as merited by the analysis. The PBGC must report on the results of its analysis to the Committees on Finance and Health, Education, Labor, and Pensions of the Senate and the Committees on Ways and Means and Education and Labor of the House of Representatives.

#### *Authorization of appropriations*

There are authorized to be appropriated such sums as may be necessary to carry out the purposes of the Lost and Found.

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<sup>317</sup> Under sec. 6057.

*Mandatory transfers of rollover distributions and coordination with distribution requirements*

*Investment options*

The provision amends ERISA<sup>318</sup> to provide that in the case of a pension plan which makes a transfer to an IRA under the mandatory distribution rules under the Code,<sup>319</sup> the Secretary of Labor may provide, in guidance or regulations issued after the enactment of this provision, that such transfer may be made to:

- A target date or life cycle fund held under such account;
- An investment product held under such account designed to preserve principal and provide a reasonable rate of return;<sup>320</sup>
- The Office of the Lost and Found in accordance with the mandatory distribution rules in the Code<sup>321</sup> and the rules in this provision for the transfer of certain benefits to the Office of the Lost and Found; or
- Such other option as the Secretary of Labor may so provide.

Not later than 270 days after the date of enactment, the Secretary of Labor must promulgate regulations identifying the target date or life cycle funds, or specifying the characteristics of such a fund, that will be deemed to meet the applicable requirements of ERISA.<sup>322</sup>

*Expansion of cap*

The provision increases the cap on mandatory distributions from \$5,000 to \$6,000.<sup>323</sup>

*Distribution of larger amounts only to IRAs, not to the Office of the Lost and Found*

Under the provision, the Office of the Lost and Found is not treated as a trustee eligible to receive mandatory distributions<sup>324</sup> that are in excess of \$1,000 but not in excess of \$6,000. In other words, the PBGC may only accept transfers of nonforfeitable accrued benefits in the amount of \$1,000 or less.

*Mandatory distributions of lesser amounts for non-responsive individuals to the Office of the Lost and Found*

Under the provision, in the case of a plan that provides for mandatory distributions of amounts of \$6,000 or less, the trust of such plan will not be considered a qualified trust under the Code unless the plan provides that, if a participant in the plan separates from the service covered by the plan and the participant's nonforfeitable accrued benefit is not in excess of \$1,000, the plan administrator must (either separately or as part of the written notice to recipients of distributions eligible for rollover treatment) either (1) notify the participant that the participant is entitled to such benefit, or (2) attempt to pay the benefit directly to the participant.

<sup>318</sup> Sec. 404(c)(3) of ERISA.

<sup>319</sup> Sec. 401(a)(31)(B).

<sup>320</sup> As described in 29 C.F.R. sec. 2550.404a-2.

<sup>321</sup> Sec. 401(a)(31)(B)(iv).

<sup>322</sup> Sec. 404(c)(3)(B) of ERISA.

<sup>323</sup> Under section 401(a)(31)(B)(ii)(I) and section 203(e)(1) of ERISA.

<sup>324</sup> Sec. 401(a)(31)(B).

If, after a plan administrator either notifies the participant of the entitlement to the benefit or attempts to pay the benefit directly to the participant, the participant does not:

- Within 6 months of the notification either make an election to have the distribution paid directly to a specified eligible retirement plan<sup>325</sup> or elect to receive a distribution of the benefit directly, or
- Accept any direct payment made within 6 months of the attempted payment (in other words, does not cash the check),
- then the plan administrator must transfer the amount of such benefit to the Office of the Lost and Found.<sup>326</sup>

A transfer of such a distribution to the Office of the Lost and Found is treated as a transfer to an individual retirement plan, and the distribution of such amounts by the Office of the Lost and Found to a non-responsive participant who is subsequently located will be treated as a distribution from an individual retirement account.

#### *Reporting for mandatory transfers*

The provision modifies the reporting requirements by plan administrators with respect to plans that are subject to the vesting standards of section 203 of ERISA, which include tax qualified defined benefit and defined contribution plans, as follows:

- By providing that plan administrators must report<sup>327</sup> the name and taxpayer identification number of each participant in the plan who, during the plan year immediately preceding such plan year separated from the service covered by the plan.
- By requiring that the following information must also be included:
  - The name and taxpayer identifying number of each participant or former participant in the plan:
    - > Who, during the current plan year or any previous plan year, was reported to IRS<sup>328</sup> as a separated participant with a deferred vested benefit that had not been paid as of the end of the previous plan year, and with respect to whom such benefit was fully paid during the plan year;
    - > With respect to whom any amount was distributed as a mandatory distribution during the plan year; or
    - > With respect to whom a deferred annuity contract was distributed during the plan year;
  - In the case of a participant or former participant whose benefit was distributed as a mandatory distribution during the plan year, the name and address of the designated trustee or issuer and the account number of the individual retirement plan to which the amount was distributed; and
  - In the case of a participant or former participant to whom a deferred annuity contract was distributed during the plan

<sup>325</sup> Sec. 402(c)(8)(B), except that a qualified trust is considered an eligible retirement plan only if it is a defined contribution plan that accepts rollovers.

<sup>326</sup> In accordance with section 4051(b) of ERISA.

<sup>327</sup> Pursuant to sec. 6057.

<sup>328</sup> Under sec. 6057.

year, the name and address of the issuer of such annuity contract and the contract or certificate number.

*Rules relating to direct trustee-to-trustee transfers*

Under the provision, additional reporting is required with respect to direct trustee-to-trustee transfers as follows:

- Notification of the Trustee: In the case of a mandatory distribution under the Code,<sup>329</sup> the plan administrator must notify the designated trustee of the account or issuer, or the plan administrator will be subject to a penalty equal to \$100 for each such failure, up to a maximum for all such failures during any calendar year not to exceed \$50,000, unless it is shown that the failure was due to reasonable cause and not to willful neglect.<sup>330</sup>
- The reports required to be made to the Secretary by the trustee of an IRA or the issuer of an endowment contract<sup>331</sup> are modified to require, in the case of an IRA account, endowment contract or IRA annuity to which a mandatory transfer<sup>332</sup> is made (including a transfer from the individual retirement plan to which the original transfer was made to another individual retirement plan), for the year of the transfer and any year in which the information previously reported changes that such report:

1. Identify the transfer as a required mandatory distribution;
2. Include the name, address, and taxpayer identifying number of the trustee or issuer of the individual retirement plan to which the amount is transferred; and
3. Be filed with the PBGC as well as with the Secretary.

There is also a similar rule for Savings Incentive Match Plan for Employees ("SIMPLE") plans where the benefit is transferred from a SIMPLE plan to another individual retirement plan. The report required for the year of the transfer and any year in which the information previously reported is changed must: (1) identify the transfer as a required mandatory distribution; (2) include the name, address, and taxpayer identifying number of the trustee or issuer of the individual retirement plan to which the amount is transferred; and (3) be filed with the PBGC as well as with the Secretary.

*Notification of participant upon separation of service*

The individual registration statement that needs to be provided to each separated participant<sup>333</sup> by the plan administrator must include a notice of availability of, and the contact information for, the Office of the Lost and Found.

*Requirement of electronic filing*

Under the provision, reports required with respect to separated participants from retirement plans,<sup>334</sup> information required with

<sup>329</sup> Pursuant to section 401(a)(31)(B).

<sup>330</sup> Sec. 6652(i) of the Code.

<sup>331</sup> Sec. 408(i).

<sup>332</sup> Under section 401(a)(31)(B).

<sup>333</sup> Pursuant to section 6057(e).

<sup>334</sup> Sec. 6057.

respect to certain plans of deferred compensation,<sup>335</sup> and periodic reports of actuaries,<sup>336</sup> as well as certain reports with respect to IRAs, (including endowment contracts),<sup>337</sup> information returns at source,<sup>338</sup> and information reports relating to certain trust and annuity plans,<sup>339</sup> (to the extent each such return or report relates to the tax treatment of a distribution from a plan, account, contract, or annuity) must be filed on magnetic media, but only with respect to persons who are required to file at least 50 returns during the calendar year which includes the first day of the plan year to which such returns or reports relate.

*Fiduciary duties under the Code and ERISA*

Under the provision, not later than one year after the date of enactment, the Secretary of Labor, in consultation with the Secretary of the Treasury, must issue a request for information (with a final rule to be issued not later than three years after such date) with respect to the following:

1. The steps a plan sponsor must take to locate a deferred vested participant in order to meet its fiduciary duty under ERISA with respect to locating that participant; and
2. The ongoing practices and procedures a plan sponsor must institute in order to meet such fiduciary duty with respect to maintaining up-to-date contact information on deferred vested participants.

EFFECTIVE DATE

The effective date of the provision is generally on the date of enactment.

The provisions related to the transfer of small benefits to the Office of the Lost and Found for certain non-responsive participants and the submission of information by plan administrators to the Office of the Lost and Found are effective with respect to plan years beginning after the second December 31 occurring after the date of the enactment.

The provisions related to changes to the mandatory distribution rules are applicable to vested benefits with respect to participants who separate from service connected to the plan in plan years beginning after the second December 31 occurring after the date of enactment.

The provisions related to modified reporting requirements under the Code and to filing certain reports electronically are applicable to returns and reports relating to years beginning after the second December 31 occurring after the date of enactment.

<sup>335</sup> Sec. 6058.

<sup>336</sup> Sec. 6059.

<sup>337</sup> Pursuant to section 408(i).

<sup>338</sup> Sec. 6047.

<sup>339</sup> Sec. 6041.

## 7. EXPANSION OF EMPLOYEE PLANS COMPLIANCE RESOLUTION SYSTEM (SEC. 307 OF THE BILL)

### PRESENT LAW

#### *Employee Plans Compliance Resolution System*<sup>340</sup>

General description of the Employee Plans Compliance Resolution System that this provision modifies may be found in section I.13 of this document.

The current EPCRS program does not provide corrections for individual IRAs although it does provide for certain corrections for SIMPLE plans and SEPs. SCP and VCP<sup>341</sup> are available to a SEP or SIMPLE plan.<sup>342</sup> SCP is only available to such a plan to correct insignificant operational failures,<sup>343</sup> and only if the SEP or SIMPLE plan is established and maintained on a document approved by the IRS.

#### *Loans*

EPCRS is available for plan loans that do not comply with one or more Code requirements (for example, the amount of the loan must not exceed the lesser of 50 percent of the participant's account balance or \$50,000<sup>344</sup> (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<sup>345</sup> 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) and such errors are corrected through VCP or Audit CAP.

Unless correction is made, a deemed distribution<sup>346</sup> in connection with a failure relating to a loan to a participant made from a plan must be reported<sup>347</sup> with respect to the affected participant and any applicable income tax withholding amount that was required to be paid in connection with the failure must be paid by the employer. As part of VCP and Audit CAP, the deemed distribution may be reported with respect to the affected participant for the year of correction (instead of the year of the failure) if the plan sponsor requests such reporting relief. Where certain requirements in EPCRS are met, no reporting may be required but this relief applies only if the plan sponsor requests the relief and provides an explanation supporting the request.

<sup>340</sup> See sec. 72(p)(2).

<sup>341</sup> Sec. 6.11 of Rev. Proc. 2019-9.

<sup>342</sup> Secs. 1.01 and 1.02 of Rev. Proc. 2019-19. A SEP is a plan intended to satisfy the requirements of Code section 408(k); a SIMPLE plan is a plan intended to satisfy the requirements of Code section 408(p). Secs. 5.06 and 5.07 of Rev. Proc. 2019-19.

<sup>343</sup> Sec. 4.01(c) of Rev. Proc. 2019-19.

<sup>344</sup> There are certain exceptions to these rules for loans, for example, individuals eligible to receive a coronavirus-related distribution under section 2202 of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, March 27, 2020, may take a loan during a specified period of time equal to the lesser of the present value of the nonforfeitable accrued benefit of the employee under the plan or \$100,000 and certain other rules apply to such loans. Special rules for loans also apply for certain individuals impacted by specified disasters, see, e.g., section 302 of Div. EE of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, December 27, 2020.

<sup>345</sup> Loans specifically for home purchases may be repaid over a longer period.

<sup>346</sup> Under sec. 72(p)(1).

<sup>347</sup> On IRS Form 1099-R.

*Voluntary Fiduciary Correction Program*

The DOL also has a correction program entitled the Voluntary Fiduciary Correction Program (“VFCP”)<sup>348</sup> under the Employee Retirement Income Security Act (“ERISA”)<sup>349</sup> designed to encourage the voluntary correction of fiduciary violations under Title I of ERISA. VFCP also provides for the correction of certain participant loan failures including situations where participant loans exceed the Code section 72(p) limitations on amount or duration.

## REASONS FOR CHANGE

The Committee believes that because of the ever growing complexity of retirement plan administration, EPCRS needs to be expanded to (1) allow more types of inadvertent errors to be corrected through self-correction, rather than requiring the time and expense of submitting such corrections to the IRS through VCP; (2) apply to certain inadvertent IRA errors; and (3) direct the Secretary to provide additional safe harbors to correct certain eligible individual failures.

## EXPLANATION OF PROVISION

*In general*

Under the provision, except as otherwise set forth in the Code or regulations prescribed by the Secretary (or the Secretary’s delegate), any eligible inadvertent failure to comply with the rules applicable to certain tax-qualified retirement plans<sup>350</sup> may be self-corrected under EPCRS,<sup>351</sup> except to the extent that such failure was identified by the Secretary prior to any actions which demonstrate a commitment by the plan to implement a self-correction. As of the date of the enactment of this Act, EPCRS is deemed amended to provide that the correction period<sup>352</sup> for an eligible inadvertent failure, except as otherwise provided under the Code or in regulations prescribed by the Secretary, is indefinite and has no last day (other than with respect to failures identified by the Secretary prior to any self-correction by the plan as noted above).

*Loan errors*

Under this provision, in the case of an eligible inadvertent plan loan error:

- Such failure may be self-corrected according to the rules of EPCRS,<sup>353</sup> including the provisions related to whether a deemed distribution must be reported on Form 1099-R, (rather than being corrected in VCP or Audit CAP); and
- the Secretary of Labor must treat such correction as meeting the requirements of VFCP if, with respect to the violation of the fiduciary standards of ERISA, there is a similar loan error eligible for correction under EPCRS and the loan error is corrected in such manner.

<sup>348</sup> 71 Fed. Reg. 20261, April 19, 2006.

<sup>349</sup> Pub. L. No. 93-406, Sept. 2, 1974.

<sup>350</sup> Under sections 401(a), 403(a), 403(b), 408(p), or 408(k).

<sup>351</sup> For purposes of this provision, references to corrections under EPCRS refers those described under Rev. Proc. 2019-19 or any successor guidance.

<sup>352</sup> Under sec. 9.02 of Rev. Proc. 2019-19 or any successor guidance.

<sup>353</sup> According to the rules of section 6.07 of Rev. Proc. 2019-19 (or any successor guidance).



*IRAs*

The provision also directs the Secretary to expand EPCRS to allow custodians of IRAs<sup>354</sup> to address eligible inadvertent failures with respect to an IRA, including, but not limited to:

1. Waivers of the excise tax<sup>355</sup> that would otherwise apply to certain accumulations in an IRA where the amount distributed during a taxable year of a participant or beneficiary is less than the minimum required distribution for such taxable year;
2. Under the self-correction component of EPCRS, waivers of the 60-day deadline for a rollover where the deadline is missed for reasons beyond the reasonable control of the account owner; and
3. Rules permitting a nonspouse beneficiary to return distributions to an inherited individual IRA<sup>356</sup> where, due to an inadvertent error by a service provider, the beneficiary had reason to believe that the distribution could be rolled over without inclusion in income of any part of the distributed amount.

*Additional safe harbors*

The Secretary is directed to expand EPCRS to provide additional safe harbor means of correcting eligible inadvertent failures including safe harbor means of calculating the earnings which must be restored to a plan in cases where plan assets have been depleted by reason of an eligible inadvertent failure.

*Definition of eligible inadvertent failure*

An eligible inadvertent failure means a failure that occurs despite the existence of practices and procedures which either (1) satisfy the standards set forth in EPCRS;<sup>357</sup> or (2) satisfy similar standards in the case of an individual retirement plan. However, an eligible inadvertent failure does not include any failure which is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction.

This provision does not apply to any such failure unless the correction is made in conformity with the general principles that apply to corrections of such failures under the Code, including regulations, or other guidance issued thereunder and including those principles and corrections set forth in EPCRS.

## EFFECTIVE DATE

The provision is effective on the date of enactment.

<sup>354</sup> As defined in section 7701(a)(37).

<sup>355</sup> Sec. 4974.

<sup>356</sup> As described in section 408(d)(3)(C).

<sup>357</sup> Sec. 4.04 of Rev. Proc. 2019-19 (or any successor guidance). Section 4.04 provides that the plan sponsor or plan administrator has established practices and procedures in place which are reasonably designed to promote and facilitate overall compliance in form and operation with applicable Code provisions and such practices and procedures have been in place and are routinely followed.

8. ELIMINATE THE “FIRST DAY OF THE MONTH” REQUIREMENT FOR GOVERNMENTAL SECTION 457(b) PLANS (SEC. 308 OF THE BILL AND SEC. 457(b) OF THE CODE)

PRESENT LAW

*Section 457(b) plans*

Among the various types of tax-favored retirement plans under present law are eligible deferred compensation plans under section 457(b). A section 457(b) plan is a plan maintained by a State or local government or a tax-exempt organization that meets certain requirements. Generally, the maximum amount that can be deferred under a section 457(b) plan by an individual during any taxable year is limited to the lesser of 100 percent of the participant’s includible compensation or the applicable dollar amount for the taxable year. The applicable dollar amount for 2021 is \$19,500 and is indexed for future taxable years. For an employee who attains age 50 by the end of the year, the dollar limit on deferrals is increased by \$6,500 (for 2021)<sup>358</sup> (called catch-up contributions).<sup>359</sup> A participant’s includible compensation means the compensation of the participant from the eligible employer for the taxable year.

One of the requirements to be an eligible deferred compensation plan under section 457(b) is that a participant’s compensation is deferred for any calendar month only if an agreement providing for such deferral has been entered into before the beginning of such month.<sup>360</sup>

REASONS FOR CHANGE

Under present law, participants in a governmental section 457(b) plan must request changes in their contribution deferral rate to the plan prior to the beginning of the month in which the deferral is made. This rule is inconsistent with the rule that applies to other defined contribution plans.

The Committee believes that such elections should be permitted to be made at any time prior to the date that the compensation being deferred is made available to the participant.

EXPLANATION OF PROVISION

The provision provides that compensation is deferred under a governmental section 457(b) plan only if an agreement providing for such deferral has been entered into before the compensation is currently available to the individual, consistent with the rule for section 401(k) and 403(b) plans. In the case of a section 457(b) plan maintained by a tax-exempt organization, the provision provides that compensation is deferred under the plan for a calendar month only if an agreement providing for such deferral has been entered into before the beginning of such month.

EFFECTIVE DATE

The provision applies to taxable years beginning after the date of enactment.

<sup>358</sup> For 2020 and 2021, this amount is \$6,500.

<sup>359</sup> Sec. 414(v).

<sup>360</sup> Sec. 457(b)(4).

9. ONE-TIME ELECTION FOR QUALIFIED CHARITABLE DISTRIBUTION TO SPLIT-INTEREST ENTITY; INCREASE IN QUALIFIED CHARITABLE DISTRIBUTION LIMITATION (SEC. 309 OF THE BILL AND SEC. 408(d)(8) OF THE CODE)

PRESENT LAW

*In general*

If an amount withdrawn from a traditional individual retirement arrangement (“IRA”) or a Roth IRA is donated to a charitable organization, the rules relating to the tax treatment of withdrawals from IRAs apply to the amount withdrawn and the charitable contribution is subject to the normally applicable limitations on deductibility of such contributions. An exception applies in the case of a qualified charitable distribution.

*Charitable contributions*

In computing taxable income, an individual taxpayer who itemizes deductions generally is allowed to deduct the amount of cash and up to the fair market value of property contributed to the following entities: (1) a charity described in section 170(c)(2); (2) certain veterans’ organizations, fraternal societies, and cemetery companies;<sup>361</sup> and (3) a Federal, State, or local governmental entity, but only if the contribution is made for exclusively public purposes.<sup>362</sup> The deduction also is allowed for purposes of calculating alternative minimum taxable income.

The amount of the deduction allowable for a taxable year with respect to a charitable contribution of property may be reduced depending on the type of property contributed, the type of charitable organization to which the property is contributed, and the income of the taxpayer.<sup>363</sup>

A taxpayer who takes the standard deduction (i.e., who does not itemize deductions) generally may not take a separate deduction for charitable contributions.<sup>364</sup> Under a temporary provision in effect for contributions made in any taxable year beginning in 2021, however, a taxpayer who does not itemize deductions is permitted to take a deduction for contributions of cash to a public charity (other than a donor advised fund or a supporting organization) not to exceed \$300 (\$600 in the case of a joint return).<sup>365</sup>

A payment to a charity (regardless of whether it is termed a “contribution”) in exchange for which the donor receives an economic benefit is not deductible, except to the extent that the donor can demonstrate, among other things, that the payment exceeds the fair market value of the benefit received from the charity. To facilitate distinguishing charitable contributions from purchases of goods or services from charities, present law provides that no charitable contribution deduction is allowed for a separate contribution of \$250 or more unless the donor obtains a contemporaneous written acknowledgement of the contribution from the charity indicating whether the charity provided any good or service (and an estimate of the value of any such good or service provided) to the tax-

<sup>361</sup> Secs. 170(c)(3)–(5).

<sup>362</sup> Sec. 170(c)(1).

<sup>363</sup> Secs. 170(b) and (e).

<sup>364</sup> Sec. 170(a).

<sup>365</sup> Secs. 63(b)(4) and 170(p).

payer in consideration for the contribution.<sup>366</sup> In addition, present law requires that any charity that receives a contribution exceeding \$75 made partly as a gift and partly as consideration for goods or services furnished by the charity (a “quid pro quo” contribution) is required to inform the contributor in writing of an estimate of the value of the goods or services furnished by the charity and that only the portion exceeding the value of the goods or services may be deductible as a charitable contribution.<sup>367</sup>

Under present law, total deductible contributions of an individual taxpayer to public charities, private operating foundations, and certain types of private nonoperating foundations generally may not exceed 50 percent of the taxpayer’s contribution base, which is the taxpayer’s adjusted gross income for a taxable year (disregarding any net operating loss carryback). To the extent a taxpayer has not exceeded the 50-percent limitation, (1) contributions of capital gain property to public charities generally may be deducted up to 30 percent of the taxpayer’s contribution base, (2) contributions of cash to most private nonoperating foundations and certain other charitable organizations generally may be deducted up to 30 percent of the taxpayer’s contribution base, and (3) contributions of capital gain property to private foundations and certain other charitable organizations generally may be deducted up to 20 percent of the taxpayer’s contribution base. For taxable years beginning after December 31, 2017, and before January 1, 2026, the 50-percent limit is increased to 60 percent for contributions of cash.<sup>368</sup>

Contributions by individuals in excess of the applicable limits generally may be carried over and deducted over the next five taxable years, subject to the relevant percentage limitations on the deduction in each of those years.

In general, a charitable deduction is not allowed for income, estate, or gift tax purposes if the donor transfers an interest in property to a charity (e.g., a remainder) while also either retaining an interest in that property (e.g., an income interest) or transferring an interest in that property to a noncharity for less than full and adequate consideration.<sup>369</sup> Exceptions to this general rule are provided for, among other interests, remainder interests in charitable remainder trusts (discussed below), pooled income funds, and present interests in the form of a guaranteed annuity or a fixed percentage of the annual value of the property.<sup>370</sup> For such interests, a charitable deduction is allowed to the extent of the present value of the interest designated for a charitable organization.

#### *Charitable remainder trusts and charitable gift annuities*

Both charitable remainder trusts and charitable gift annuities are arrangements under which a taxpayer contributes assets to charity (directly or through a trust) but retains an interest. As part of these arrangements, a stream of payments is guaranteed to one or more noncharitable beneficiaries (possibly including the tax-

<sup>366</sup> Sec. 170(f)(8). For any contribution of a cash, check, or other monetary gift, no deduction is allowed unless the donor maintains as a record of such contribution a bank record or written communication from the donee charity showing the name of the donee organization, the date of the contribution, and the amount of the contribution. Sec. 170(f)(17).

<sup>367</sup> Sec. 6115.

<sup>368</sup> Sec. 170(b)(1)(G).

<sup>369</sup> Secs. 170(f), 2055(e)(2), and 2522(c)(2).

<sup>370</sup> Sec. 170(f)(2).

payer) over a period of time, with the remaining interest passing to charity. The taxpayer claims a charitable deduction for the portion of the transfer attributable to the charitable interest.

#### *Charitable remainder trusts*

A charitable remainder annuity trust is a trust that is required to pay, at least annually, a fixed dollar amount of at least five percent of the initial value of the trust to a noncharity for the life of an individual or for a period of 20 years or less, with the remainder passing to charity. A charitable remainder unitrust is a trust that generally is required to pay, at least annually, a fixed percentage of at least five percent of the fair market value of the trust's assets determined at least annually to a noncharity for the life of an individual or for a period of 20 years or less, with the remainder passing to charity.<sup>371</sup>

A trust does not qualify as a charitable remainder annuity trust if the annuity for a year is greater than 50 percent of the initial fair market value of the trust's assets. A trust does not qualify as a charitable remainder unitrust if the percentage of assets that are required to be distributed at least annually is less than five percent or greater than 50 percent. A trust does not qualify as a charitable remainder annuity trust or a charitable remainder unitrust unless the value of the remainder interest in the trust is at least 10 percent of the value of the assets contributed to the trust.

Distributions from a charitable remainder annuity trust or charitable remainder unitrust are treated in the following order as: (1) ordinary income to the extent of the trust's current and previously undistributed ordinary income for the trust's year in which the distribution occurred, (2) capital gains to the extent of the trust's current capital gain and previously undistributed capital gain for the trust's year in which the distribution occurred, (3) other income (e.g., tax-exempt income) to the extent of the trust's current and previously undistributed other income for the trust's year in which the distribution occurred, and (4) corpus.<sup>372</sup>

In general, distributions to the extent they are characterized as income are includible in the income of the beneficiary for the year that the annuity or unitrust amount is required to be distributed even though the annuity or unitrust amount is not distributed until after the close of the trust's taxable year.<sup>373</sup>

#### *Charitable gift annuities*

A charitable gift annuity is similar in concept to a charitable remainder annuity trust, except that, under a contract between the taxpayer and a charity, the assets are transferred to the charity (not to a separate trust) in exchange for the charity's promise to make fixed annuity payments for life to the donor or to the donor and one other person.

<sup>371</sup> Sec. 664(d). Charitable remainder annuity trusts and charitable remainder unitrusts are exempt from Federal income tax for a tax year unless the trust has any unrelated business taxable income for the year (including certain debt financed income). A charitable remainder trust that loses its exemption from income tax for a taxable year is taxed as a complex trust. As such, the trust is allowed a deduction in computing taxable income for amounts required to be distributed in a taxable year, not to exceed the amount of the trust's distributable net income for the year. Taxes imposed on the trust are required to be allocated to corpus. Treas. Reg. sec. 1.664-1(d)(2).

<sup>372</sup> Sec. 664(b).

<sup>373</sup> Treas. Reg. sec. 1.664-1(d)(4).

Charitable gift annuities are not treated as commercial-type insurance for purposes of section 501(m), under which an organization is not described in section 501(c)(3) if a substantial part of its activities consists of providing commercial-type insurance.<sup>374</sup>

### *IRA rules*

Within limits, individuals may make deductible and nondeductible contributions to a traditional IRA. Amounts in a traditional IRA are includible in income when withdrawn (except to the extent the withdrawal represents a return of nondeductible contributions). Certain individuals also may make nondeductible contributions to a Roth IRA (deductible contributions cannot be made to Roth IRAs). Qualified withdrawals from a Roth IRA are excludable from gross income. Withdrawals from a Roth IRA that are not qualified withdrawals are includible in gross income to the extent attributable to earnings. Includible amounts withdrawn from a traditional IRA or a Roth IRA before attainment of age 59½ are subject to an additional 10-percent early withdrawal tax unless an exception applies. Under present law, minimum distributions are required to be made from tax-favored retirement arrangements, including IRAs. Minimum required distributions from a traditional IRA must generally begin by April 1 of the calendar year following the year in which the IRA owner attains age 72.<sup>375</sup>

If an individual has made nondeductible contributions to a traditional IRA, a portion of each distribution from an IRA is nontaxable until the total amount of nondeductible contributions has been received. In general, the amount of a distribution that is nontaxable is determined by multiplying the amount of the distribution by the ratio of the remaining nondeductible contributions to the account balance. In making the calculation, all traditional IRAs of an individual are treated as a single IRA, all distributions during any taxable year are treated as a single distribution, and the value of the contract, income on the contract, and investment in the contract are computed as of the close of the calendar year.

In the case of a distribution from a Roth IRA that is not a qualified distribution, in determining the portion of the distribution attributable to earnings, contributions and distributions are deemed to be distributed in the following order: (1) regular Roth IRA contributions; (2) taxable conversion contributions;<sup>376</sup> (3) nontaxable conversion contributions; and (4) earnings. In determining the amount of taxable distributions from a Roth IRA, all Roth IRA distributions in the same taxable year are treated as a single distribution, all regular Roth IRA contributions for a year are treated as a single contribution, and all conversion contributions during the year are treated as a single contribution.

Distributions from an IRA (other than a Roth IRA) are generally subject to withholding unless the individual elects not to have withholding apply.<sup>377</sup> Elections not to have withholding apply are to be made in the time and manner prescribed by the Secretary.

<sup>374</sup> Sec. 501(m)(3)(E) and (5).

<sup>375</sup> Minimum distribution rules also apply in the case of distributions after the death of a traditional or Roth IRA owner.

<sup>376</sup> Conversion contributions refer to conversions of amounts in a traditional IRA to a Roth IRA.

<sup>377</sup> Sec. 3405.

*Qualified charitable distributions*

Otherwise taxable IRA distributions from a traditional or Roth IRA are excluded from gross income to the extent they are qualified charitable distributions.<sup>378</sup> The exclusion may not exceed \$100,000 per taxpayer per taxable year.

An individual who receives a deduction for a contribution to a traditional IRA for years ending on or after age 70½ is not eligible to exclude such amount from income as a qualified charitable distribution. Thus, the amount of qualified charitable distributions otherwise excludable from an individual's gross income for a taxable year is reduced (but not below zero) by the excess of (i) the aggregate amount of deductions allowed to the taxpayer for contributions to a traditional IRA for taxable years ending on or after the individual attains age 70½, over (ii) the aggregate amount of reductions for all taxable years preceding the current year.

Special rules apply in determining the amount of an IRA distribution that is otherwise taxable. The otherwise applicable rules regarding taxation of IRA distributions and the deduction of charitable contributions continue to apply to distributions from an IRA that are not qualified charitable distributions. A qualified charitable distribution is taken into account for purposes of the minimum distribution rules applicable to traditional IRAs to the same extent the distribution would have been taken into account under such rules had the distribution not been directly distributed under the qualified charitable distribution provision. An IRA does not fail to qualify as an IRA as a result of qualified charitable distributions being made from the IRA.

A qualified charitable distribution is any distribution from an IRA directly by the IRA trustee to an organization described in section 170(b)(1)(A) (generally, public charities) other than a supporting organization (as described in section 509(a)(3)) or a donor advised fund (as defined in section 4966(d)(2)). Distributions are eligible for the exclusion only if made on or after the date the IRA owner attains age 70½ and only to the extent the distribution would be includible in gross income (without regard to this provision).

The exclusion applies only if a charitable contribution deduction for the entire distribution otherwise would be allowable (under present law), determined without regard to the generally applicable percentage limitations. Thus, for example, if the deductible amount is reduced because of a benefit received in exchange, or if a deduction is not allowable because the donor did not obtain sufficient substantiation, the exclusion is not available with respect to any part of the IRA distribution.

If the IRA owner has any IRA that includes nondeductible contributions, a special rule applies in determining the portion of a distribution that is includible in gross income (but for the qualified charitable distribution provision) and thus is eligible for qualified charitable distribution treatment. Under the special rule, the distribution is treated as consisting of income first, up to the aggregate amount that would be includible in gross income (but for the qualified charitable distribution provision) if the aggregate balance

<sup>378</sup>Sec. 408(d)(8). The exclusion does not apply to distributions from employer-sponsored retirement plans, including SIMPLE IRAs and simplified employee pensions ("SEPs").

of all IRAs having the same owner were distributed during the same year. In determining the amount of subsequent IRA distributions includible in income, proper adjustments are to be made to reflect the amount treated as a qualified charitable distribution under the special rule.

Distributions that are excluded from gross income by reason of the qualified charitable distribution provision are not taken into account in determining the deduction for charitable contributions under section 170.

#### REASONS FOR CHANGE

The present-law qualified charitable distribution rules provide senior citizens with flexibility in making gifts to charity by treating certain charitable distributions from an IRA as required minimum distributions while excluding these distributions from gross income. The \$100,000 annual exclusion limit, however, has not been increased since the provision first went into effect in 2006. The Committee believes it is important to index the annual exclusion limit for inflation to prevent future erosion of the qualified charitable distribution tax benefit. In addition, the Committee wishes to build on the success of the present-law rules by allowing additional flexibility for seniors in the form of a one-time election to make qualified charitable distributions to a split-interest entity, such as a charitable gift annuity or a charitable remainder trust.

#### EXPLANATION OF PROVISION

First, the provision indexes the annual \$100,000 exclusion limit for inflation for taxable years beginning after 2021.

Second, the provision allows a taxpayer to elect for a taxable year to treat certain distributions from an IRA to a split-interest entity as if the contributions were made directly to a qualifying charity for purposes of the exclusion from gross income for qualified charitable distributions. Such an election may not have been in effect for a preceding taxable year; thus, the election may be made for only one taxable year during the taxpayer's lifetime. The aggregate amount of distributions of the taxpayer with respect to the election may not exceed \$50,000 (indexed for inflation for taxable years beginning after 2021).

A split-interest entity means: (1) a charitable remainder annuity trust (as defined in section 664(d)(1)); (2) a charitable remainder unitrust (as defined in section 664(d)(2)); or (3) a charitable gift annuity (as defined in section 501(m)). In each case, the trust or arrangement must be funded exclusively by qualified charitable distributions. In the case of a charitable gift annuity, fixed payments of 5 percent or greater must commence not later than one year from the date of funding.

In the case of a distribution from an IRA to a charitable remainder annuity trust or charitable remainder unitrust, the distribution qualifies for the one-time election only if a charitable deduction for the entire value of the charitable remainder interest would be allowable under section 170 (determined without regard to this provision or the charitable deduction percentage limits under section 170(b)). In the case of a distribution to a charitable gift annuity, the distribution qualifies for the one-time election only if a charitable deduction in an amount equal to the amount of the distribu-



tion reduced by the value of the annuity<sup>379</sup> would be allowable under section 170 (determined without regard to this provision or the charitable deduction percentage limits under section 170(b)).

In addition, a distribution from an IRA to a split-interest entity qualifies for the one-time election only if: (1) no person holds an income interest in the split-interest entity other than the individual for whose benefit such account is maintained, the spouse of such individual, or both; and (2) the income interest in the split-interest entity is nonassignable.

In the case of a charitable remainder annuity trust or a charitable remainder unitrust that is funded by qualified charitable distributions, distributions are treated as ordinary income in the hands of a beneficiary to whom an annuity or unitrust payment is made. A qualified charitable distribution made to fund a charitable gift annuity is not treated as an investment in the contract for purposes of section 72(c).

#### EFFECTIVE DATE

The provision is effective for distributions made in taxable years ending after the date of enactment.

#### 10. DISTRIBUTIONS TO FIREFIGHTERS (SEC. 310 OF THE BILL AND SEC. 72(t) OF THE CODE)

##### PRESENT LAW

Distributions from tax-favored retirement plans A distribution from a qualified retirement plan,<sup>380</sup> 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 IRA generally is included in income for the year distributed.<sup>381</sup> 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.<sup>382</sup>

##### *Qualified public safety employees in governmental plans*

An exception to the early withdrawal tax applies if a distribution is made to an employee after separation from service after attain-

<sup>379</sup>The annuity must be described in section 501(m)(5)(B), which provides that the annuity is described in section 514(c)(5), determined as if the amount paid in cash for the issuance of the annuity were property. Section 514(c)(5), in turn, describes when an obligation to pay an annuity is not treated as “acquisition indebtedness” for purposes of the section 514 debt-financed income rules. Under that section, the obligation to pay the annuity: (1) generally must be the sole consideration issued in exchange for property if, at the time of the exchange, the value of the annuity is less than 90 percent of the value of the property received in exchange; (2) is payable over the life of one individual or the lives of two individuals in being at such time; and (3) does not guarantee a minimum amount of payments or specify a maximum amount of payments and does not provide for any adjustment of the amount of the annuity payments by reference to the income received from the transferred property or any other property. Sec. 514(c)(5).

<sup>380</sup>Qualified under section 401(a).

<sup>381</sup>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.

<sup>382</sup>Sec. 72(t). Under present law, the 10-percent early withdrawal tax does not apply to distributions from a governmental section 457(b) plan.

ment of age 55.<sup>383</sup> Under a special rule for distributions to qualified public safety employees in a governmental plan,<sup>384</sup> this exception applies to distributions made after separation from service after attainment of age 50 (“age 50 exception”).<sup>385</sup> For this purpose, a qualified public safety employee means (1) any employee of a State or a political subdivision of a State who provides police protection, firefighting services, or emergency medical services for any area within the State or political subdivision’s jurisdiction; or (2) any Federal law enforcement officer,<sup>386</sup> any Federal customs and border protection officer,<sup>387</sup> any Federal firefighter,<sup>388</sup> any Federal employee who is an air traffic controller<sup>389</sup> or nuclear materials courier,<sup>390</sup> any member of the United States Capitol Police, any member of the Supreme Court Police, or any diplomatic security special agent of the Department of State.

#### REASONS FOR CHANGE

The Committee believes that private sector firefighters merit the same treatment as public sector firefighters, and thus wishes to extend the age 50 exception to private sector firefighters.

#### EXPLANATION OF PROVISION

The provision amends the age 50 exception for qualified public safety employees in governmental plans so that the exception also applies to distributions from a qualified retirement plan or section 403(b) plan<sup>391</sup> to an employee who provides firefighting services. Thus, the provision expands the age 50 exception to also apply to private-sector firefighters receiving distributions from a qualified retirement plan or section 403(b) plan.

#### EFFECTIVE DATE

The provision is effective for distributions made after December 31, 2021.

#### 11. EXCLUSION OF CERTAIN DISABILITY-RELATED FIRST RESPONDER RETIREMENT PAYMENTS (SEC. 311 OF THE BILL AND SEC. 139C OF THE CODE)

##### PRESENT LAW

Qualified retirement plans (and other tax-favored employer-sponsored retirement plans) are accorded special tax treatment and fall into two categories: defined benefit plans and defined contribution plans. A defined contribution plan is a type of qualified retirement plan whereby contributions, earnings, and losses are allocated to a separate account for each participant. Defined contribution plans may provide for nonelective contributions and matching contributions by employers and pre-tax (that is, contributions are either ex-

<sup>383</sup> Sec. 72(t)(2)(A)(v).

<sup>384</sup> As defined in section 414(d).

<sup>385</sup> Sec. 72(t)(10).

<sup>386</sup> As defined in 5 U.S.C. secs. 8331(20) or 8401(17).

<sup>387</sup> As defined in 5 U.S.C. secs. 8331(31) or 8401(36).

<sup>388</sup> As defined in 5 U.S.C. secs. 8331(21) or 8401(14).

<sup>389</sup> As defined in 5 U.S.C. secs. 8331(30) or 8401(35).

<sup>390</sup> As defined in 5 U.S.C. secs. 8331(27) or 8401(33).

<sup>391</sup> The provision applies to a distribution from a qualified retirement plan, an annuity plan described in section 403(a), or an annuity contract described in section 403(b). Sec. 402(c)(8)(B)(iii), (iv), and (vi).

cluded from income or deductible) or after-tax contributions by employees.

*Disability-related payments*

Amounts received under worker's compensation acts as compensation for personal injuries or sickness ("disability payments") generally are excluded from the gross income of the recipients.<sup>392</sup> The exclusion from gross income includes compensation for personal injuries or sickness received under a statute in the nature of a worker's compensation act, and also extends such exclusion to survivors of the affected worker. However, these exclusions generally do not apply to amounts received as a retirement pension or annuity (including retirement disability payments) to the extent that the amounts are determined by reference to the employee's age, length of service, or prior contributions. Such retirement payments, which may be distributed from a section 401(a) qualified retirement plan, a section 403(a) or (b) tax-sheltered annuity plan, or an eligible deferred compensation plan of a State or local government employer under section 457(b) ("retirement distributions"), generally are included in income for the year distributed.

REASONS FOR CHANGE

The Committee believes that certain retirement distributions paid to qualified first responders should be excluded from gross income to the extent such payments are related to the first responders' disability.

EXPLANATION OF PROVISION

The provision adds Section 139C to the Code to address the tax treatment of certain disability-related retirement distributions to qualified first responders. An individual's gross income does not include qualified first responder retirement payments for any taxable year to the extent such payments do not exceed an annualized excludable disability amount. A qualified first responder retirement payment that is excluded from gross income is a pension or annuity that would otherwise be includible in gross income, is received in connection with the individual's qualified first responder service, and is paid from a qualified trust, annuity plan, governmental deferred compensation plan under section 457(b), or a section 403(b) plan.<sup>393</sup> Also, for this purpose, qualified first responder service means services performed as a law enforcement officer, firefighter, paramedic, or emergency medical technician. The provision does not limit the exclusion from gross income to individuals who provide such services in a public capacity or to individuals who address only emergency situations.

The portion of the retirement distributions which is exempted from gross income is the "annualized excludable disability amount." This is based on the determination of the excludable amount of disability payments ("service-connected excludable disability amount") that the individual received during the 12-month period before the individual attained retirement age. A service-connected excludable

<sup>392</sup> Sec. 104(a)(1).

<sup>393</sup> These plans are described in clauses (iii), (iv), (v), and (vi) of section 402(c)(8)(B), respectively.

disability amount means periodic payments which are not includible in the individual's gross income because they are amounts received under workmen's compensation acts as compensation for personal injuries or sickness,<sup>394</sup> are received in connection with the individual's qualified first responder service, and terminate when the individual attains retirement age.

The provision also provides that for an individual who only receives service-connected excludable disability amounts for a portion of the year, the annualized excludable disability amount is determined by multiplying the service-connected excludable disability amounts by the ratio of 365 to the number of days in such period to which amounts were properly attributable.

Unlike worker's compensation payments, the exclusion under the provision that is applicable to eligible first responders does not extend to surviving spouses or other survivors once the eligible individual is deceased.

#### EFFECTIVE DATE

The provision is effective for amounts received with respect to taxable years beginning after December 31, 2026.

#### 12. INDIVIDUAL RETIREMENT PLAN STATUTE OF LIMITATIONS FOR EXCISE TAX ON EXCESS CONTRIBUTIONS AND CERTAIN ACCUMULATIONS (SEC. 312 OF THE BILL AND SEC. 6501 OF THE CODE)

##### PRESENT LAW

##### *Excise taxes*

If an individual makes excess contributions to an individual retirement account<sup>395</sup> or individual retirement annuity,<sup>396</sup> an excise tax in the amount equal to six percent of the amount of the excess contributions to such individual's IRAs (determined as of the close of the taxable year) is imposed for each taxable year as long as the amount of the excess contributions remain in the plan.<sup>397</sup> However, the amount of the tax for any taxable year is limited so that it does not exceed six percent of the value of the account or annuity (determined as of the close of the taxable year).

An "excess contribution" generally means the excess (if any) of the amount of contributions made to the individual's IRAs (other than a Roth IRA) for the taxable year over the amount allowable as a deduction for such contributions.<sup>398</sup> For 2021, the total contributions an individual could make to his or her traditional and Roth IRAs was the lesser of \$6,000 (\$7,000 if the participant was age 50 or older), or the individual's taxable compensation for the year.

In addition, an excise tax on "certain accumulations" applies if the amount distributed during a taxable year of a participant or beneficiary of a qualified retirement plan<sup>399</sup> or any eligible de-

<sup>394</sup> Sec. 104(a)(1).

<sup>395</sup> Sec. 408(a).

<sup>396</sup> Sec. 408(b).

<sup>397</sup> Sec. 4973.

<sup>398</sup> Under section 219.

<sup>399</sup> As defined in section 4974(d) and including a section 401(a) qualified plan, a section 403(a) annuity plan, a section 403(b) tax-sheltered annuity, and an IRA (a section 408 individual retirement account or annuity).

ferred compensation plan,<sup>400</sup> is less than the minimum required distribution for such taxable year. The excise tax is equal to 50 percent of the amount by which such minimum required distribution exceeds the actual amount distributed during the taxable year and is imposed on the individual required to take the distribution. The Secretary may waive the excise tax where the taxpayer establishes (to the satisfaction of the Secretary) that the failure is due to reasonable error and reasonable steps are taken to remedy the shortfall.

#### *Statute of limitations*

In general, the statute of limitations with respect to a tax liability starts to run within three years after the return is filed.<sup>401</sup> The term “return” means the return required to be filed by the taxpayer relating to the particular type of tax (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit). With respect to the excise taxes imposed on excess contributions and certain accumulations,<sup>402</sup> Form 5329, Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts, is the return that needs to be filed to start the statute of limitations.<sup>403</sup> Unless Form 5329 is filed with the Form 1040, the statute of limitations will not begin to run.<sup>404</sup>

#### REASONS FOR CHANGE

Under present law, the statute of limitations with respect to the excise taxes imposed on excess contributions and certain accumulations in connection with an IRA starts as of the date the Form 5329 is filed with the individual’s tax return with respect to the underlying violation.

The Committee believes the statute of limitations should begin in such circumstances when the taxpayer files an individual tax return for the year of the violation, thereby providing relief from the possibility that the statute of limitations does not start because the taxpayer failed to file the Form 5329 with the individual’s tax return because the taxpayer was unaware of the Form or the obligation to file it.

#### EXPLANATION OF PROVISION

The provision provides that for purposes of any excise tax imposed on excess contributions or on certain accumulations in connection with an IRA, the return referred to in this section is the income tax return filed by the person on whom the tax is imposed for the year in which the act (or failure to act) giving rise to the liability for such tax occurred. The filing of Form 5329 will gen-

<sup>400</sup> As defined in section 457(b).

<sup>401</sup> Sec. 6501(a).

<sup>402</sup> Secs. 4973 and 4974, respectively.

<sup>403</sup> Internal Revenue Service, Internal Revenue Manual, Forms Reporting More Than One Item of Tax, Ch. 25.6, sec. 25.6.1.9.4.3 (May 2, 2019).

<sup>404</sup> *Ibid.* at 25.6.1.9.4.3(6)(b). “The period of limitations on assessment for the miscellaneous excise taxes does not begin with the filing of the Form 1040. The other miscellaneous excise taxes carry their own period of assessment based on when the Form 5329 is received for assessment.” See also, *Robert K. Paschall, et ux. V. Commissioner*, 137 T.C. 8 (2011). “We hold that the filing of the Forms 1040 did not start the statute of limitations running for purposes of the section 4973 excise tax in the absence of accompanying Forms 5329.”

erally no longer be required to start the three-year statute of limitations.

In the case of a person who is not required to file an income tax return for such year, (1) the relevant return is the income tax return that such person would have been required to file but for the fact that such person was not required to file such return, and (2) the three-year statute of limitations period is deemed to begin on the date by which the return would have been required to be filed (excluding any extension thereof).

#### EFFECTIVE DATE

The provision is effective on the date of enactment.

#### 13. REQUIREMENT TO PROVIDE PAPER STATEMENTS IN CERTAIN CASES (SEC. 313 OF THE BILL AND SEC. 105 OF ERISA)

##### PRESENT LAW

##### *Pension benefit statement*

ERISA requires plan administrators to periodically furnish participants and beneficiaries with statements describing the individual's benefit under the plan. Such requirements depend in part on the type of plan and the individual to whom the statement is provided.<sup>405</sup>

In general, a benefit statement is required to indicate, on the basis of the latest available information: (1) the total benefits accrued; (2) the vested accrued benefit or the earliest date on which the accrued benefit will become vested; and (3) an explanation of any permitted disparity or floor-offset arrangement that may be applied in determining accrued benefits under the plan.<sup>406</sup> With respect to information on vested benefits, the Secretary of Labor is required to provide that the requirements are met if, at least annually, the plan: (1) updates the information on vested benefits that is provided in the benefit statement; or (2) provides in a separate statement information as is necessary to enable participants and beneficiaries to determine their vested benefits. The benefit statement must be written in a manner calculated to be understood by the average plan participant.

If a plan administrator fails to provide a required benefit statement to a participant or beneficiary, the participant or beneficiary may bring a civil action to recover from the plan administrator \$100 a day, within the court's discretion, or other relief that the court deems proper.

##### *Requirements for defined contribution plans*

The administrator of a defined contribution plan is required to provide a benefit statement (1) to a participant or beneficiary who has the right to direct the investment of the assets in his or her account, at least quarterly, (2) to any other participant or other

<sup>405</sup> ERISA sec. 105. The requirement does not apply to a one-participant retirement plan described in section 101(i)(8)(B) of ERISA.

<sup>406</sup> Sec. 401(l). Under the permitted disparity rules, contributions or benefits may be provided at a higher rate with respect to compensation above a specified level and at a lower rate with respect to compensation up to the specified level. In addition, benefits under a defined benefit plan may be offset by a portion of a participant's expected social security benefits. Under a floor-offset arrangement, benefits under a defined benefit pension plan are reduced by benefits under a defined contribution plan.

beneficiary who has his or her own account under the plan, at least annually, and (3) to other beneficiaries, upon written request, but limited to one request during any 12-month period.

A benefit statement provided with respect to a defined contribution plan must include the value of each investment to which assets in the individual's account are allocated (determined as of the plan's most recent valuation date), including the value of any assets held in the form of employer securities (without regard to whether the securities were contributed by the employer or acquired at the direction of the individual). In at least one benefit statement provided during a 12-month period, the statement must include a lifetime income disclosure that sets forth the lifetime income stream equivalent of the total benefits accrued with respect to the participant or beneficiary.<sup>407</sup>

A quarterly benefit statement provided to a participant or beneficiary who has the right to direct investments must also include: (1) an explanation of any limitations or restrictions on any right of the individual to direct an investment; (2) an explanation, written in a manner calculated to be understood by the average plan participant, of the importance, for the long-term retirement security of participants and beneficiaries, of a well-balanced and diversified investment portfolio, including a statement of the risk that holding more than 20 percent of a portfolio in the security of one entity (such as employer securities) may not be adequately diversified; and (3) a notice directing the participant or beneficiary to the DOL's website for sources of information on individual investing and diversification.

#### *Requirements for defined benefit plans*

The administrator of a defined benefit plan is required either: (1) to furnish a benefit statement at least once every three years to each participant who has a vested accrued benefit under the plan and who is employed by the employer at the time the benefit statements are furnished to participants; or (2) to furnish at least annually to each such participant notice of the availability of a benefit statement and the manner in which the participant can obtain it. The Secretary of Labor is authorized to provide that years in which no employee or former employee benefits under the plan need not be taken into account in determining the three-year period.

The administrator of a defined benefit pension plan is also required to furnish a benefit statement to a participant or beneficiary upon written request, limited to one request during any 12-month period.

In the case of a statement provided to a participant with respect to a defined benefit plan (other than at the participant's request), information may be based on reasonable estimates determined under regulations prescribed by the Secretary of Labor in consultation with the PBGC.

<sup>407</sup> ERISA sec. 105(a)(2)(B)(iii). The term "lifetime income stream equivalent of the total benefits accrued" means the amount of monthly payments the participant or beneficiary would receive if the total accrued benefits of such participant or beneficiary were used to provide lifetime income streams, based on assumptions specified in rules prescribed by the Secretary. Lifetime income streams for this purpose are a qualified joint and survivor annuity (as defined in ERISA section 205(d)), based on assumptions specified in rules prescribed by the Secretary of Labor, including the assumption that the participant or beneficiary has a spouse of equal age, and a single life annuity. Such lifetime income streams may have a term certain or other features to the extent permitted under rules prescribed by the Secretary of Labor.

*Delivery of pension benefit statement*

The pension benefit statement may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the recipient. DOL regulations provide guidance on the disclosure of the pension benefit statement, in addition to other required statements and information.<sup>408</sup> Under the regulations, the plan administrator generally must use measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries, and other specified individuals. The guidance includes two safe harbors pursuant to which an administrator may disclose information electronically and be treated as meeting this requirement.

*2002 safe harbor*

Under the first safe harbor, provided by regulation in 2002 (“2002 safe harbor”), a plan administrator is treated as meeting the above requirement if the administrator takes appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents (1) results in actual receipt of transmitted information, and (2) protects the confidentiality of personal information relating to the individual’s accounts and benefits.<sup>409</sup> In addition, electronically-delivered documents must be prepared and furnished in a manner that is consistent with the style, format, and content requirements applicable to the particular document. Notice (either electronic or non-electronic) must also be provided at the time the document is furnished electronically that apprises the individual of the significance of the document when it is not otherwise reasonably evident and of the right to request and obtain a paper version. The plan must provide any paper versions that are requested.

The 2002 safe harbor applies only to individuals who generally either (1) have the ability to effectively access electronic documents at work, and access to the employer or plan sponsor’s electronic information system is an integral part of the individual’s duties; or (2) have consented to receiving documents electronically, have not withdrawn such consent, and were provided a statement prior to consent that contains certain required disclosures regarding such consent. Additional information must be furnished upon certain changes to hardware or software requirements.

*Alternative safe harbor*

Under a safe harbor that is an alternative to the 2002 safe harbor (“alternative safe harbor”), a plan administrator is deemed to meet the requirement relating to taking measures reasonably calculated to ensure actual receipt of covered documents if the plan administrator complies with certain notice, access, and other requirements described in the regulations.<sup>410</sup> For this purpose, covered documents are generally documents that the plan administrator is required to furnish to participants and beneficiaries under ERISA, except documents required to be furnished only upon request.

<sup>408</sup> 29 C.F.R. sec. 2520.104b-1.

<sup>409</sup> 29 C.F.R. sec. 2520.104b-1(c).

<sup>410</sup> 29 C.F.R. sec. 2520.104b-31.



In order to satisfy the alternative safe harbor, a notice of internet availability must be furnished at the time the covered document is made available on the website. Subject to certain additional rules, a notice of internet availability may be provided annually and apply to multiple covered documents. The notice must comply with certain content requirements and must be written in a manner reasonably calculated to be understood by the average plan participant. Certain requirements also apply to the website where the covered documents are posted.

If an individual requests a paper version of a covered document, under the alternative safe harbor, the plan administrator must promptly furnish such paper version free of charge. Additional requirements relating to the opting out of electronic delivery apply, including that individual must be able to globally opt out of electronic delivery. In addition, the plan administrator must furnish to each individual, prior to the administrator's reliance on the safe harbor, a paper notification that covered documents will be furnished electronically. Such paper notice must include certain information, including the electronic address that will be used for the individual and any necessary instructions. Special rules apply to separated participants.

Under the alternative safe harbor, a plan administrator is also permitted to satisfy the safe harbor by using an email address to furnish covered documents to an individual, provided certain requirements are met.

The alternative safe harbor only applies to participants, beneficiaries, and other individuals entitled to receive disclosures if the individual provides an electronic address at which the individual may receive a written notice of internet availability or email of covered documents, or if the individual is assigned an electronic address for employment-related purposes.

#### REASONS FOR CHANGE

The Committee recognizes the importance of pension benefit statements to a participant's understanding of his or her benefit under a retirement plan. In addition, the Committee recognizes that some participants may be more likely to see and review their benefit statements if they receive a statement on paper (rather than merely electronically). Thus, the Committee believes that it is appropriate to generally require (unless the participant elects otherwise) defined contribution plans to provide at least one paper pension benefit statement per year, and defined benefit plans to provide at least one such statement every three years.

#### EXPLANATION OF PROVISION

The provision modifies the requirement under ERISA relating to the delivery of pension benefit statements to generally require that, for a defined contribution plan, at least one such statement with respect to an individual must be provided on paper in written form for each calendar year. Similarly, for a defined benefit plan, at least one pension benefit statement with respect to an individual must be provided on paper every three years. An exception applies to (1) a plan that discloses documents using the 2002 safe harbor (subject to the modifications to this safe harbor described below); or (2) a plan that permits participants and beneficiaries to request

electronic delivery of pension benefit statements, if the participant or beneficiary makes such a request and the statement is so delivered.

The provision also directs the Secretary of Labor to make certain amendments to its regulations. With respect to the 2002 safe harbor,<sup>411</sup> the Secretary of Labor is directed to update the regulation no later than December 31, 2021 to provide that a plan may furnish pension benefit statements<sup>412</sup> electronically only if, in addition to meeting other requirements under the regulations, the plan (1) furnishes each participant and beneficiary a one-time initial paper notice, prior to the electronic delivery of any pension benefit statement, of the participant's right to request that all documents required to be disclosed under title I of ERISA be furnished on paper, and (2) furnishes each participant who is separated from service at least one paper pension benefit statement each year, unless the participant requests electronic delivery of such statements (and such statements are so delivered).

In addition, the Secretary must update guidance governing electronic disclosure (other than the 2002 safe harbor) no later than December 31, 2021 to the extent necessary to ensure the following, with respect to a plan that discloses required documents or statements electronically:

- A participant or beneficiary under such a plan is permitted the opportunity to request that any disclosure required to be delivered on paper under applicable guidance by the DOL is furnished by electronic delivery;
- Each paper statement furnished under such a plan includes (1) an explanation of how to request that all such statements, and any other document required to be disclosed, be furnished by electronic delivery; and (2) contact information for the plan sponsor, including a telephone number;
- The plan may not charge any fee to a participant or beneficiary for the delivery of paper statements;
- Each paper pension benefit statement identifies each plan document required to be disclosed and includes information about how a participant or beneficiary may access each such document;
- Each document required to be disclosed that is furnished by electronic delivery includes an explanation of how to request that all such documents be furnished on paper; and
- A plan is permitted to furnish a duplicate electronic statement in any case in which the plan furnishes a paper pension benefit statement.

#### EFFECTIVE DATE

The provision applies to plan years beginning after December 31, 2022.

<sup>411</sup> 29 C.F.R. sec. 2520.104b-1(c).

<sup>412</sup> The pension benefit statement that is required to be provided on paper under the provision at least once per calendar year for a defined contribution plan and at least once every three years for a defined benefit plan.

14. SEPARATE APPLICATION OF TOP HEAVY RULES TO DEFINED CONTRIBUTION PLANS COVERING EXCLUDIBLE EMPLOYEES (SEC. 314 OF THE BILL AND SEC. 416 OF THE CODE)

PRESENT LAW

*Top-heavy requirements*

Top-heavy requirements apply to limit the extent to which accumulated benefits or account balances under a qualified retirement plan can be concentrated with key employees.<sup>413</sup> Whereas the general nondiscrimination requirements are designed to test annual contributions or benefits for highly compensated employees, compared to those of non-highly compensated employees, the top-heavy rules test the portion of the total plan contributions or benefits that have accumulated for the benefit of key employees as a group. If a plan is top-heavy, minimum contributions or benefits must be provided for non-key employees and, in some cases, faster vesting is required. In general, for a defined contribution plan, this minimum contribution is three percent of the participant's compensation; however, such contribution is limited by the percentage at which contributions are made for the key employee with the highest percentage of contributions.

For this purpose, a key employee is an officer with annual compensation greater than \$185,000 (for 2021), a five-percent owner, or a one-percent owner with compensation in excess of \$150,000. A defined benefit plan generally is top-heavy if the present value of cumulative accrued benefits for key employees exceeds 60 percent of the cumulative accrued benefits for all employees. A defined contribution plan is top-heavy if the aggregate of accounts for key employees exceeds 60 percent of the aggregate accounts for all employees. The nature of the top-heavy test is such that a plan of a large business with many employees is unlikely to be top-heavy. The top-heavy requirements are therefore viewed as primarily affecting plans of smaller employers in which the owners participate.

*Minimum coverage requirements*

As part of the general nondiscrimination requirements, a qualified retirement plan must satisfy the minimum coverage requirement.<sup>414</sup> Under the minimum coverage requirement, the plan's coverage of employees must be nondiscriminatory. This is determined by calculating the plan's ratio percentage, that is, the ratio of the percentage of non-highly compensated employees (of all non-highly compensated employees in the workforce) covered under the plan over the percentage of highly compensated employees covered. If the plan's ratio percentage is 70 percent or greater, the plan satisfies the minimum coverage requirement. If the plan's ratio percentage is less than 70 percent, a multi-part test applies.<sup>415</sup> In addition, the average benefit percentage test must be satisfied. Under the average benefit percentage test, the average rate of contributions or benefit accruals for all non-highly compensated employees

<sup>413</sup> Secs. 401(a)(10)(B) and 416.

<sup>414</sup> Sec. 410(b).

<sup>415</sup> The plan must cover a group (or classification) of employees that is reasonable and established under objective business criteria, such as hourly or salaried employees (referred to as a reasonable classification), and the plan's ratio percentage must be at or above a specific level specified in the regulations.

in the workforce (taking into account all plans of the employer) must be at least 70 percent of the average contribution or accrual rate of all highly compensated employees.

The minimum coverage and general nondiscrimination requirements apply annually on the basis of the plan year. Employees who have not satisfied minimum age and service conditions under the plan, certain nonresident aliens, and employees covered by a collective bargaining agreement are generally disregarded.<sup>416</sup> However, a plan that covers employees with less than a year of service or who are under age 21 (“otherwise excludable employees”) must generally include those employees in any nondiscrimination test for the year but can test the plan for nondiscrimination in two parts: (1) by separately testing the portion of the plan covering otherwise excludable employees and treating all such employees as the only employees of the employer; and (2) then testing the rest of the plan taking into account the rest of the employees of the employer and excluding the otherwise excludable employees.

#### REASONS FOR CHANGE

The Committee believes that the rules allowing an employer to separately test otherwise excludable employees for certain nondiscrimination testing purposes were intended to encourage plan sponsors to permit employees to defer earlier than when the employee meets the minimum age and service conditions under the Code. Such separate testing is not allowed for the top-heavy test. Small business retirement plans often do not cover employees that do not meet the minimum age and service requirements because if the plan is or becomes top heavy, the employer may be required to contribute a top-heavy employer contribution for all employees who are eligible to participate in the plan, straining the budget for these small businesses. Thus, the Committee believes it is appropriate to allow an employer to perform the top-heavy test separately with respect to otherwise excludable employees. This policy would remove the financial incentive to exclude employees who do not meet minimum age and service from retirement plans and extend retirement plan coverage to more workers.

#### EXPLANATION OF PROVISION

Under the provision, if a top-heavy defined contribution plan covers employees who do not meet the minimum age and service requirements under the Code, and the plan satisfies the top-heavy minimum contribution requirement separately with respect to such employees, such employees may be excluded from consideration in determining whether any plan of the employer satisfies the top-heavy minimum contribution requirement.

#### EFFECTIVE DATE

The provision applies to plan years beginning after date of enactment.

<sup>416</sup> Qualified plans generally cannot delay an employee’s participation in the plan beyond the later of completion of one year of service (*i.e.*, a 12-month period with at least 1,000 hours of service) or attainment of age 21. Sec. 410(a)(1). A plan or portion of a plan covering collectively bargained employees is generally deemed to satisfy the nondiscrimination requirements.

15. REPAYMENT OF QUALIFIED BIRTH OR ADOPTION DISTRIBUTIONS  
LIMITED TO THREE YEARS (SEC. 315 OF THE BILL AND SEC. 72 OF  
THE CODE)

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 IRA generally is included in income for the year distributed.<sup>417</sup> 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.<sup>418</sup>

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.

*Distributions in the event of a qualified birth or adoption*

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.

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.<sup>419</sup>

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 indi-

<sup>417</sup> 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.

<sup>418</sup> Sec. 72(t). Under present law, the 10-percent early withdrawal tax does not apply to distributions from a governmental section 457(b) plan.

<sup>419</sup> A qualified birth or adoption distribution is subject to income tax withholding unless the recipient elects otherwise. Mandatory 20-percent withholding does not apply.

vidual of an eligible adoptee is finalized. An eligible adoptee 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 name, age, and taxpayer identification number of the child or eligible adoptee to which any qualified birth or adoption distribution relates must 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 \$5,000. The maximum aggregate amount applies on an individual basis. Therefore, each spouse separately may receive a maximum aggregate amount of \$5,000 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<sup>420</sup> does not exceed \$5,000. 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 \$5,000 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 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.

#### REASONS FOR CHANGE

Under present law, distributions from retirement plans for the birth or adoption of a child may be recontributed to a retirement plan at any time after the distribution is received and are treated as rollovers to the plan. However, a taxpayer making such a recontribution more than three years after the distribution was received

<sup>420</sup> The term "controlled group" means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414.

might be denied a refund for taxes paid on such distribution if such refund is claimed after the statute of limitations period for the return has been closed, which generally occurs after three years. Therefore, someone who took a birth or adoption distribution and recontributes such amount more than three years later might not be able to amend his or her return to request a refund for the taxes that were paid in the year of the withdrawal.

The Committee believes that in order to avoid such a result, recontributions should be required to be made within three years of the date the distribution is received.

#### EXPLANATION OF PROVISION

Under the provision, a recontribution of any portion of a qualified birth or adoption distribution, may, at any time during the three-year period beginning on the day after the date on which the distribution was received, be recontributed to an applicable eligible retirement plan to which a rollover can be made.

#### EFFECTIVE DATE

The provision provides that the amendment made to this section takes effect as if included in the enactment of section 113 of the Setting Every Community Up for Retirement Enhancement Act of 2019.<sup>421</sup>

#### 16. EMPLOYER MAY RELY ON EMPLOYEE CERTIFYING THAT DEEMED HARDSHIP DISTRIBUTION CONDITIONS ARE MET (SEC. 316 OF THE BILL AND SECS. 401(k), 403(b), AND 457(b) OF THE CODE)

##### PRESENT LAW

##### *Section 401(k) plan and section 403(b) plan hardship distributions*

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”). A section 403(b) plan may also include an elective deferral arrangement. Amounts attributable to elective deferrals under a section 401(k) plan or a section 403(b) plan generally cannot be distributed before the occurrence of one or more specified events, including financial hardship of the employee.<sup>422</sup>

A hardship distribution from a section 401(k) plan may include, in addition to the employee’s elective deferrals, qualified matching contributions, qualified nonelective contributions, and earnings on any of these amounts.<sup>423</sup> A hardship distribution from a section 403(b) plan may include elective deferrals, but not earnings on those deferrals.<sup>424</sup> Qualified matching contributions and qualified

<sup>421</sup>Sec. 113 of Div. O of the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116–94, December 20, 2019.

<sup>422</sup>Secs. 401(k)(2)(B)(i)(IV) and 403(b)(7)(A)(i)(V) and (11)(B). Other types of contributions may also be subject to this restriction.

<sup>423</sup>Sec. 401(k)(14). Qualified matching contributions (as defined in section 401(k)(3)(D)(ii)(I)) and qualified nonelective contributions (as defined in section 401(m)(4)(C)) may be used to enable the plan to satisfy certain nondiscrimination tests, to prevent discrimination in favor of highly compensated employees.

<sup>424</sup>Sec. 403(b)(11).

nonelective contributions to a section 403(b) plan that are in a custodial account are not eligible to be distributed on account of hardship.<sup>425</sup> A distribution under a section 401(k) plan is not treated as failing to be on account of hardship solely because the employee does not take any available plan loan. Distributions on account of hardship may be subject to an additional 10-percent early withdrawal tax.<sup>426</sup>

Applicable Treasury regulations provide that a distribution is made on account of hardship only if the distribution is made on account of an immediate and heavy financial need of the employee and is necessary to satisfy the financial need.<sup>427</sup> Generally, the determination of whether an employee has an immediate and heavy financial need is based on the relevant facts and circumstances. However, a distribution is deemed to be made on account of an immediate and heavy financial need if it is for: (1) generally, deductible expenses for medical care;<sup>428</sup> (2) costs directly related to the purchase of a principal residence for the employee (excluding mortgage payments); (3) payment of tuition, related educational fees, and room and board expenses, for up to the next 12 months of post-secondary education for the employee, the employee's spouse, child, or dependent;<sup>429</sup> or for a primary beneficiary under the plan; (4) payments necessary to prevent the eviction of the employee from the employee's principal residence or foreclosure on the mortgage on that residence; (5) payments for burial or funeral expenses for the employee's deceased parent, spouse, child, or dependent, or for a deceased primary beneficiary under the plan; (6) expenses for the repair of damage to the employee's principal residence that would qualify for the casualty deduction;<sup>430</sup> or (7) expenses and losses (including loss of income) incurred by the employee on account of a federally-declared disaster.<sup>431</sup>

A distribution is treated as necessary to satisfy the financial need under the Treasury regulations only to the extent that the amount of the distribution does not exceed the amount required. In addition, in order to be treated as necessary to satisfy the financial need, the following requirements must be met: (1) the employee has obtained all other currently available distributions under all plans of the employer; (2) the employee has provided to the plan administrator a written representation that he or she has insufficient cash or other liquid assets reasonably available to satisfy the need; and (3) the plan administrator does not have actual knowledge contrary to the representation.<sup>432</sup>

<sup>425</sup> Treas. Reg. sec. 1.403(b)-6(c).

<sup>426</sup> Sec. 72(t).

<sup>427</sup> Treas. Reg. secs. 1.401(k)-1(d)(3); 1.403(b)-6(d)(2).

<sup>428</sup> Expenses for (or necessary to obtain) medical care that would be deductible under section 213(d), determined without regard to the limitations in section 213(a) (relating to the applicable percentage of adjusted gross income and the recipients of the medical care) provided that, if the recipient of the medical care is not listed in section 213(a), the recipient is a primary beneficiary under the plan.

<sup>429</sup> As defined in section 152 without regard to section 152(b)(1), (b)(2), and (d)(1)(B).

<sup>430</sup> Under section 165 (determined without regard to section 165(h)(5) and whether the loss exceeds 10 percent of adjusted gross income).

<sup>431</sup> A disaster declared by the Federal Emergency Management Agency ("FEMA") under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, provided that the employee's principal residence or principal place of employment at the time of the disaster was located in an area designated by FEMA for individual assistance with respect to the disaster.

<sup>432</sup> Treas. Reg. sec. 1.401(k)-1(d)(3)(iii).



*Governmental section 457(b) plan distributions upon unforeseeable emergency*

An eligible deferred compensation plan of a governmental employer (referred to as a “governmental section 457(b) plan”) is generally similar to a qualified cash or deferred arrangement under a section 401(k) plan in that it consists of elective deferrals made at the election of an employee. Such deferrals generally may not be distributed from the plan before the occurrence of one or more specified events, including when the participant is faced with an unforeseeable emergency.<sup>433</sup>

Under Treasury regulations, the unforeseeable emergency must be defined in the plan as a severe financial hardship of the participant or beneficiary resulting from an illness or accident of the participant or beneficiary, or the participant’s or beneficiary’s spouse or dependent;<sup>434</sup> loss of the participant’s or beneficiary’s property due to casualty;<sup>435</sup> or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the participant or the beneficiary.<sup>436</sup> The Treasury regulations provide the following as examples of unforeseeable emergencies: (1) the imminent foreclosure of or eviction from the participant’s or beneficiary’s primary residence; (2) the need to pay for medical expenses, including non-refundable deductibles, as well as for the cost of prescription drug medication; and (3) the need to pay for the funeral expenses of a spouse or a dependent of a participant or beneficiary. The purchase of a home and the payment of college tuition are not unforeseeable emergencies, unless such expenses otherwise qualify.

In general, under the regulations, whether a participant or beneficiary is faced with an unforeseeable emergency permitting a distribution is to be determined based on the relevant facts and circumstances of each case, but, in any case, a distribution on account of unforeseeable emergency may not be made to the extent that such emergency is or may be relieved through reimbursement or compensation from insurance or otherwise, by liquidation of the participant’s assets, to the extent the liquidation of such assets would not itself cause severe financial hardship, or by cessation of deferrals under the plan. Distributions on account of an unforeseeable emergency must be limited to the amount reasonably necessary to satisfy the emergency need.

REASONS FOR CHANGE

The Committee believes that the existing administrative barriers to taking hardship withdrawals from retirement plans should be reduced, making it easier for participants who wish to access retirement funds in times of financial need. The Committee believes that generally allowing self-certification is a logical step in light of the success of the coronavirus-related distribution self-certification rules and the current hardship regulations under which employees self-certify the unavailability of funds to address the hardship.

<sup>433</sup> Sec. 457(d)(1)(A)(iii).

<sup>434</sup> As defined in section 152, and, for taxable years beginning on or after January 1, 2005, without regard to section 152(b)(1), (b)(2), and (d)(1)(B).

<sup>435</sup> This includes the need to rebuild a home following damage to a home not otherwise covered by homeowner’s insurance, such as damage that is the result of a natural disaster.

<sup>436</sup> Treas. Reg. sec. 1.457-6(c)(2).

## EXPLANATION OF PROVISION

Under the provision, in determining whether a distribution is due to an employee hardship, the plan administrator of a section 401(k) plan or a section 403(b) plan may rely on the employee's certification that the distribution is on account of a financial need of a type that is deemed in Treasury regulations to be an immediate and heavy financial need. Thus, if the employee certifies that the financial need for the hardship distribution is one of the types of deemed immediate and heavy financial needs that are described in the Treasury regulations,<sup>437</sup> such as funeral expenses for the employee's deceased parent, the distribution is treated as being made on account of an immediate and heavy financial need. In addition, under the provision, the plan administrator may rely on the employee's certification that the distribution is not in excess of the amount required to satisfy the financial need.

Similarly, with respect to a governmental section 457(b) plan, in determining whether a participant's distribution is made when the participant is faced with an unforeseeable emergency, a plan administrator may rely on the participant's certification that the distribution is on account of an unforeseeable emergency of a type that is specifically described in Treasury regulations as an unforeseeable emergency<sup>438</sup> and that the distribution does not exceed the amount reasonably necessary to satisfy the emergency need.

## EFFECTIVE DATE

The provision is effective for plan years beginning after December 31, 2021.

17. PENALTY-FREE WITHDRAWALS FROM RETIREMENT PLANS FOR INDIVIDUALS IN CASE OF DOMESTIC ABUSE (SEC. 317 OF THE BILL AND SEC. 72(t) OF THE CODE)

## PRESENT LAW

*Distributions from tax-favored retirement plans*

A distribution from a tax-qualified plan described in section 401(a) (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 individual retirement arrangement (an "IRA") generally is included in income for the year distributed.<sup>439</sup> These plans are referred to collectively as "eligible retirement plans."<sup>440</sup> 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

<sup>437</sup> Treas. Reg. sec. 1.401(k)-1(d)(3)(ii)(B), or any successor regulation.

<sup>438</sup> Treas. Reg. sec. 1.457-6(c)(2)(i), or any successor regulation.

<sup>439</sup> 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.

<sup>440</sup> Sec. 402(c)(8)(B). Eligible retirement plans also include annuity plans described in section 403(a).

to as the “early withdrawal tax”) on the amount includible in income.<sup>441</sup>

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.<sup>442</sup>

The terms of a qualified retirement plan, section 403(b) plan, or governmental section 457(b) plan generally determine when distributions are permitted. However, for many types of plans, restrictions apply to distributions before an employee’s termination of employment, referred to as “in-service” distributions or withdrawals. Despite such restrictions, an in-service distribution from a qualified retirement plan that includes a qualified cash-or-deferred arrangement (a “section 401(k) plan”) or a section 403(b) plan may be permitted in the case of financial hardship. Similarly, a governmental section 457(b) plan may permit distributions in the case of an unforeseeable emergency. Under a qualified retirement plan that is a pension plan (i.e., defined benefit pension plan or money purchase pension plan), distributions generally may be made only in the event of retirement, death, disability, or other separation from service, although in-service distributions may be permitted after age 59½.<sup>443</sup>

#### REASONS FOR CHANGE

The Committee recognizes that a domestic abuse victim may need funds to escape an unsafe situation. The Committee believes that such individuals should be able to access funds from retirement plans when needed, with minimal administrative hurdle and without being subject to the 10-percent early withdrawal tax that otherwise generally applies to early distributions from a retirement plan. In addition, the Committee wishes to permit such individuals to recontribute such withdrawals to a retirement plan, so that individuals who are able to later repay the funds do not miss out valuable retirement savings.

#### EXPLANATION OF PROVISION

Under the provision, an exception to the 10-percent early withdrawal tax applies in the case of an eligible distribution to a domestic abuse victim. In addition, such eligible distributions may be recontributed to applicable eligible retirement plans, subject to certain requirements.

<sup>441</sup> Sec. 72(t). The 10-percent early withdrawal tax does not apply to distributions from a governmental section 457(b) plan.

<sup>442</sup> Rev. Proc. 2016-47, 2016-37 I.R.B. 346, provides for a self-certification procedure (subject to verification on audit) that may be used by a taxpayer claiming eligibility for a waiver of the 60-day requirement with respect to a rollover into a plan or IRA in certain specified circumstances.

<sup>443</sup> Sec. 401(a)(36); Treas. Reg. secs. 1.401-1(b)(1)(i) and 1.401(a)-1(b)(1)(i). Section 401(k) plans, section 403(b) plans, and governmental section 457(b) plans also may permit in-service distributions after age 59½.

*Eligible distributions to a domestic abuse victim*

The provision provides that an eligible distribution to a domestic abuse victim is a distribution from an applicable eligible retirement plan to an individual if made during the one-year period beginning on a date on which the individual is a victim of domestic abuse by a spouse or domestic partner. Domestic abuse is defined under the provision as physical, psychological, sexual, emotional, or economic abuse, including efforts to control, isolate, humiliate, or intimidate the victim, or to undermine the victim's ability to reason independently, including by means of abuse of the victim's child or another family member living in the household. In making such a distribution, a plan administrator may rely on the participant's certification that the distribution is an eligible distribution to a domestic abuse victim.

An applicable eligible retirement plan, 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.<sup>444</sup> The maximum aggregate amount which may be treated as an eligible distribution to a domestic abuse victim by an individual is the lesser of \$10,000 or 50 percent of the value of the employee's account under the plan.<sup>445</sup> An eligible distribution to a domestic abuse victim is treated as meeting requirements relating to the timing of distributions under a section 401(k) plan, section 403(b) plan, or governmental section 457(b) plan.

Under the provision, an employer plan is not treated as violating any Code requirement merely because it treats a distribution to an individual (that would otherwise be an eligible distribution to a domestic abuse victim) as an eligible distribution to a domestic abuse victim, 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<sup>446</sup> does not exceed the lesser of \$10,000 or 50 percent of the value of the employee's accounts under the plans of the employer's controlled group. Thus, under such circumstances an employer plan is not treated as violating any Code requirement merely because an individual might receive, for example, total distributions in excess of \$10,000 as a result of distributions from plans of other employers or IRAs.

*Recontributions to applicable eligible retirement plans*

The provision provides that any portion of an eligible distribution to a domestic abuse victim may generally, 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 eligible distributions to domestic abuse victims from a plan, the plan must permit an employee who has received such an eligible distribution from that plan to recontribute only up

<sup>444</sup> An eligible distribution to a domestic abuse victim is subject to income tax withholding unless the recipient elects otherwise. Mandatory 20-percent withholding does not apply.

<sup>445</sup> 50 percent of the present value of the nonforfeitable accrued benefit of the employee under the plan.

<sup>446</sup> The term "controlled group" means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414.

to the amount that was distributed from that plan to that employee, provided the employee otherwise is eligible to make contributions (other than recontributions of eligible distributions to domestic abuse victims) to that plan. Any portion of an eligible distribution to a domestic abuse victim 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 provision is effective for distributions made after the date of enactment.

#### 18. REFORM OF FAMILY ATTRIBUTION RULE (SEC. 318 OF THE BILL AND SEC. 414 OF THE CODE)

##### PRESENT LAW

##### *Nondiscrimination requirements*

A qualified retirement plan is prohibited from discriminating in favor of highly compensated employees, referred to as the nondiscrimination requirements. These requirements are intended to ensure that a qualified retirement plan provides meaningful benefits to an employer's rank-and-file employees as well as highly compensated employees so that qualified retirement plans achieve the goal of retirement security for both lower-paid and higher-paid employees. The nondiscrimination requirements consist of a minimum coverage requirement and general nondiscrimination requirements.<sup>447</sup> For purposes of these requirements, 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 \$130,000 (for 2021).<sup>448</sup>

The minimum coverage and general nondiscrimination requirements apply annually on the basis of the plan year. In applying these requirements, as discussed below, employees of all members of a controlled group or affiliated service group are treated as employed by a single employer. Employees who have not satisfied minimum age and service conditions under the plan, certain non-resident aliens, and employees covered by a collective bargaining agreement are generally disregarded.<sup>449</sup> However, a plan that covers employees with less than a year of service or who are under age 21 must generally include those employees in any nondiscrimination test for the year but can test the plan for nondiscrimination in two parts: (1) by separately testing the portion of the plan covering employees who have not completed a year of service or are under age 21 and treating all of the employer's employees with less than a year of service or under age 21 as the only

<sup>447</sup> Sections 401(a)(3) and 410(b) address the minimum coverage requirement; section 401(a)(4) describes the general nondiscrimination requirements, with related rules in section 401(a)(5). Detailed regulations implement the statutory requirements. Governmental plans are generally exempt from these requirements.

<sup>448</sup> Sec. 414(q). At the election of the employer, employees who are highly compensated based on compensation may be limited to the top 20 percent highest paid employees. A non-highly compensated employee is an employee other than a highly compensated employee.

<sup>449</sup> A plan or portion of a plan covering collectively bargained employees is generally deemed to satisfy the nondiscrimination requirements.

employees of the employer; and (2) then testing the rest of the plan taking into account the rest of the employees of the employer and excluding those employees. If a plan does not satisfy the non-discrimination requirements on its own, it may in some circumstances be aggregated with another plan, and the two plans tested together as a single plan.

*Aggregation rules for groups under common control*

In general, in applying the requirements for tax-favored treatment for retirement plans, employees of employers (including corporations and other entities) that are members of a group under common control are treated as employed by a single employer (referred to as aggregation rules).<sup>450</sup> For example, in applying the nondiscrimination requirements, the employees of all the members of a group, and the benefits provided under plans maintained by any member of the group, are generally taken into account. In the case of taxable entities, common control is generally based on the percentage of equity ownership with a general threshold of 80 percent ownership. Other tests apply for entities that do not involve ownership.

*Family attribution rules*

The family attribution rules address the scenarios in which a person, such as a family member, is treated as having an ownership interest in a business.<sup>451</sup> For example, a spouse is generally attributed their spouse's ownership unless certain criteria are satisfied.<sup>452</sup>

One common exception to spousal attribution is for individuals who are legally separated under a divorce decree.<sup>453</sup> Other exceptions include spouses who do not directly own any stock in the business during the taxpayer year, a spouse who is neither an employee or director nor participates in the management of the business at any time during the year, where no more than 50 percent of the business' gross income derives from passive investments, and where the stock is transferable (i.e., is not subject to restrictions) that are in favor of the individual or his or her minor children (e.g., the business owner cannot be required to offer a right of first refusal to his or her spouse or their children before selling the business to a third party).

A parent is generally attributed the ownership of a minor child under the age of 21 and is attributed the ownership of an adult child, age 21 or older, if the parent owns more than 50 percent of the business. A minor child is attributed the ownership of a parent while an adult child is attributed the ownership of a parent only if the adult child owns more than 50 percent of the business. There is no exception to the application of the family attribution rules for

<sup>450</sup> Sec. 414(c) and the regulations thereunder provide for aggregation of groups under common control. Section 414(b), (m) and (o) also provide aggregation rules for a controlled group of corporations and affiliated service groups. Under section 414(t), the aggregation rules apply also for purposes of various benefits other than retirement benefits. In addition, other provisions incorporate the aggregation rules by reference, such as section 4980H, requiring certain employers to offer health coverage to full-time employees.

<sup>451</sup> Family attribution can address interests owned between spouses or among parents and children or grandparents and grandchildren.

<sup>452</sup> Sec. 1563(e)(5). For example, if a husband and wife each owned 25 percent of a business, generally both spouses would be treated as owning 50 percent of that business.

<sup>453</sup> Sec. 1563(e).

a minor child of individuals who are separated or divorced. For example, ownership of a business may be attributed to a divorced spouse through his or her minor child to the extent the exceptions for marital attribution do not apply.

The application of these rules is impacted by the laws on familial property ownership in community property state. In such a state, spouses may be deemed to own half of the property acquired during a marriage, except under limited circumstances. Accordingly, spouses in community property states may fail to satisfy the criteria that a spouse does not directly own any stock in the business during the taxpayer year.

#### REASONS FOR CHANGE

The Committee believes that there should be an exception to the family attribution rules to account for community property states and situations where spouses who are divorced or separated may be combined in a controlled group due to the spouses' minor child.

#### EXPLANATION OF PROVISION

The provision adds special rules to address family attribution and to disregard community property laws for purposes of determining ownership of a business.<sup>454</sup> For purposes of applying the attribution rules,<sup>455</sup> community property laws are disregarded for purposes of determining ownership. In addition, the stock of an individual not attributed under section 1563(e)(5) to the individual's spouse shall not be attributed to such spouse by reason of section 1563(e)(6)(A), which addresses minor children. Except as provided by the Secretary, stock in different corporations that is attributed to a child under section 1563(e)(6)(A) from each parent, but that is not attributed to such parents as spouses under section 1563(e)(5), shall not by itself result in such corporations being members of the same controlled group. If these modifications under the provision causes two or more entities to be a controlled group, or an affiliated service group, or to no longer be in a controlled group or affiliated service group, such change shall be treated as a transaction to which the special minimum coverage rule for certain dispositions or acquisitions applies.<sup>456</sup>

#### EFFECTIVE DATE

The provision applies to plan years beginning on or after the date of enactment.

#### 19. AMENDMENTS TO INCREASE BENEFIT ACCRUALS UNDER PLAN FOR PREVIOUS PLAN YEAR ALLOWED UNTIL EMPLOYER TAX RETURN DUE DATE (SEC. 319 OF THE BILL AND SEC. 401(b) OF THE CODE)

##### PRESENT LAW

Present law provides a remedial amendment period during which, under certain circumstances, a retirement plan may be amended retroactively in order to comply with the tax qualification

<sup>454</sup> Sec. 414(m)(6)(B).

<sup>455</sup> Under sec. 1563.

<sup>456</sup> Sec. 410(b)(6)(C).

requirements.<sup>457</sup> In general, plan amendments to reflect changes in the law generally must be made by the time prescribed by law for filing the income tax return of the employer for the employer's taxable year in which the change in law occurs (including extensions). Discretionary amendments must be adopted by the end of the plan year.<sup>458</sup> The Secretary may extend the time by which plan amendments need to be made.

Section 201 of the SECURE Act<sup>459</sup> provides that 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.

#### REASONS FOR CHANGE

Present law requires that discretionary plan amendments to an existing retirement plan must generally be adopted by the last day of the plan year in which the amendment is effective, but an employer may adopt a new retirement plan by the due date of the employer's tax return for the fiscal year in which the plan is effective. This rule precludes an employer from adding plan provisions to an existing plan that may be beneficial to participants after the end of the plan year but before the due date for the employer's tax return.

The Committee believes that discretionary amendments to an existing plan that increase participants' benefits to a plan for the prior plan year should be permitted to be adopted up until the date that the employer's tax return is due to be filed.

#### EXPLANATION OF PROVISION

Under the provision, if an employer amends a stock bonus, pension, profit-sharing, or annuity plan to increase benefits accrued under the plan effective for the preceding plan year (other than increasing the amount of matching contributions),<sup>460</sup> the amendment would not otherwise cause the plan to fail to meet any of qualification requirements, and the amendment is adopted before the time prescribed by law for filing the return of the employer for a taxable year (including extensions) during which the amendment is effective, the employer may elect to treat such amendment as having been adopted as of the last day of the plan year in which the amendment is effective.

#### EFFECTIVE DATE

The provision applies to amendments made in plan years beginning after December 31, 2022.

<sup>457</sup> Sec. 401(b).

<sup>458</sup> Rev. Proc. 2016-37, 2016-29 I.R.B. 136, June 29, 2016.

<sup>459</sup> Sec. 201 of Div. O. of the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, December 20, 2019.

<sup>460</sup> As defined in subsection 401(m)(4)(A).



20. RETROACTIVE FIRST YEAR ELECTIVE DEFERRALS FOR SOLE PROPRIETORS (SEC. 320 OF THE BILL AND SEC. 401(b) OF THE CODE)

PRESENT LAW

Present law provides a remedial amendment period during which, under certain circumstances, a retirement plan may be amended retroactively in order to comply with the tax qualification requirements.<sup>461</sup> In general, plan amendments to reflect changes in the law generally must be made by the time prescribed by law for filing the income tax return of the employer for the employer's taxable year in which the change in law occurs (including extensions). The Secretary may extend the time by which plan amendments need to be made.

Section 201 of SECURE Act<sup>462</sup> provides that 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. That provision permits employers to establish and fund a qualified plan by the due date for filing the employer's return for the preceding plan year. However, that provision 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 "section 401(k) plan").<sup>463</sup>

Under section 201 of the SECURE Act, a section 401(k) plan of a sole proprietor can be funded with employer contributions as of the due date for the business's return, but the elective deferrals must be made as of December 31 of the prior year. However, an individual is deemed to have made a contribution to an individual retirement plan for a taxable year if it is contributed after the taxable year has ended but is made "on account of" that year and before the due date for filing the IRA owner's tax return, (generally) for that year without extensions, (generally, April 15).<sup>464</sup>

REASONS FOR CHANGE

An employer may establish a new section 401(k) plan after the end of the taxable year, but before the due date for the employer's tax return and treat the plan as having been established on the last day of the taxable year. Such plans may be funded by employer contributions for which the employer may take a deduction, up to the employer's tax filing date.

The Committee believes that such plans when sponsored by sole proprietors or single-member LLCs, should be able to receive employee contributions up to the date of the employee's tax return filing date, but only for the initial year in which the plan is established.

<sup>461</sup> Sec. 401(b).

<sup>462</sup> Sec. 201 of Div. O. of the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, December 20, 2019.

<sup>463</sup> Treas. Reg. sec. 1.401(k)-1(e)(2)(ii).

<sup>464</sup> Sec. 219(f)(3). For taxpayers affected by a federally declared disaster, the IRS has the authority to postpone various tax deadlines for a period of up to one year. Sec. 7508A and ERISA sec. 518.

## EXPLANATION OF PROVISION

Under the provision, in the case of an individual who owns the entire interest in an unincorporated trade or business, and who is the only employee of such trade or business, any elective deferral<sup>465</sup> under a section 401(k) plan to which the preceding sentence applies which is made by such individual before the time for filing the return of such individual for the taxable year (determined without regard to any extensions) ending after or with the end of the plan's first plan year is treated as having been made before the end of the plan's first plan year. This extension of time would only apply to the first plan year in which the section 401(k) plan is established.

## EFFECTIVE DATE

The provision is effective for plan years beginning after the date of enactment.

21. LIMITING CESSATION OF IRA TREATMENT TO PORTION OF ACCOUNT INVOLVED IN A PROHIBITED TRANSACTION (SEC. 321 OF THE BILL AND SEC. 408 OF THE CODE)

## PRESENT LAW

Background on prohibited transactions may be found in section I.12 of this document.

*Disqualification of IRA in certain prohibited transactions*

If an individual for whose benefit an IRA is established (or such individual's beneficiary) engages in a prohibited transaction with respect to the IRA, the IRA loses its tax-favored status and ceases to be an IRA as of the first day of the taxable year in which the prohibited transaction occurs.<sup>466</sup> As a result, the IRA is treated as distributing to the individual on the first day of that taxable year the fair market value of all of the assets in the account. If the fair market value of the IRA assets exceeds the basis in the account, the individual has taxable gain that is includible in gross income. If the individual is under age 59½, the individual may also be subject to the 10-percent tax on early distributions.<sup>467</sup> The individual and the individual's beneficiaries are exempt, however, from the excise tax that otherwise applies to prohibited transactions.<sup>468</sup>

## REASONS FOR CHANGE

The Committee recognizes that many prohibited transactions involving IRAs are inadvertent. In addition, under present law, the entire IRA is disqualified when the IRA owner or beneficiary engages in a prohibited transaction, regardless of the size of the prohibited transaction. The Committee believes it is appropriate to treat only the portion of the IRA that is involved in the prohibited transaction as distributed.

<sup>465</sup> As defined in section 402(g)(3).

<sup>466</sup> Sec. 408(e)(2). "Prohibited transaction" means a transaction prohibited by section 4975.

<sup>467</sup> Sec. 72(t).

<sup>468</sup> Sec. 4975(c)(3).

## EXPLANATION OF PROVISION

The provision modifies the disqualification rule that applies when an IRA owner or beneficiary engages in a prohibited transaction so that only the portion of the IRA that is used in the prohibited transaction is treated as distributed to the individual. Thus, under the provision, if an IRA owner or beneficiary engages in a prohibited transaction with respect to the IRA, the portion of the account used in the transaction is treated as distributed to the individual as of the first day of the taxable year in which the transaction occurred (using fair market value of the portion on that first day).

## EFFECTIVE DATE

The provision applies to taxable years beginning after date of enactment.

## TITLE IV—TECHNICAL AMENDMENTS

1. AMENDMENTS RELATING TO SETTING EVERY COMMUNITY UP FOR RETIREMENT ENHANCEMENT ACT OF 2019 (SEC. 401 OF THE BILL AND SECS. 401(a)(9) AND 4973 OF THE CODE)

## PRESENT LAW

*Increase in age for required beginning date for mandatory distributions*

The SECURE Act changed the age on which the required beginning date for required minimum distributions was based, from age 70½ to age 72.<sup>469</sup> Background on these rules may be found in section I.5 of this document.

*Difficulty of care payments*

The SECURE Act also modified certain retirement contribution limits as they apply to “difficulty of care” payments.<sup>470</sup> A difficulty of care payment is compensation for providing the additional care needed for certain qualified foster individuals.<sup>471</sup> Such payments are excludable from gross income. Generally, the amount that may be contributed to an IRA is limited by the compensation that is includible in an individual’s gross income for the taxable year.<sup>472</sup> However, the SECURE Act modified the limit on nondeductible contributions to a traditional IRA to generally allow an individual to contribute a difficulty of care payment.<sup>473</sup> Under the SECURE Act, if the deductible amount of IRA contributions in effect for a taxable year (which is tied to the amount of nondeductible contributions that may be made) exceeds the individual’s compensation that is includible in gross income, the individual may elect to increase the limit on nondeductible contributions by the amount of the difficulty of care payment (or, if less, the excess of the deductible amount of IRA contributions over the individual’s compensation for the year).

<sup>469</sup> Pub. L. No. 116–94, Division O, sec. 114.

<sup>470</sup> Pub. L. No. 116–94, Division O, sec. 116.

<sup>471</sup> Sec. 131(c).

<sup>472</sup> Secs. 408(o)(2) and 408A(c)(2).

<sup>473</sup> Sec. 408(o)(5).

## EXCISE TAX ON EXCESS IRA CONTRIBUTIONS

To the extent that contributions to an IRA exceed the contribution limits, the individual is subject to an excise tax equal to six percent of the excess amount.<sup>474</sup> This excise tax generally applies each year until the excess amount is distributed.

## REASONS FOR CHANGE

The Committee wishes to clarify certain provisions of the SECURE Act.

EXPLANATION OF PROVISION<sup>475</sup>

The provision clarifies that the increase in the age on which the required beginning date for required minimum distributions is based (to age 72) does not change the general requirement to actuarially increase the accrued benefit of an employee who retires in a calendar year after the year the employee attains age 70½ (other than a five-percent owner) to take into account the period after age 70½ in which the employee was not receiving any benefits under the plan.<sup>476</sup>

The provision also clarifies that the excise tax on excess contributions to an IRA generally does not apply to difficulty of care payments contributed to an IRA.<sup>477</sup>

## EFFECTIVE DATE

The amendments made by the provision are effective as if included in the section of the SECURE Act to which the amendment relates.

## TITLE V—ADMINISTRATIVE PROVISIONS

## 1. PROVISIONS RELATING TO PLAN AMENDMENTS (SEC. 501 OF THE BILL)

## PRESENT LAW

Present law provides a remedial amendment period during which, under certain circumstances, a retirement plan may be amended retroactively in order to comply with tax qualification requirements.<sup>478</sup> In general, plan amendments to reflect changes in the law generally must be made by the time prescribed by law for filing the income tax return of the employer for the employer's taxable year in which the change in law occurs (including extensions). The Secretary may extend the time by which plan amendments need to be made.

The Code and ERISA provide that, in general, accrued benefits cannot be reduced by a plan amendment.<sup>479</sup> This prohibition on the

<sup>474</sup> Secs. 4973(b) and (f).

<sup>475</sup> In addition to the clarifications described below, the provision fixes a clerical error in section 72(t).

<sup>476</sup> Sec. 401(a)(9)(C)(iii).

<sup>477</sup> The excise tax does not apply to any designated nondeductible contribution to an IRA that does not exceed the limit on nondeductible contributions by reason of the individual's election to increase such limit to account for the difficulty of care payment. Sec. 4973(b) (as amended by this provision).

<sup>478</sup> Sec. 401(b).

<sup>479</sup> Code sec. 411(d)(6); ERISA sec. 204(g).

reduction of accrued benefits is commonly referred to as the “anti-cut-back rule.”

#### REASONS FOR CHANGE

The Committee recognizes that it may be difficult for plan sponsors to amend their plans in order to implement the provisions of this bill at the time such provisions become effective. The Committee therefore believes it is appropriate to offer relief to plans and allow for retroactive amendments.

#### EXPLANATION OF PROVISION

The provision permits certain plan amendments made pursuant to the changes in the Act, or regulations issued thereunder, to be retroactively effective. If a plan amendment meets the requirements of the provision, then the plan will be treated as being operated in accordance with its terms, and the amendment will not violate the anti-cut-back rule. In order for this treatment to apply, the plan must be operated as if the plan amendment were in effect, and the amendment is required to be made on or before the last day of the first plan year beginning on or after January 1, 2023 (or such later date as the Secretary may prescribe). However, if the plan is a governmental plan, the amendment is required to be made on or before the last day of the first plan year beginning on or after January 1, 2025 (or such later date as the Secretary may prescribe).

If the amendment is required to be made to retain qualified status as a result of the changes in the law (or regulations), the amendment is required to be made retroactively effective as of the date on which the change became effective with respect to the plan and the plan is required to be operated in compliance until the amendment is made. Amendments that are not required to retain qualified status but that are made pursuant to the changes made by the Act (or applicable regulations) may be made retroactively effective as of the first day the amendment is effective.

A plan amendment will not be considered to be pursuant to the Act (or applicable regulations) if it has an effective date before the effective date of the provision under the Act (or regulations) to which it relates. Similarly, the provision does not provide relief from the anti-cut-back rule for periods prior to the effective date of the relevant provision (or regulations) or the plan amendment. The Secretary (or the Secretary’s delegate) is authorized to provide exceptions to the relief from the prohibition on reductions in accrued benefits. It is intended that the Secretary will not permit inappropriate reductions in contributions or benefits that are not directly related to the provisions under the Act.

The provision also amends the deadlines for certain plan amendments made pursuant to the SECURE Act and the Coronavirus Aid, Relief, and Economic Security Act, to conform with the deadlines provided under this provision.<sup>480</sup>

<sup>480</sup> The provision modifies the general deadlines for plan amendments under the SECURE Act (section 601 of the SECURE Act), and the deadlines for amendments relating to coronavirus-related distributions and the waiver of required minimum distributions under the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, sections 2202 and 2203.

## EFFECTIVE DATE

The provision is effective on date of enactment.

## TITLE VI—REVENUE PROVISIONS

## 1. SIMPLE AND SEP ROTH IRAS (SEC. 601 OF THE BILL AND SECS 408A, 408, 402 OF THE CODE)

## PRESENT LAW

An IRA is generally established by an individual for whom the IRA is maintained.<sup>481</sup> In some cases, an employer may establish IRAs on behalf of employees and provide retirement contributions to the IRAs. 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.<sup>482</sup> 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.

There are two basic types of IRAs: traditional IRAs, to which deductible or nondeductible contributions can be made, and Roth IRAs, contributions to which are not deductible. The total contributions made to all IRAs for a year cannot exceed \$6,000 (for 2021), plus an additional \$1,000 (not indexed) in catch-up contributions for individuals age 50 or older. Certain individuals are not permitted to make deductible contributions to a traditional IRA or to make contributions to a Roth IRA, depending on their income.

Distributions from traditional IRAs are generally includible in income, except to the extent a portion of the distribution is treated as a recovery of the individual's basis (if any). Qualified distributions from a Roth IRA are excluded from income;<sup>483</sup> other distributions from a Roth IRA are includible in income to the extent of earnings. IRA distributions generally can be rolled over to another IRA or qualified retirement plan; however, a distribution from a Roth IRA generally can be rolled over only to another Roth IRA or a designated Roth account.

Savings Incentive Match Plan for Employees ("SIMPLE") plans and Simplified Employee Pension ("SEP") plans are special types of employer-sponsored retirement plans to which the employer makes contributions to IRAs established for each of the employer's employees in accordance with the Code requirements for each type of plan.<sup>484</sup> SIMPLE IRAs and SEPs may not be designated as Roth IRAs.<sup>485</sup>

<sup>481</sup> Secs. 219, 408, and 408A provide the 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.

<sup>482</sup> Sec. 408(c).

<sup>483</sup> A qualified distribution is a distribution that (1) is made after the five-taxable-year period beginning with the first taxable year for which the individual first made a contribution to a Roth IRA, and (2) is made after attainment of age 59½, on account of death or disability, or is made for first-time homebuyer expenses of up to \$10,000. Sec. 408A(d)(2).

<sup>484</sup> Secs. 408(p), (k).

<sup>485</sup> Sec. 408A(f)(1).

### *SIMPLE IRA plans*

An employer is generally eligible to establish a SIMPLE IRA plan if it had no more than 100 employees who received at least \$5,000 of compensation from the employer in the preceding year.<sup>486</sup> Contributions to a SIMPLE IRA plan may include employee salary reduction contributions (i.e., elective deferrals) and employer contributions either in the form of matching contributions up to three percent of an employee's compensation or nonelective contributions of a flat two percent of compensation regardless of the employee's elective deferral.

SIMPLE IRA plans may be designed so that the employee will receive cash compensation unless the employee affirmatively elects to make elective deferrals to the plan. Alternatively, a plan may provide that elective deferrals are made at a specified rate (when the employee becomes eligible to participate) unless the employee elects otherwise (i.e., affirmatively elects not to make contributions or to make contributions at a different rate). This alternative plan design is referred to as automatic enrollment. Starting with taxable years after December 31, 2019, eligible employers are allowed a credit of \$500 per year for up to three years for startup costs for new SIMPLE IRA plans that include automatic enrollment. An employer is also allowed a credit of \$500 per year for up to three years if it converts an existing plan to an automatic enrollment design.

There is an annual threshold on the amount of an elective deferral that an employee may make to a SIMPLE IRA plan (subject to cost of living adjustments). The salary reduction contributions under a SIMPLE IRA plan count toward the overall annual limit on elective deferrals an employee may make to this and other plans permitting elective deferrals. For 2021, the annual contribution limit for SIMPLE IRA plans is \$13,500. If permitted by the SIMPLE IRA plan, participants who are age 50 or above at the end of the calendar year may also make catch up contributions, the limit for which is \$3,000 in 2021.

### *SEP IRA plans*

A Simplified Employee Pension ("SEP") plan is a special type of employer-sponsored retirement plan whereby only the employer makes contributions to the plan.<sup>487</sup> Unlike SIMPLE IRA plans, any size employer may establish a SEP plan. The amount of the contribution to the SEP IRA plan is up to the lesser of 25 percent of the employee's compensation or the dollar limit applicable to contributions to a qualified defined contribution plan (\$58,000 for 2021).<sup>488</sup> A traditional IRA is set up for each eligible employee, and all contributions must be fully vested. Any employee must be eligible to participate in the SEP if the employee has (1) attained age 21, (2) performed services for the employer during at least three of the immediately preceding five years, and (3) received at least \$650 (for 2021) in compensation from the employer for the year.<sup>489</sup> Contributions to a SEP generally must bear a uniform relationship to compensation.

<sup>486</sup> Sec. 408(p).

<sup>487</sup> Sec. 408(k).

<sup>488</sup> *Ibid.*

<sup>489</sup> The annual compensation limit for SEPs is \$290,000.

Effective for taxable years beginning before January 1, 1997, certain employers with no more than 25 employees could maintain a salary reduction SEP (“SARSEP”) under which employees could make elective deferrals. The SARSEP rules were generally repealed with the enactment of the SIMPLE plan rules. However, contributions may continue to be made to SARSEPs that were established before 1997. Salary reduction contributions to a SARSEP are subject to the same limit that applies to elective deferrals under a section 401(k) plan (\$19,500 for 2021). An individual who has attained age 50 before the end of the taxable year may also make catch-up contributions to a SARSEP up to a limit of \$6,500 (for 2021).

#### *Roth Contributions*

Elective deferrals are generally made on a pre-tax basis. However, certain retirement plans, such as section 401(k), section 403(b), and governmental 457(b) plans, may include a qualified Roth contribution program under which elective deferrals are made on an after-tax basis (designated Roth contributions), and attributable distributions are excluded from income. The annual dollar limit on a participant’s designated Roth contributions is the same as the limit on elective deferrals, reduced by the participant’s elective deferrals that are not designated Roth contributions. Designated Roth contributions are generally treated the same as any other elective deferral for certain purposes, including the restrictions on distributions.

#### REASONS FOR CHANGE

Under present law, SEP and SIMPLE IRAs may only be classified as traditional IRAs with elective deferrals made on a pre-tax basis. The Committee believes that participants should be able to contribute to SEP and SIMPLE IRAs as Roth IRAs.

#### EXPLANATION OF PROVISION

Under the provision, a SEP and a SIMPLE IRA are permitted to be designated as Roth IRAs. Contributions to a SEP or SIMPLE IRA that is a designated Roth IRA are not excludable from gross income (employer contributions as well as elective deferrals), and qualified distributions from such Roth IRAs are excludable from gross income. With respect to SEP and SIMPLE IRAs, an individual retirement plan that is designated as a Roth IRA shall not be treated as a SEP or SIMPLE IRA unless the employee elects for the plan to be treated as such (at such time and in such manner as the Secretary may provide). In the case of any payment or distribution out of a SIMPLE IRA, with respect to which an election has been made and which is received during the two-year period beginning on the date the individual first participated in any salary reduction arrangement in a SIMPLE IRA maintained by the individual’s employer,<sup>490</sup> a “qualified rollover distribution” shall not include any payment or distribution paid into an account other than a SIMPLE IRA.

The contribution limit for Roth IRAs generally is increased by the contributions made on the individual’s behalf to the SIMPLE IRA or SEP for the taxable year, subject to certain limits. In this

<sup>490</sup> Sec. 72(t)(6).



case of a SIMPLE IRA, the Roth IRA contribution limit is increased only to the extent that the contributions made on the individual's behalf (1) do not exceed the sum of the limit on elective contributions to a SIMPLE IRA and the required employer contribution to such IRA,<sup>491</sup> and (2) do not cause the individual's elective contributions to exceed the elective deferral limit.<sup>492</sup> In the case of a SEP plan, the Roth IRA contribution limit is increased only to the extent that the contributions made on the individual's behalf do not exceed the annual contribution limit applicable to SEPs.<sup>493</sup>

#### EFFECTIVE DATE

The provision applies to taxable years beginning after December 31, 2021.

#### 2. HARDSHIP WITHDRAWAL RULES FOR 403(b) PLANS (SEC. 602 OF THE BILL AND SEC. 403(b) OF THE CODE)

##### PRESENT LAW

Background on rules related to hardship distributions under a section 403(b) plan may be found in section III.16 of this document.

##### REASONS FOR CHANGE

The Committee believes that the rules that apply to the types of contributions that may be withdrawn upon hardship should be the same for section 401(k) plans and section 403(b) plans.

##### EXPLANATION OF PROVISION

The provision conforms the hardship distribution rules for section 403(b) plans to those of section 401(k) plans. Thus, the provision provides that in addition to elective deferrals, a section 403(b) plan may distribute, on account of an employee's hardship, qualified nonelective contributions,<sup>494</sup> qualified matching contributions,<sup>495</sup> and earnings on any of these contributions (including on elective deferrals).

#### EFFECTIVE DATE

The provision is effective for plan years beginning after December 31, 2021.

#### 3. ELECTIVE DEFERRALS GENERALLY LIMITED TO THE REGULAR CONTRIBUTION LIMIT (SEC. 603 OF THE BILL AND SECS. 414, 402, AND 457 OF THE CODE)

##### PRESENT LAW

##### *Defined contribution plan limits*

Qualified retirement plans (and other tax-favored employer-sponsored retirement plans) are accorded special tax treatment and fall

<sup>491</sup> Sec. 408(p)(2).

<sup>492</sup> Sec. 402(g)(1) (taking into account any additional elective deferrals permitted as catch-up contributions under section 414(v)).

<sup>493</sup> Sec. 408(j).

<sup>494</sup> As defined in section 401(m)(4)(C).

<sup>495</sup> As defined in section 401(k)(3)(D)(ii)(I).

into two categories: defined benefit plans and defined contribution plans. A defined contribution plan is a type of qualified retirement plan whereby contributions, earnings, and losses are allocated to a separate account for each participant.

Defined contribution plans may provide for nonelective contributions and matching contributions by employers and pre-tax (that is, contributions are either excluded from income or deductible) or after-tax contributions by employees. Total contributions made to an employee's account for a year cannot exceed the lesser of \$58,000 (for 2021) or the employee's compensation.

Under certain types of defined contribution plans, including section 401(k) plans, section 403(b) plans, or governmental section 457(b) plans, an employee may elect to have contributions (elective deferrals) made to the plan, rather than receive the same amount in cash. The maximum annual amount of elective deferrals that can be made by an employee for a year is \$19,500 (for 2021) or, if less, the employee's compensation.<sup>496</sup> For an employee who attains age 50 by the end of the year, the dollar limit on elective deferrals is increased by \$6,500 (for 2021) (called "catch-up contributions").<sup>497</sup> Elective deferrals generally cannot be distributed from the plan before the employee's severance from employment, death, disability or attainment of age 59½ or in the case of hardship or plan termination.

#### *Catch-up contributions*

Certain retirement plans may permit employees to make catch-up contributions, subject to certain limitations. Employees aged 50 or older may make catchup contributions to a section 401(k), section 403(b), and governmental 457(b) plans, up to \$6,500 in 2021 (indexed for inflation). If elective deferral and catch-up contributions are made to both a qualified defined contribution plan and a section 403(b) plan for the same employee, a single limit applies to the elective deferrals under both plans. Special contribution limits apply to certain employees under a section 403(b) plan maintained by a church. In addition, under a special catch-up rule, an increased elective deferral limit applies under a plan maintained by an educational organization, hospital, home health service agency, health and welfare service agency, church, or convention or association of churches in the case of employees who have completed 15 years of service. In this case, the limit is increased by the least of (1) \$3,000, (2) \$15,000, reduced by the employee's total elective deferrals in prior years, and (3) \$5,000 times the employee's years of service, reduced by the employee's total elective deferrals in prior years.<sup>498</sup>

The section 457(b) plan limits apply separately from the combined limit applicable to section 401(k) and 403(b) plan contributions, so that an employee covered by a governmental section 457(b) plan and a section 401(k) or 403(b) plan can contribute the

<sup>496</sup> Secs. 402(g); 457(c). This limit applies to total elective deferrals under all of a participant's section 401(k) plans and section 403(b) plans but applies separately to any governmental section 457(b) plan.

<sup>497</sup> Sec. 414(v).

<sup>498</sup> Because contributions to a defined contribution plan cannot exceed an employee's compensation, contributions for an employee are generally not permitted after termination of employment. However, under a special rule, a former employee may be deemed to receive compensation for up to five years after termination of employment for purposes of receiving employer nonelective contributions under a section 403(b) plan.

full amount to each plan. In addition, under a special catch-up rule, for one or more of the participant's last three years before normal retirement age, the otherwise applicable limit is increased to the lesser of (1) two times the normal annual limit (\$39,000 for 2021) or (2) the sum of the otherwise applicable limit for the year plus the amount by which the limit applicable in preceding years of participation exceeded the deferrals for that year.

#### *Roth contributions*

Elective deferrals are generally made on a pre-tax basis. However, certain retirement plans, such as section 401(k), section 403(b), and governmental section 457(b) plans, may include a qualified Roth contribution program under which elective deferrals are made on an after-tax basis (designated Roth contributions), and qualified distributions are excluded from income.<sup>499</sup> A qualified distribution is a distribution that (1) is made after the five-taxable-year period beginning with the first taxable year for which the individual first made the contribution, and (2) is made after attainment of age 59½, or on account of death or disability.

#### REASONS FOR CHANGE

The Committee believes that participants should be required to make catch-up contributions to certain retirement plans, such as section 401(a) qualified plans, section 403(b) plans, and governmental section 457(b) plans, on an after-tax basis or with Roth treatment.

#### EXPLANATION OF PROVISION

Under the provision, a section 401(a) qualified plan, section 403(b) plan, or governmental section 457(b) plan that permits an eligible participant to make catch-up contributions must require such contributions to be designated Roth contributions. The provision does not apply to a Savings Incentive Match Plan for Employees ("SIMPLE") IRA or Simplified Employee Pension ("SEP") plan.

#### EFFECTIVE DATE

The provision applies to taxable years beginning after December 31, 2021.

#### 4. OPTIONAL TREATMENT OF EMPLOYER MATCHING CONTRIBUTIONS AS ROTH CONTRIBUTIONS (SEC. 604 OF THE BILL AND SEC. 402A OF THE CODE)

#### PRESENT LAW

##### *Defined Contribution Plan Contributions*

Defined contribution plans may provide for nonelective contributions and matching contributions by employers and pre-tax (that is, contributions are either excluded from income or deductible) or after-tax contributions by employees. Total contributions made to an employee's account for a year cannot exceed the lesser of \$58,000 (for 2021) or the employee's compensation. The deduction for employer contributions to a defined contribution plan for a year

<sup>499</sup> Sec. 402A.

is generally limited to 25 percent of the participants' compensation. A participant must at all times be fully vested in his or her own contributions to a defined contribution plan and must vest in employer contributions under three-year cliff vesting or two-to-six-year graduated vesting.<sup>500</sup>

Defined contribution plans can be further categorized into different types, such as profit-sharing plans, stock bonus plans, or money purchase plans, and may include special features, such as a qualified cash or deferred arrangement (section 401(k)) or an employee stock ownership plan ("ESOP"). Under a common type of retirement arrangement, a section 401(k) plan, an employee may elect to have contributions (elective deferrals) made to the plan, rather than receive the same amount in cash. For 2021, elective deferrals of up to \$19,500 may be made, plus, for employees aged 50 or older, up to \$6,500 in catch-up contributions. Elective deferrals generally cannot be distributed from the plan before the employee's severance from employment, death, disability, or attainment of age 59½ or in the case of hardship or plan termination.

#### *Designated Roth contributions*

Elective deferrals are generally made on a pre-tax basis.<sup>501</sup> However, certain defined contributions plans, such as a section 401(k), 403(b), or governmental 457(b) plan, may include a qualified Roth contribution program under which elective deferrals are made on an after-tax basis (designated Roth contributions), but certain distributions ("qualified distributions"), including earnings, are excluded from income.<sup>502</sup> A qualified distribution is a distribution that (1) is made after the five-taxable-year period beginning with the first taxable year for which the individual first made the contribution, and (2) is made after attainment of age 59½, or on account of death or disability.

#### *Employer Contributions*

Employers generally are not required to make contributions to a defined contribution plan, but many employers make matching contributions or nonelective contributions. Matching contributions are employer contributions that are made only if the employee makes contributions and can relate to pre-tax elective deferrals, designated Roth contributions, or other after-tax contributions. Matching contributions are generally based on a formula that is a percentage of the employee's contribution to the plan. Alternatively, matching contributions may be made by the employer to the plan that are a flat dollar amount up to a particular percentage of the employee's compensation.

In contrast, nonelective contributions are made without regard to whether the employee makes pre-tax or after-tax contributions. Nonelective contributions by an employer are based on a fixed or

<sup>500</sup> Under the automatic enrollment 401(k) safe harbor, the matching and nonelective contributions are allowed to become 100 percent vested only after two years of service (rather than being required to be immediately vested when made).

<sup>501</sup> Section 401(k) plans may be designed so that elective deferrals are made only if the employee affirmatively elects them. However, a section 401(k) plan may provide for "automatic enrollment," under which elective deferrals are made at a specified rate unless the employee affirmatively elects not to make contributions or to make contributions at a different rate. Various rules have been developed to provide favorable treatment for plans that provide for automatic enrollment, subject to certain notice requirements.

<sup>502</sup> Sec. 402A.

discretionary formula that could take into account the participant's years of service or age. Nonelective contributions could also generally be a flat dollar amount to the plan for each eligible employee.

If an employee makes elective deferrals that are designated Roth contributions to a defined contribution plan, the employer may not make matching or nonelective contributions on a Roth basis. The employer may only allocate contributions to match designated Roth contributions into a pre-tax account.

#### REASONS FOR CHANGE

The Committee believes that employees should have the option to elect to make matching contributions on a Roth basis.

#### EXPLANATION OF PROVISION

Under the provision, a section 401(a) qualified plan, a section 403(b) plan, or a governmental 457(b) plan may permit an employee to designate matching contributions as designated Roth contributions. An employer matching contribution that is a designated Roth contribution shall not be excludable from gross income.

#### EFFECTIVE DATE

The provision applies to contributions made after the date of the enactment.

### III. VOTES OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the following statement is made concerning the vote of the Committee on Ways and Means in its consideration of H.R. 2954, the "Securing a Strong Retirement Act of 2021".

An amendment in the nature of a substitute to H.R. 2954 passed by voice vote with a quorum being present.

H.R. 2954 as amended by an amendment in the nature of a substitute was ordered favorably reported to the House of Representatives by voice vote with a quorum being present.

### IV. BUDGET EFFECTS OF THE BILL

#### A. COMMITTEE ESTIMATE OF BUDGETARY EFFECTS

In compliance with clause 3(d) of rule XIII of the Rules of the House of Representatives, the following statement is made concerning the effects on the budget of the bill.

The bill is estimated to increase Federal fiscal year budget receipts by \$1.636 billion dollars for the period 2021 through 2031.

ESTIMATED BUDGET EFFECTS OF H.R. 2954,  
THE "SECURING A STRONG RETIREMENT ACT OF 2021,"  
AS REPORTED BY THE COMMITTEE ON WAYS AND MEANS

Fiscal Years 2021 - 2031

[Millions of Dollars]

Provision	Effective	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2021-26	2021-31
<b>I. Expanding Coverage and Increasing Retirement Savings</b>														
1. Expanding automatic enrollment in retirement plans [1]...	pyba 12/31/22	---	---	-426	-633	-637	-696	-720	-727	-734	-743	-752	-2,393	-6,070
2. Modification of credit for small employer pension plan startup costs.....	tyba 12/31/21	---	-39	-133	-239	-321	-367	-386	-394	-398	-402	-405	-1,099	-3,084
3. Promotion of Saver's credit.....	DOE	---	---	-7	-15	-23	-32	-42	-53	-65	-78	-93	-77	-409
4. Enhancement of 403(b) plans.....	aaa 12/31/21	---	---	---	---	---	---	---	---	---	---	---	---	---
5. Increase in age for required beginning date for mandatory distributions .....	[2]	---	-380	-383	-364	-339	-376	-373	-378	-1,427	-1,504	-1,345	-1,842	-6,869
6. Indexing IRA catch-up limit.....	tyba 12/31/22	---	---	---	---	---	-17	-20	-19	-18	-40	-38	-17	-153
7. Higher catch-up limit to apply at age 62, 63 and 64 [3].....	tyba 12/31/22	---	---	-9	-22	-35	-54	-73	-91	-110	-130	-151	-120	-675
8. Multiple employer 403(b) plans [4].....	pyba 12/31/21	---	-3	-7	-9	-12	-17	-21	-26	-30	-34	-40	-48	-199
9. Treatment of student loan payments as elective deferrals for purposes of matching contributions [5].....	cmf pyba 12/31/21	---	-63	-100	-139	-184	-222	-239	-253	-269	-281	-292	-708	-2,042
10. Application of credit for small employer pension plan startup costs to employers which join an existing plan .....	[6]	[7]	-4	-10	-16	-20	-23	-25	-27	-29	-31	-34	-74	-221
11. Military spouse retirement plan eligibility credit for small employers. [8] .....	tyba DOE	---	-14	-18	-19	-19	-21	-22	-23	-24	-25	-26	-91	-211
12. Small immediate financial incentives for contributing to a plan.....	pyba DOE	---	---	---	---	---	---	---	---	---	---	---	---	---
13. Safe harbor for corrections of employee elective deferral failures .....	[9]	30	51	53	56	58	60	62	64	66	68	71	308	639
14. One-year reduction in period of service requirement for long-term, part-time workers [10].....	[11]	-8	-12	-14	-16	-19	-24	-29	-31	-34	-38	-42	-94	-268
<b>Total of Expanding Coverage and Increasing Retirement Savings.....</b>		<b>22</b>	<b>-465</b>	<b>-1,055</b>	<b>-1,416</b>	<b>-1,551</b>	<b>-1,790</b>	<b>-1,889</b>	<b>-1,959</b>	<b>-3,073</b>	<b>-3,238</b>	<b>-3,146</b>	<b>-6,255</b>	<b>-19,562</b>
<b>II. Preservation of Income</b>														
1. Remove required minimum distribution barriers for life annuities.....	DOE	---	-64	-122	-158	-175	-190	-160	-101	147	458	808	-708	445
2. Qualifying longevity annuity contracts .....	[12]	-6	-4	-4	-4	-5	-6	-6	-6	-6	-7	-7	-29	-61
3. Insurance-dedicated exchange-traded funds .....	[13]	---	---	---	---	---	---	---	-68	-171	-263	-364	---	-866
<b>Total of Preservation of Income.....</b>		<b>-6</b>	<b>-68</b>	<b>-126</b>	<b>-162</b>	<b>-180</b>	<b>-196</b>	<b>-166</b>	<b>-175</b>	<b>-30</b>	<b>188</b>	<b>437</b>	<b>-737</b>	<b>-482</b>

[illegible]

Provision	Effective	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2031-36	2021-31
<b>VI. Revenue Provisions</b>														
1. SIMPLE and SEP Roth IRAs.....	tyba 12/31/21	1	17	28	40	53	68	75	87	100	118	124	207	711
2. Hardship withdrawal rules for 403(b) plans.....	pyba 12/31/21	8	19	31	45	59	67	71	73	74	76	79	230	602
3. Elective deferrals generally limited to regular contribution limit.....	tyba 12/31/21	---	2,892	3,694	3,540	3,060	2,493	1,737	572	-616	-1,603	-2,542	15,678	13,225
4. Optional treatment of employer matching contributions as Roth contributions.....	cma DOE	240	1,252	1,504	1,739	1,480	1,953	1,516	1,256	1,034	659	234	8,168	12,868
<b>Total of Revenue Provisions.....</b>		<b>249</b>	<b>4,180</b>	<b>5,258</b>	<b>5,364</b>	<b>4,652</b>	<b>4,681</b>	<b>3,399</b>	<b>1,988</b>	<b>592</b>	<b>-750</b>	<b>-2,105</b>	<b>24,284</b>	<b>27,407</b>
<b>NET TOTAL.....</b>		<b>333</b>	<b>2,931</b>	<b>3,725</b>	<b>3,680</b>	<b>2,782</b>	<b>2,450</b>	<b>809</b>	<b>-962</b>	<b>-3,421</b>	<b>-4,795</b>	<b>-5,891</b>	<b>15,900</b>	<b>1,636</b>

Joint Committee on Taxation

NOTE: Details may not add to totals due to rounding. The date of enactment is assumed to be July 1, 2021.

Legend for "Effective" column.

aaa = amounts invested after  
arwrt = amounts received with respect to  
cma = contributions made after  
cnrl = contributions made for

dna = distributions made after  
dnrt = distributions made in  
DOE = date of enactment  
pyba = plan years beginning after

pyba/a = plan years beginning on or after  
tyba = taxable years beginning after  
tyca = taxable years ending after

(1) Estimate includes the following budget effects:

Total Revenue Effect.....	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2031-36	2021-31
On-budget effects.....	---	---	-426	-633	-637	-696	-720	-727	-734	-743	-752	-2,393	-6,070
Off-budget effects.....	---	---	-385	-579	-584	-644	-669	-677	-685	-694	-704	-2,192	-5,621

(2) Effective for distributions required to be made after 12/31/21, with respect to individuals who attain age 72 after each date. Increase in RMD age to 73 beginning on January 1, 2022. Further increase in RMD age to 74 on January 1, 2029 and increase in RMD to age 75 on January 1, 2032.

(3) Estimate includes the following budget effects:

Total Revenue Effect.....	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2031-36	2021-31
On-budget effects.....	---	-3	-7	-9	-12	-17	-21	-26	-30	-34	-40	-48	-199
Off-budget effects.....	---	-3	-6	-8	-11	-15	-19	-23	-27	-31	-36	-43	-179

(4) Estimate includes the following budget effects:

Total Revenue Effect.....	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2031-36	2021-31
On-budget effects.....	---	---	-1	-1	-1	-2	-2	-3	-3	-3	-4	-5	-20
Off-budget effects.....	---	---	-63	-100	-139	-184	-222	-239	-253	-269	-281	-292	-2,042

(5) Estimate includes the following budget effects:

Total Revenue Effect.....	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2031-36	2021-31
On-budget effects.....	---	---	-49	-78	-109	-144	-177	-192	-203	-216	-226	-235	-557
Off-budget effects.....	---	---	-14	-22	-30	-40	-45	-47	-50	-53	-55	-57	-413

(6) Effective for eligible employer plans which become effective with respect to the eligible employer after the date of the enactment of this Act.

(7) Loss of less than \$500,000.

(8) Estimate includes the following budget effects:

Total Revenue Effect.....	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2031-36	2021-31
On-budget effects.....	---	---	-14	-18	-19	-21	-22	-23	-24	-25	-26	-26	-211
Off-budget effects.....	---	---	-13	-17	-18	-20	-21	-22	-23	-24	-25	-25	-201

Footnotes for the Table are continued on following page(s)



## Footnotes for the Table continued:

[9] Effective with respect to any errors with respect to which the date referred to in section 414(a) (as added by this provision) is after the date of enactment of this Act.

[10] Estimate includes the following budget effects

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2021-26	2021-31
Total Revenue Effect.....	-8	-12	-14	-16	-19	-24	-29	-31	-34	-38	-42	-94	-269
On-budget effects.....	-7	-11	-13	-15	-17	-22	-26	-28	-31	-34	-37	-85	-244
Off-budget effects.....	-1	-1	-1	-1	-2	-2	-3	-3	-3	-4	-4	-8	26

[11] Effective as if included in the addition of section 401(s)(2)(D)(ii) by section 112 of the Setting Every Community Up for Retirement Enhancement Act of 2019, Division O of Pub. L. 116-94.

[12] For paragraph (1) of subsection (a) of section 202 of this Act, effective on or after the date of enactment. For paragraphs (2) and (3) of subsection (a) of section 202 of this Act, effective with respect to contracts purchased or received in an exchange on or after July 2, 2014.

[13] For subsection (a) of section 203 of the Act, effective on the date of enactment. For subsections (b) and (c), effective with respect to segregated asset account investments made on or after the date that is seven years after the date of enactment.

[14] Gain of less than \$500,000.

[15] Effective as if included in the enactment of section 113 of the Setting Every Community Up for Retirement Enhancement Act of 2019, Division O of Pub. L. 116-94.

[16] Estimate includes the following budget effects:

	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2021-26	2021-31
Total Revenue Effect.....	---	-16	-33	-50	-68	-94	-117	-137	-157	-175	-194	-261	-1,042
On-budget effects.....	---	-14	-28	-42	-58	-81	-101	-118	-134	-149	-163	-223	-887
Off-budget effects.....	---	-2	-5	-7	-10	-13	-16	-20	-23	-27	-31	-38	-154

[17] Effective as if included in the applicable section of the Setting Every Community Up for Retirement Enhancement Act of 2019, Division O of Pub. L. 116-94, to which it relates.

B. STATEMENT REGARDING NEW BUDGET AUTHORITY AND TAX  
EXPENDITURES BUDGET AUTHORITY

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee states that the bill involves no new or increased budget authority. The Committee further states that the bill involves no new tax expenditure.

C. COST ESTIMATE PREPARED BY THE CONGRESSIONAL BUDGET  
OFFICE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, requiring a cost estimate prepared by CBO, the following statement by CBO is provided.

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, September 2, 2021.*

Hon. RICHARD NEAL,  
*Chairman, Committee on Ways and Means,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2954, the Securing a Strong Retirement Act of 2021.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Ellen Steele and James Williamson.

Sincerely,

PHILLIP L. SWAGEL,  
*Director.*

Enclosure.

At a Glance			
H.R. 2954, Securing a Strong Retirement Act of 2021			
As ordered reported by the House Committee on Ways and Means on May 5, 2021			
By Fiscal Year, Millions of Dollars	2021	2021-2026	2021-2031
Direct Spending (Outlays)	0	0	0
Revenues	333	15,171	158
Increase or Decrease (-) in the Deficit	-333	-15,171	-158
Spending Subject to Appropriation (Outlays)	0	70	not estimated
Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2032?	> \$5 billion	Contains intergovernmental mandate?	Yes, Over Threshold
		Contains private-sector mandate?	Yes, Over Threshold

The bill would:

- Increase the age at which required minimum distributions from retirement plans must begin
- Require employers to automatically enroll eligible employees in certain defined contribution retirement plans, including section 401(k) and 403(b) plans

- Increase the current tax credit for start-up costs an employer incurs in adopting a new pension plan
  - Make a portion of disability-related distributions from pensions or annuities to first responders nontaxable
  - Require the Pension Benefit Guaranty Corporation to establish the Retirement Savings Lost and Found program
  - Require certain retirement plans to designate catch-up contributions as Roth contributions
  - Allow certain retirement plans to permit employees to designate employer matching contributions as Roth contributions
- Estimated budgetary effects would mainly stem from:
- Additional revenues from requiring some retirement contributions to be made on an after-tax basis
  - Reduced revenues from provisions that would increase before-tax retirement contributions

Areas of significant uncertainty include:

- Projections of contributions to and participation in retirement plans

The Congressional Budget Act of 1974, as amended, stipulates that revenue estimates provided by the staff of the Joint Committee on Taxation (JCT) are the official estimates for all tax legislation considered by the Congress. CBO therefore incorporates such estimates into its cost estimates of the effects of legislation. Most of the estimates for the provisions of H.R. 2954 were provided by JCT.

Bill summary: H.R. 2954 would amend the tax code to modify rules for retirement plans and tax-favored savings accounts. Several provisions would reduce revenues significantly by expanding automatic enrollment in retirement plans and raising the age at which required minimum distributions (RMDs) from defined contribution retirement plans or traditional individual retirement arrangements (IRAs) must begin. Other provisions would increase revenues by directing some retirement plans to require catch-up contributions to be designated as Roth contributions and allowing some plans to permit employees to designate their employers' matching contributions as Roth contributions.

Estimated Federal cost: The estimated budgetary effect of H.R. 2954 is shown in Table 1. The costs of the legislation fall within budget function 600 (Income Security).

TABLE 1.—ESTIMATED BUDGETARY EFFECTS OF H.R. 2954

	By fiscal year, millions of dollars—												
	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2021–2026	2021–2031
Increases or Decreases (–) in Revenues													
Title I. Expanding Coverage and Increasing Retirement Savings:													
Estimated Revenues .....	22	–581	–1,209	–1,567	–1,701	–1,948	–2,048	–2,114	–3,223	–3,383	–3,286	–6,984	–21,040
On-Budget .....	23	–564	–1,142	–1,480	–1,604	–1,845	–1,943	–2,005	–3,112	–3,271	–3,173	–6,614	–20,122
Off-Budget .....	–1	–16	–66	–87	–97	–102	–104	–108	–110	–112	–114	–370	–918
Title II. Preservation of Income:													
Estimated Revenues .....	–6	–68	–126	–162	–180	–196	–166	–175	–30	188	437	–737	–482
Title III. Simplification and Clarification of Retirement Plan Rules:													
Estimated Revenues .....	67	–716	–352	–107	–139	–146	–535	–816	–910	–995	–1,076	–1,393	–5,727
On-Budget .....	67	–715	–346	–100	–129	–134	–519	–795	–888	–967	–1,045	–1,355	–5,573
Off-Budget .....	0	–2	–5	–7	–10	–13	–16	–20	–23	–27	–31	–38	–154
Title VI. Revenue Offsets:													
Estimated Revenues .....	249	4,180	5,258	5,364	4,652	4,581	3,399	1,988	592	–750	–2,105	24,284	27,407
Total Revenues .....	333	2,815	3,571	3,529	2,632	2,292	650	–1,117	–3,571	–4,940	–6,031	15,171	158
On-Budget .....	334	2,833	3,642	3,623	2,739	2,407	770	–989	–3,438	–4,801	–5,886	15,579	1,230
Off-Budget .....	–1	–18	–71	–94	–107	–115	–120	–128	–133	–139	–145	–408	–1,072
Increases in Spending Subject to Appropriation													
Estimated Authorization .....	0	5	5	10	20	30	n.e.	n.e.	n.e.	n.e.	n.e.	70	n.e.
Estimated Outlays .....	0	5	5	10	20	30	n.e.	n.e.	n.e.	n.e.	n.e.	70	n.e.

Sources: Congressional Budget Office; staff of the Joint Committee on Taxation.  
Components may not sum to totals because of rounding; n.e. = not estimated.

Basis of estimate: The Congressional Budget Act of 1974, as amended, stipulates that revenue estimates provided by the staff of the Joint Committee on Taxation (JCT) will be the official estimates for all tax legislation considered by the Congress. CBO therefore incorporates those estimates into its cost estimates of the effects of legislation. Most of the estimates for the provisions of H.R. 2954 were provided by JCT.<sup>503</sup> For this estimate, CBO and JCT assume that the bill will be enacted before the end of fiscal year 2021.

Revenues: In total, JCT estimates, H.R. 2954 would raise revenues by \$158 million over the 2021–2031 period, raising on-budget revenues by \$1.2 billion and reducing off-budget revenues by \$1.1 billion.

Title I. Expanding Coverage and Increasing Retirement Savings. H.R. 2954 would implement changes to tax law concerning the treatment of retirement plans. JCT estimates that title I would reduce total revenues by \$21.0 billion over the 2021–2031 period. Five provisions in title I would affect off-budget revenues over that period, reducing those revenues by \$918 million. The provisions listed here would have notable effects.

- Section 105 would raise the age at which participants must begin to receive RMDs from retirement plans. Under current law, participants generally must take distributions starting at age 72. The bill would raise the age for some participants to 73 on January 1, 2022, increase it to 74 on January 1, 2029, and raise it again to 75 on January 1, 2032. JCT estimates that the change would reduce revenues by \$6.9 billion over the 2021–2031 period.

- Section 101 would require employers that offer section 401(k) or 403(b) plans with salary reduction agreements to automatically enroll eligible employees in those plans. Under current law, retirement plans may provide for automatic contributions. H.R. 2954 would require employers to automatically enroll employees at contribution rates of 3 percent to 10 percent in the first year. That rate would increase by 1 percentage point annually until it reached at least 10 percent (with a cap at 15 percent). Employees could still opt out of automatic enrollment or adjust their contributions. JCT estimates that the change would reduce revenues by \$6.1 billion over the 2021–2031 period; of that amount, \$449 million would be off-budget.

- Section 102 would increase the current nonrefundable tax credit for start-up costs that employers incur when they adopt a new pension plan. Under current law, employers are allowed a nonrefundable tax credit equal to 50 percent of the cost of starting up a plan. H.R. 2954 would increase the credit to 100 percent for employers with up to 50 employees. JCT estimates that the change would reduce revenues by \$3.1 billion over the 2021–2031 period.

- Section 107 would raise the limits on catch-up contributions to employer-sponsored retirement plans. Under current law, starting at age 50, employees can make additional con-

<sup>503</sup> For JCT's estimates of the provision that include detail beyond the summary presented below, see Joint Committee on Taxation, *Estimated Revenue Effects of H.R. 2954, The "Securing a Strong Retirement Act of 2021,"* Scheduled for Markup by the Committee on Ways and Means on May 5, 2021, JCX–22–21 (May 3, 2021). [www.jct.gov/publications/2021/jcx-22-21](http://www.jct.gov/publications/2021/jcx-22-21).

tributions each year to their 401(k), 403(b), or governmental section 457(b) plan or to a Savings Incentive Match Plan for Employees (SIMPLE IRA). For 2021, the catch-up limit for most plans is \$6,500; the SIMPLE limit is \$3,000. (Both amounts are indexed to inflation.) H.R. 2954 would raise the catch-up amount for employer-sponsored plans to \$10,000 and increase the SIMPLE amount to \$5,000. The new limits would apply at age 62, 63, and 64. JCT estimates that the change would reduce revenues by \$2.2 billion over the 2021–2031 period.

- Section 109 would allow employees to receive matching contributions to their retirement plans when they make payments on student loans. Under current law, employers may make matching contributions when employees make elective deferrals to retirement plans. H.R. 2954 would allow employers to make matching contributions to 401(k), 403(b), and 457(b) plans or to a SIMPLE IRA when an employee makes a student loan payment. The total payments for a year could not exceed the amount of elective deferrals that the employee would otherwise be permitted to contribute under current law, and the payments would be reduced by any elective deferrals made by the employee for the year. JCT estimates that the change would reduce revenues by \$2.0 billion over the 2021–2031 period.

- Section 113 would allow employers time to correct mistakes to elective deferrals from or automatic enrollments in retirement plans. H.R. 2954 would provide employers offering a 403(b) tax-sheltered annuity, an IRA, or a 457(b) plan up to 9½ months after the end of the plan year to correct such mistakes. JCT estimates that the change would increase revenues by \$639 million over the 2021–2031 period.

- Section 103 would direct the Internal Revenue Service to promote the Saver's Credit (a tax credit for contributions to retirement plans and IRAs) to increase its use. JCT estimates that the change would reduce revenues by \$409 million over the 2021–2031 period.

- Section 114 would reduce the time some employees must wait to participate in a 401(k) plan. Under current law, employers offering those plans must allow employees to participate if they complete one year of employment in which they worked at least 1,000 hours or three consecutive years in which they worked at least 500 hours. H.R. 2954 would reduce the latter requirement to two years. JCT estimates that the change would reduce revenues by \$268 million over the 2021–2031 period.

- Other provisions in title I include the expansion of a start-up credit available for employers joining multiemployer retirement plans and a new credit for employers that would allow military spouses to participate in retirement plans sooner than they would otherwise be eligible. JCT estimates that those provisions, along with others that would have smaller budgetary effects, would reduce revenues by \$432 million over the 2021–2031 period.

Title II. Preservation of Income. H.R. 2954 would make several changes to the treatment of life annuities in retirement plans and

to regulations related to variable annuities. JCT estimates that those provisions would reduce revenues by \$482 million over the 2021–2031 period. The following provisions in title II would have the largest effects:

- Section 203 would allow variable annuities to offer exchange-traded funds (ETFs) that are insurance dedicated. ETFs are pooled investment vehicles that are traded on stock exchanges and widely available through retirement plans and taxable investment accounts. Under current law, ETFs are not generally available through individual variable annuities because they cannot satisfy the regulatory requirements to be insurance dedicated. H.R. 2954 would direct the Department of the Treasury to update regulations for annuities to allow ETFs to be offered. JCT estimates that the change would reduce revenues by \$866 million over the 2021–2031 period.
- Section 201 would remove certain required minimum distribution rules related to life annuities in retirement plans and IRAs. Under current law, several tests regarding RMDs are intended to limit tax deferrals by precluding commercial annuities from providing certain guaranteed annual increases. Those tests also may limit the return of premium death benefit funds or guaranteed specific payment amounts distributed over a set period of time (known as period certain guarantees) for participating annuities. H.R. 2954 would amend the RMD rules to allow commercial annuities to offer those features. For example, section 201 would allow annual annuity payments to increase by a constant percentage and allow for a lump-sum payment that accelerates a beneficiary's receipt of annuity income. JCT estimates that the change would increase revenues by \$445 million over the 2021–2031 period.

Title III. Simplification and Clarification of Retirement Plan Rules. This title would change certain rules for retirement plans. JCT estimates that title III would reduce total revenues by \$5.7 billion over the 2021–2031 period. One provision in title III (section 318) would affect off-budget revenues over that period, reducing those revenues by \$154 million. Six provisions in particular would have notable revenue effects:

- Section 311 would make a portion of certain disability-connected distributions from pensions or annuities to qualified first responders nontaxable. JCT estimates that the provision would reduce revenues by \$2.6 billion over the 2021–2031 period.
- Section 309 would allow for a onetime \$50,000 IRA distribution to a split-interest entity—a planned-giving instrument, such as a charitable remainder annuity trust, charitable remainder unitrust, or a charitable gift annuity. The provision also would index the exclusion limit on qualified distributions to inflation. JCT estimates that the provision would reduce revenues by \$2.3 billion over the 2021–2031 period.
- Section 318 would establish new rules for determining ownership of a business for the purposes of coverage and non-discrimination tests for retirement plans. JCT estimates that the provision would reduce revenues by \$1.0 billion over the 2021–2031 period.

- Section 316 would allow certain retirement plan administrators to rely on employees' certification that they qualify for hardship distributions from retirement plans and that the distribution amounts do not exceed immediate and heavy financial need. JCT estimates that the provision would increase revenues by \$407 billion over the 2021–2031 period.

- Section 306 would require the Pension Benefit Guaranty Corporation (PBGC) to create the Retirement Savings Lost and Found program to collect unclaimed pension balances of up to \$1,000 from pension funds and maintain a database allowing people to locate their balances and contact plans in which they participated. JCT estimates that the provision would reduce revenues by \$410 million over the 2021–2031 period. This provision also would affect discretionary spending, which is discussed further under the heading "Spending Subject to Appropriation."

- Section 314 would allow retirement plans to separately apply the top-heavy test to excludable and nonexcludable employees. Under current law, top-heavy rules ensure that the benefits of employer-sponsored retirement plans are not overly concentrated among higher-compensated employees. H.R. 2954 would allow retirement plans to separately consider nonexcludable employees and excludable employees (such as workers under age 21 who have less than one year of employment) for determining whether a plan is top heavy, thus reducing the risk to employers of allowing excludable employees to participate. JCT estimates that the provision would increase revenues by \$398 million over the 2021–2031 period.

Title VI. Revenue Offsets. This title contains four provisions that would increase revenues by a total of \$27.4 billion over the 2021–2031 period, as follows:

- Section 603 would require certain retirement plans to designate catch-up contributions as Roth contributions. Under current law, employees age 50 or older can make additional contributions to retirement plans, usually on a before-tax basis. The bill would require catch-up contributions to be made on an after-tax (Roth) basis for certain government and private-sector plans. JCT estimates that the provision would increase revenues by \$13.2 billion over the 2021–2031 period.

- Section 604 would allow certain retirement plans to permit employees to designate employers' matching contributions as Roth contributions. Those government and private-sector plans could make matching contributions, designated as Roth contributions, on an after-tax basis. JCT estimates that the provision would increase revenues by \$13.0 billion over the 2021–2031 period.

- Section 601 would allow Simplified Employee Pension and SIMPLE IRA plans to be designated as Roth IRAs. JCT estimates that the provision would increase revenues by \$711 million over the 2021–2031 period.

- Section 602 would allow 403(b) retirement plans to make hardship distributions. Such plans are most commonly available to employees of public schools and nonprofit organizations. Currently, the plans can distribute elective deferrals in the case of an employee's immediate and heavy financial need. The



provision also would allow 403(b) plans to distribute qualified nonelective contributions and qualified matching contributions, or earnings on any contributions, in a case of financial hardship. JCT estimates that the provision would increase revenues by \$602 million over the 2021–2031 period.

Spending subject to appropriation: As discussed above, section 306 would require PBGC to establish the Retirement Savings Lost and Found program. Under that program, PBGC would collect unclaimed pension balances of up to \$1,000 and maintain a database allowing people to find those balances and contact the pension plans in which they participated. The program would cover defined benefit plans as well as 401(k) and other defined contribution plans. The bill would require PBGC to establish the new program within three years of enactment. For this provision, CBO assumes that the authorized and necessary amounts will be provided in each year beginning in 2022.

Under current law, if a pension plan terminates but cannot locate a participant who is owed benefits, the funds are transferred to PBGC's Missing Participants Program. The new program would be much larger than the existing one because it would apply to all plans, not just terminated ones.

When a worker with accrued pension benefits of less than \$5,000 leaves a company, under current law the pension plan may distribute the balance to the worker rather than maintaining that worker in the plan; under H.R. 2954, that amount would increase to \$6,000. The bill also would require unclaimed accrued benefits of less than \$1,000 to be transferred to PBGC, which would hold the assets as a trustee for the worker until the benefits were claimed. Because those assets would still belong to the worker, the transfer would not be considered a governmental receipt.

CBO estimates that enacting H.R. 2954 would cost \$70 million over the 2022–2026 period (see Table 1). Costs over the first four years would mainly be for planning. Beginning in 2024, spending also would cover the initial costs of hardware and software for the online system and initial operational costs. (Using information from PBGC and data about similar programs, CBO expects that more than three years would be needed to implement the new PBGC program.)

#### *Uncertainty*

These estimates of the budgetary effects of H.R. 2954 are subject to uncertainty because they are made on the basis of underlying projections and other estimates that are subject to change. Specifically, estimates for many of the bill's revenue provisions rely on projections of contributions to and participation in retirement plans, which in turn are based on CBO's economic projections for the next decade under current law and on estimates of the way taxpayers could change their saving behavior in response to changes in retirement plan rules.

The estimate of spending for the Retirement Savings Lost and Found program also is subject to uncertainty in several areas. For example, CBO cannot predict how many accounts would be created under the program or what services would be provided to people who are searching for their pension accounts. More than half of U.S. workers now participate in a pension plan. The number of

transfers from those plans to PBGC would depend on the number of workers participating in a plan who left a job with less than \$1,000 in accrued benefits and the share of that group that did not claim those benefits. Under current law, plans need not report unclaimed benefits, and CBO is unaware of any current comprehensive data on such benefits, so it is unclear how many transfers would be made to PBGC.

**Pay-As-You-Go considerations:** The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in revenues that are subject to those pay-as-you-go procedures are shown in Table 1. Only on-budget changes to outlays or revenues are subject to pay-as-you-go procedures.

**Increase in long-term deficits:** CBO and JCT estimate that enacting H.R. 2954 would increase on-budget deficits by more than \$5 billion in at least one of the four consecutive 10-year periods beginning in 2032.

**Mandates:** JCT has determined that the tax provisions of H.R. 2954 would impose intergovernmental and private-sector mandates as defined in Unfunded Mandates Reform Act (UMRA) by no longer allowing participants to make before-tax catch-up contributions to retirement plans other than IRAs. The cost of those mandates would exceed the annual intergovernmental and private-sector thresholds established in UMRA (\$85 million and \$170 million in 2021, respectively, adjusted annually for inflation).

The nontax provisions of H.R. 2954 would impose a private-sector mandate by requiring retirement plans to provide benefit statements on paper at least once each year for defined contribution plans and once every three years for defined benefit plans. Under current law, such statements must be made quarterly, and they can be delivered on paper or electronically. CBO estimates that the cost of the mandate would be small.

The nontax provisions of the bill would not impose an intergovernmental mandate.

Estimate prepared by: Federal Revenues: Ellen Steele, James Williamson, Staff of the Joint Committee on Taxation; Federal Costs: Noah Meyerson, Mandates: Andrew Laughlin, Staff of the Joint Committee on Taxation.

Estimate reviewed by: Joshua Shakin, Chief, Revenue Estimating Unit; John McClelland, Director of Tax Analysis; Sheila Dacey, Chief, Income Security and Education Cost Estimates Unit; H. Samuel Papenfuss, Deputy Director of Budget Analysis.

## **V. OTHER MATTERS TO BE DISCUSSED UNDER THE RULES OF THE HOUSE**

### **A. COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS**

With respect to clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee made findings and recommendations that are reflected in this report.

## B. STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

With respect to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee advises that the bill contains no measure that authorizes funding, so no statement of general performance goals and objectives is required.

## C. INFORMATION RELATING TO UNFUNDED MANDATES

This information is provided in accordance with section 423 of the Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104–4). The Committee has determined that the bill contains one unfunded Federal mandate that is imposed on the private sector, as well as on State, local, and tribal governments: the requirement that catch-up contributions in a retirement plan (other than an IRA) be made on a Roth basis.

## D. APPLICABILITY OF HOUSE RULE XXI, CLAUSE 5(b)

Clause 5(b) of rule XXI of the Rules of the House of Representatives provides, in part, that “It shall not be in order to consider a bill, joint resolution, amendment, or conference report carrying a retroactive Federal income tax rate increase.” The Committee, after careful review, states that the bill does not involve any retroactive Federal income tax rate increase within the meaning of the rule.

## E. TAX COMPLEXITY ANALYSIS

Section 4022(b) of Pub. L. No. 105–266, the Internal Revenue Service Restructuring and Reform Act of 1998 (the “RRA”), requires the staff of the Joint Committee on Taxation (in consultation with the IRS and the Treasury Department) to provide a tax complexity analysis. The complexity analysis is required for all legislation reported by the Senate Committee on Finance, the House Committee on Ways and Means, or any committee of conference if the legislation includes a provision that directly or indirectly amends the Internal Revenue Code of 1986 and has widespread applicability to individuals or small businesses.

Pursuant to clause 3(h)(1) of rule XIII of the Rules of the House of Representatives, for each such provision identified by the staff of the Joint Committee on Taxation, a summary description of the provision is provided below along with an estimate of the number and type of affected taxpayers, and a discussion regarding the relevant complexity and administrative issues.

Following the analysis of the staff of the Joint Committee on Taxation are the comments of the IRS and Treasury regarding each provision included in the complexity analysis.

### List of Provisions in the Complexity Analysis

#### 1. INCREASE IN AGE FOR REQUIRED BEGINNING DATE FOR MANDATORY DISTRIBUTIONS (SEC. 105 OF THE BILL)

##### *Summary description of provision*

The provision changes the age on which the required beginning date for required minimum distributions is based, from the calendar year in which the employee or IRA owner attains age 72 to the calendar year in which the employee or IRA owner attains age

73, for individuals who attain age 72 after December 31, 2021, and who attain age 73 before January 1, 2029. In addition, the provision changes such age from 73 years to 74 years, for individuals who attain age 73 after December 31, 2028, and who attain age 74 before January 1, 2032. Such age is further increased to age 75 for individuals who attain age 74 after December 31, 2031.

*Number of affected taxpayers*

It is estimated that the provision will affect over 10 percent of taxpayers during the budget window.

*Discussion*

The IRS will need to modify its forms and publications to reflect the provision. It would also need to update information on its website and provide communications to external stakeholders. Additionally, both taxpayers and the IRS will need to continue to monitor required minimum distributions as well as claimed qualified charitable distributions based on the potential mismatch created by the age requirements. Disputes between taxpayers and the IRS may increase in the case of discrepancies between these records.

2. REPAYMENT OF QUALIFIED BIRTH OR ADOPTION DISTRIBUTION LIMITED TO THREE YEARS (SEC. 315 OF THE BILL)

*Summary description of the provision*

A recontribution of any portion of a qualified birth or adoption distribution may, at any time during the three-year period beginning on the date after the date on which the distribution was received, be recontributed to an applicable eligible retirement plan to which a rollover can be made. Under present law, 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. Accordingly, the time period during which a recontribution may be made is limited to a three-year period, rather than being permitted at any time after the date on which the distribution was received.

The provision would take effect as if it were included in the enactment of section 113 of the Setting Every Community Up for Retirement Enhancement Act of 2019.<sup>503</sup>

*Number of affected taxpayers*

It is estimated that the provision will affect over 10 percent of taxpayers during the budget window and will continue to increase over time.

*Discussion*

The provision reduces the complexity created under present law by reducing the recontribution period from an unlimited period of time to a 3-year period. Specifically, employers will be required to track such recontributions under the special rules that apply to employer plans. The ability to recontribute such distributions during

<sup>503</sup>Sec. 113 of Div. O of the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, December 20, 2019.

the three-year period beginning on the date after the date on which the distribution was received, rather than with no time limit over the lifetime of an individual, although not necessarily to the plan or IRA from which the related distribution was made, will still require tracking of recontributions to ensure amounts so denominated do not exceed the aggregate lifetime qualified birth or adoption distributions from all plans of an individual. Tracking these amounts will also require that plan administrators and IRA trustees, plan participants and IRA owners, and the IRS, keep accurate and detailed records of distributions and recontributions for a period of three years.

The provision will require the IRS to update its publications to address qualified birth and adoption distributions, as well as updating information on its website and providing communications to external stakeholders. Both taxpayers and the IRS will need to monitor recontributions which will be limited to a period of three years, rather than having no time limit. Because the three year period for recontributions is consistent with the three-year statute of limitations period in which a refund for taxes paid on such distributions needs to be claimed, this modification will be helpful in reducing the complexity of this provision.

#### F. CONGRESSIONAL EARMARKS, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

With respect to clause 9 of rule XXI of the Rules of the House of Representatives, the Committee has carefully reviewed the provisions of the bill, and states that the provisions of the bill do not contain any congressional earmarks, limited tax benefits, or limited tariff benefits within the meaning of the rule.

#### G. DUPLICATION OF FEDERAL PROGRAMS

In compliance with clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of the bill establishes or reauthorizes: (1) a program of the Federal Government known to be duplicative of another Federal program; (2) a program included in any report to Congress pursuant to section 21 of Pub. L. No. 111–139; or (3) a program related to a program identified in the most recent Catalog of Federal Domestic Assistance, published pursuant to section 6104 of title 31, United States Code.

#### H. HEARINGS

Pursuant to clause 3(c)(6) of rule VIII, clause 12 of rule XXI, and sec. 3(u) of H. Res. 8 (117th Congress),

(1) The following hearing was used to develop or consider H.R. 2954: Member Day Hearing held on March 23, 2021.

### VI. CHANGES IN EXISTING LAW MADE BY THE BILL

#### A. CHANGES IN EXISTING LAW PROPOSED BY THE BILL

Pursuant to clause 3(e)(1)(B) of rule XIII of the Rules of the House of Representatives, changes in existing law proposed by the bill are shown as follows (existing law proposed to be omitted is en-

closed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

**INTERNAL REVENUE CODE OF 1986**

\* \* \* \* \*

**Subtitle A—Income Taxes**

\* \* \* \* \*

**CHAPTER 1—NORMAL TAXES AND SURTAXES**

\* \* \* \* \*

**Subchapter A—DETERMINATION OF TAX LIABILITY**

\* \* \* \* \*

**PART IV—CREDITS AGAINST TAX**

\* \* \* \* \*

**Subpart D—BUSINESS RELATED CREDITS**

Sec. 38. General business credit.

\* \* \* \* \*

Sec. 45U. *Military spouse retirement plan eligibility credit for small employers.*

\* \* \* \* \*

**SEC. 38. GENERAL BUSINESS CREDIT.**

(a) ALLOWANCE OF CREDIT.—There shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the sum of—

(1) the business credit carryforwards carried to such taxable year,

(2) the amount of the current year business credit, plus

(3) the business credit carrybacks carried to such taxable year.

(b) CURRENT YEAR BUSINESS CREDIT.—For purposes of this subpart, the amount of the current year business credit is the sum of the following credits determined for the taxable year:

(1) the investment credit determined under section 46,

(2) the work opportunity credit determined under section 51(a),

(3) the alcohol fuels credit determined under section 40(a),

- (4) the research credit determined under section 41(a),
- (5) the low-income housing credit determined under section 42(a),
- (6) the enhanced oil recovery credit under section 43(a),
- (7) in the case of an eligible small business (as defined in section 44(b)), the disabled access credit determined under section 44(a),
- (8) the renewable electricity production credit under section 45(a),
- (9) the empowerment zone employment credit determined under section 1396(a),
- (10) the Indian employment credit as determined under section 45A(a),
- (11) the employer social security credit determined under section 45B(a),
- (12) the orphan drug credit determined under section 45C(a),
- (13) the new markets tax credit determined under section 45D(a),
- (14) in the case of an eligible employer (as defined in section 45E(c)), the small employer pension plan startup cost credit determined under section 45E(a),
- (15) the employer-provided child care credit determined under section 45F(a),
- (16) the railroad track maintenance credit determined under section 45G(a),
- (17) the biodiesel fuels credit determined under section 40A(a),
- (18) the low sulfur diesel fuel production credit determined under section 45H(a),
- (19) the marginal oil and gas well production credit determined under section 45I(a),
- (20) the distilled spirits credit determined under section 5011(a),
- (21) the advanced nuclear power facility production credit determined under section 45J(a),
- (22) the nonconventional source production credit determined under section 45K(a),
- (23) the new energy efficient home credit determined under section 45L(a),
- (24) the portion of the alternative motor vehicle credit to which section 30B(g)(1) applies,
- (25) the portion of the alternative fuel vehicle refueling property credit to which section 30C(d)(1) applies,
- (26) the mine rescue team training credit determined under section 45N(a),
- (27) in the case of an eligible agricultural business (as defined in section 45O(e)), the agricultural chemicals security credit determined under section 45O(a),
- (28) the differential wage payment credit determined under section 45P(a),
- (29) the carbon dioxide sequestration credit determined under section 45Q(a),
- (30) the portion of the new qualified plug-in electric drive motor vehicle credit to which section 30D(c)(1) applies,

(31) the small employer health insurance credit determined under section 45R,

(32) in the case of an eligible employer (as defined in section 45S(c)), the paid family and medical leave credit determined under section 45S(a), **[plus]**

(33) in the case of an eligible employer (as defined in section 45T(c)), the retirement auto-enrollment credit determined under section 45T(a) **[.], plus**

(34) *in the case of an eligible small employer (as defined in section 45U(c)), the military spouse retirement plan eligibility credit determined under section 45U(a).*

(c) LIMITATION BASED ON AMOUNT OF TAX.—

(1) IN GENERAL.—The credit allowed under subsection (a) for any taxable year shall not exceed the excess (if any) of the taxpayer's net income tax over the greater of—

(A) the tentative minimum tax for the taxable year, or

(B) 25 percent of so much of the taxpayer's net regular tax liability as exceeds \$25,000.

For purposes of the preceding sentence, the term “net income tax” means the sum of the regular tax liability and the tax imposed by section 55, reduced by the credits allowable under subparts A and B of this part, and the term “net regular tax liability” means the regular tax liability reduced by the sum of the credits allowable under subparts A and B of this part.

(2) EMPOWERMENT ZONE EMPLOYMENT CREDIT MAY OFFSET 25 PERCENT OF MINIMUM TAX.—

(A) IN GENERAL.—In the case of the empowerment zone employment credit—

(i) this section and section 39 shall be applied separately with respect to such credit, and

(ii) for purposes of applying paragraph (1) to such credit—

(I) 75 percent of the tentative minimum tax shall be substituted for the tentative minimum tax under subparagraph (A) thereof, and

(II) the limitation under paragraph (1) (as modified by subclause (I)) shall be reduced by the credit allowed under subsection (a) for the taxable year (other than the empowerment zone employment credit and the specified credits).

(B) EMPOWERMENT ZONE EMPLOYMENT CREDIT.—For purposes of this paragraph, the term “empowerment zone employment credit” means the portion of the credit under subsection (a) which is attributable to the credit determined under section 1396 (relating to empowerment zone employment credit).

(4) SPECIAL RULES FOR SPECIFIED CREDITS.—

(A) IN GENERAL.—In the case of specified credits—

(i) this section and section 39 shall be applied separately with respect to such credits, and

(ii) in applying paragraph (1) to such credits—

(I) the tentative minimum tax shall be treated as being zero, and

(II) the limitation under paragraph (1) (as modified by subclause (I)) shall be reduced by the cred-



it allowed under subsection (a) for the taxable year (other than the specified credits).

(B) SPECIFIED CREDITS.—For purposes of this subsection, the term “specified credits” means—

(i) for taxable years beginning after December 31, 2004, the credit determined under section 40,

(ii) the credit determined under section 41 for the taxable year with respect to an eligible small business (as defined in paragraph (5)(A) after application of the rules of paragraph (5)(B)),

(iii) the credit determined under section 42 to the extent attributable to buildings placed in service after December 31, 2007,

(iv) the credit determined under section 45 to the extent that such credit is attributable to electricity or refined coal produced—

(I) at a facility which is originally placed in service after the date of the enactment of this paragraph, and

(II) during the 4-year period beginning on the date that such facility was originally placed in service,

(v) the credit determined under section 45 to the extent that such credit is attributable to section 45(e)(10) (relating to Indian coal production facilities),

(vi) the credit determined under section 45B,

(vii) the credit determined under section 45G,

(viii) the credit determined under section 45R,

(ix) the credit determined under section 45S,

(x) the credit determined under section 46 to the extent that such credit is attributable to the energy credit determined under section 48,

(xi) the credit determined under section 46 to the extent that such credit is attributable to the rehabilitation credit under section 47, but only with respect to qualified rehabilitation expenditures properly taken into account for periods after December 31, 2007, and

(xii) the credit determined under section 51.

(5) RULES RELATED TO ELIGIBLE SMALL BUSINESSES.—

(A) ELIGIBLE SMALL BUSINESS.—For purposes of this subsection, the term “eligible small business” means, with respect to any taxable year—

(i) a corporation the stock of which is not publicly traded,

(ii) a partnership, or

(iii) a sole proprietorship,

if the average annual gross receipts of such corporation, partnership, or sole proprietorship for the 3-taxable-year period preceding such taxable year does not exceed \$50,000,000. For purposes of applying the test under the preceding sentence, rules similar to the rules of paragraphs (2) and (3) of section 448(c) shall apply.

(B) TREATMENT OF PARTNERS AND S CORPORATION SHAREHOLDERS.—For purposes of paragraph (4)(B)(ii), any credit determined under section 41 with respect to a partnership

or S corporation shall not be treated as a specified credit by any partner or shareholder unless such partner or shareholder meets the gross receipts test under subparagraph (A) for the taxable year in which such credit is treated as a current year business credit.

(6) SPECIAL RULES.—

(A) MARRIED INDIVIDUALS.—In the case of a husband or wife who files a separate return, the amount specified under subparagraph (B) of paragraph (1) shall be \$12,500 in lieu of \$25,000. This subparagraph shall not apply if the spouse of the taxpayer has no business credit carryforward or carryback to, and has no current year business credit for, the taxable year of such spouse which ends within or with the taxpayer's taxable year.

(B) CONTROLLED GROUPS.—In the case of a controlled group, the \$25,000 amount specified under subparagraph (B) of paragraph (1) shall be reduced for each component member of such group by apportioning \$25,000 among the component members of such group in such manner as the Secretary shall by regulations prescribe. For purposes of the preceding sentence, the term "controlled group" has the meaning given to such term by section 1563(a).

(C) LIMITATIONS WITH RESPECT TO CERTAIN PERSONS.—In the case of a person described in subparagraph (A) or (B) of section 46(e)(1) (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990), the \$25,000 amount specified under subparagraph (B) of paragraph (1) shall equal such person's ratable share (as determined under section 46(e)(2) (as so in effect) of such amount.

(D) ESTATES AND TRUSTS.—In the case of an estate or trust, the \$25,000 amount specified under subparagraph (B) of paragraph (1) shall be reduced to an amount which bears the same ratio to \$25,000 as the portion of the income of the estate or trust which is not allocated to beneficiaries bears to the total income of the estate or trust.

(E) CORPORATIONS.—In the case of a corporation, this subsection shall be applied by treating the corporation as having a tentative minimum tax of zero.

(d) ORDERING RULES.—For purposes of any provision of this title where it is necessary to ascertain the extent to which the credits determined under any section referred to in subsection (b) are used in a taxable year or as a carryback or carryforward—

(1) IN GENERAL.—The order in which such credits are used shall be determined on the basis of the order in which they are listed in subsection (b) as of the close of the taxable year in which the credit is used.

(2) COMPONENTS OF INVESTMENT CREDIT.—The order in which the credits listed in section 46 are used shall be determined on the basis of the order in which such credits are listed in section 46 as of the close of the taxable year in which the credit is used.

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**SEC. 45E. SMALL EMPLOYER PENSION PLAN STARTUP COSTS.**

(a) **GENERAL RULE.**—For purposes of section 38, in the case of an eligible employer, the small employer pension plan startup cost credit determined under this section for any taxable year is an amount equal to 50 percent of the qualified startup costs paid or incurred by the taxpayer during the taxable year.

(b) **DOLLAR LIMITATION.**—The amount of the credit determined under this section for any taxable year shall not exceed—

(1) for the first credit year and each of the 2 taxable years immediately following the first credit year, the greater of—

(A) \$500, or

(B) the lesser of—

(i) \$250 for each employee of the eligible employer who is not a highly compensated employee (as defined in section 414(q)) and who is eligible to participate in the eligible employer plan maintained by the eligible employer, or

(ii) \$5,000, and

(2) zero for any other taxable year.

(c) **ELIGIBLE EMPLOYER.**—For purposes of this section—

(1) **IN GENERAL.**—The term “eligible employer” has the meaning given such term by section 408(p)(2)(C)(i).

(2) **REQUIREMENT FOR NEW QUALIFIED EMPLOYER PLANS.**—Such term shall not include an employer if, during the 3-taxable year period immediately preceding the 1st taxable year for which the credit under this section is otherwise allowable for a qualified employer plan of the employer, the employer or any member of any controlled group including the employer (or any predecessor of either) established or maintained a qualified employer plan with respect to which contributions were made, or benefits were accrued, for substantially the same employees as are in the qualified employer plan.

(d) **OTHER DEFINITIONS.**—For purposes of this section—

(1) **QUALIFIED STARTUP COSTS.**—

(A) **IN GENERAL.**—The term “qualified startup costs” means any ordinary and necessary expenses of an eligible employer which are paid or incurred in connection with—

(i) the establishment or administration of an eligible employer plan, or

(ii) the retirement-related education of employees with respect to such plan.

(B) **PLAN MUST HAVE AT LEAST 1 PARTICIPANT.**—Such term shall not include any expense in connection with a plan that does not have at least 1 employee eligible to participate who is not a highly compensated employee.

(2) **ELIGIBLE EMPLOYER PLAN.**—The term “eligible employer plan” means a qualified employer plan within the meaning of section 4972(d).

(3) **FIRST CREDIT YEAR.**—The term “first credit year” means—

(A) the taxable year which includes the date that the eligible employer plan to which such costs relate becomes [effective] *effective with respect to the eligible employer*, or

(B) at the election of the eligible employer, the taxable year preceding the taxable year referred to in subparagraph (A).

(e) SPECIAL RULES.—For purposes of this section—

(1) AGGREGATION RULES.—All persons treated as a single employer under subsection (a) or (b) of section 52, or subsection (m) or (o) of section 414, shall be treated as one person. All eligible employer plans shall be treated as 1 eligible employer plan.

[(2) DISALLOWANCE OF DEDUCTION.—No deduction shall be allowed for that portion of the qualified startup costs paid or incurred for the taxable year which is equal to the credit determined under subsection (a).]

(2) DISALLOWANCE OF DEDUCTION.—No deduction shall be allowed—

(A) for that portion of the qualified startup costs paid or incurred for the taxable year which is equal to so much of the portion of the credit determined under subsection (a) as is properly allocable to such costs, and

(B) for that portion of the employer contributions by the employer for the taxable year which is equal to so much of the credit increase determined under subsection (f) as is properly allocable to such contributions.

(3) ELECTION NOT TO CLAIM CREDIT.—This section shall not apply to a taxpayer for any taxable year if such taxpayer elects to have this section not apply for such taxable year.

(4) INCREASED CREDIT FOR CERTAIN SMALL EMPLOYERS.—In the case of an employer which would be an eligible employer under subsection (c) if section 408(p)(2)(C)(i) was applied by substituting “50 employees” for “100 employees”, subsection (a) shall be applied by substituting “100 percent” for “50 percent”.

(f) ADDITIONAL CREDIT FOR EMPLOYER CONTRIBUTIONS BY CERTAIN ELIGIBLE EMPLOYERS.—

(1) IN GENERAL.—In the case of an eligible employer, the credit allowed for the taxable year under subsection (a) (determined without regard to this subsection) shall be increased by an amount equal to the applicable percentage of employer contributions (other than any elective deferrals (as defined in section 402(g)(3)) by the employer to an eligible employer plan (other than a defined benefit plan (as defined in section 414(j))).

(2) LIMITATIONS.—

(A) DOLLAR LIMITATION.—The amount determined under paragraph (1) (before the application of subparagraph (B)) with respect to any employee of the employer shall not exceed \$1,000.

(B) CREDIT PHASE-IN.—In the case of any eligible employer which had for the preceding taxable year more than 50 employees, the amount determined under paragraph (1) (without regard to this subparagraph) shall be reduced by an amount equal to the product of—

(i) the amount otherwise so determined under paragraph (1), multiplied by

(ii) a percentage equal to 2 percentage points for each employee of the employer for the preceding taxable year in excess of 50 employees.

(3) APPLICABLE PERCENTAGE.—For purposes of this section, the applicable percentage for the taxable year during which the eligible employer plan is established with respect to the eligible

*employer shall be 100 percent, and for taxable years thereafter shall be determined under the following table:*

<i>In the case of the following taxable year beginning after the taxable year during which plan is established with respect to the eligible employer:</i>	<i>The applicable percentage shall be:</i>
<i>1st .....</i>	<i>100%</i>
<i>2nd .....</i>	<i>75%</i>
<i>3rd .....</i>	<i>50%</i>
<i>4th .....</i>	<i>25%</i>
<i>Any taxable year thereafter .....</i>	<i>0%</i>

(4) DETERMINATION OF ELIGIBLE EMPLOYER; NUMBER OF EMPLOYEES.—For purposes of this subsection, whether an employer is an eligible employer and the number of employees of an employer shall be determined under the rules of subsection (c), except that paragraph (2) thereof shall only apply to the taxable year during which the eligible employer plan to which this section applies is established with respect to the eligible employer.

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**SEC. 45U. MILITARY SPOUSE RETIREMENT PLAN ELIGIBILITY CREDIT FOR SMALL EMPLOYERS.**

(a) *IN GENERAL.*—For purposes of section 38, in the case of any eligible small employer, the military spouse retirement plan eligibility credit determined under this section for any taxable year is an amount equal to the sum of—

(1) \$250 with respect to each military spouse who is an employee of such employer and who is eligible to participate in an eligible defined contribution plan of such employer at any time during such taxable year, plus

(2) so much of the contributions made by such employer to all such plans with respect to such employee during such taxable year as do not exceed \$250.

(b) *LIMITATION.*—An individual shall only be taken into account as a military spouse under subsection (a) for the taxable year which includes the date on which such individual began participating in the eligible defined contribution plan of the employer and the 2 succeeding taxable years.

(c) *ELIGIBLE SMALL EMPLOYER.*—For purposes of this section—

(1) *IN GENERAL.*—The term “eligible small employer” means an eligible employer (as defined in section 408(p)(2)(C)(i)(I)).

(2) *APPLICATION OF 2-YEAR GRACE PERIOD.*—A rule similar to the rule of section 408(p)(2)(C)(i)(II) shall apply for purposes of this section.

(d) *MILITARY SPOUSE.*—For purposes of this section—

(1) *IN GENERAL.*—The term “military spouse” means, with respect to any employer, any individual who is married (within the meaning of section 7703 as of the first date that the employee is employed by the employer) to an individual who is a member of the uniformed services (as defined section 101(a)(5) of title 10, United States Code). For purposes of this section, an employer may rely on an employee’s certification that such employee’s spouse is a member of the uniformed services if such

certification provides the name, rank, and service branch of such spouse.

(2) **EXCLUSION OF HIGHLY COMPENSATED EMPLOYEES.**—With respect to any employer, the term “military spouse” shall not include any individual if such individual is a highly compensated employee of such employer (within the meaning of section 414(q)).

(e) **ELIGIBLE DEFINED CONTRIBUTION PLAN.**—For purposes of this section, the term “eligible defined contribution plan” means, with respect to any eligible small employer, any defined contribution plan (as defined in section 414(i)) of such employer if, under the terms of such plan—

(1) military spouses employed by such employer are eligible to participate in such plan not later than the date which is 2 months after the date on which such individual begins employment with such employer, and

(2) military spouses who are eligible to participate in such plan—

(A) are immediately eligible to receive an amount of employer contributions under such plan which is not less the amount of such contributions that a similarly situated participant who is not a military spouse would be eligible to receive under such plan after 2 years of service, and

(B) immediately have a nonforfeitable right to the employee’s accrued benefit derived from employer contributions under such plan.

(f) **AGGREGATION RULE.**—All persons treated as a single employer under subsection (b), (c), (m) or (o) of section 414 shall be treated as one employer for purposes of this section.

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## **Subchapter B—COMPUTATION OF TAXABLE INCOME**

\* \* \* \* \*

### **PART II—ITEMS SPECIFICALLY INCLUDED IN GROSS INCOME**

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#### **SEC. 72. ANNUITIES; CERTAIN PROCEEDS OF ENDOWMENT AND LIFE INSURANCE CONTRACTS.**

(a) **GENERAL RULES FOR ANNUITIES.**—

(1) **INCOME INCLUSION.**—Except as otherwise provided in this chapter, gross income includes any amount received as an annuity (whether for a period certain or during one or more lives) under an annuity, endowment, or life insurance contract.

(2) **PARTIAL ANNUITIZATION.**—If any amount is received as an annuity for a period of 10 years or more or during one or more lives under any portion of an annuity, endowment, or life insurance contract—

(A) such portion shall be treated as a separate contract for purposes of this section,

(B) for purposes of applying subsections (b), (c), and (e), the investment in the contract shall be allocated pro rata

between each portion of the contract from which amounts are received as an annuity and the portion of the contract from which amounts are not received as an annuity, and

(C) a separate annuity starting date under subsection (c)(4) shall be determined with respect to each portion of the contract from which amounts are received as an annuity.

(b) EXCLUSION RATIO.—

(1) IN GENERAL.—Gross income does not include that part of any amount received as an annuity under an annuity, endowment, or life insurance contract which bears the same ratio to such amount as the investment in the contract (as of the annuity starting date) bears to the expected return under the contract (as of such date).

(2) EXCLUSION LIMITED TO INVESTMENT.—The portion of any amount received as an annuity which is excluded from gross income under paragraph (1) shall not exceed the unrecovered investment in the contract immediately before the receipt of such amount.

(3) DEDUCTION WHERE ANNUITY PAYMENTS CEASE BEFORE ENTIRE INVESTMENT RECOVERED.—

(A) IN GENERAL.—If—

(i) after the annuity starting date, payments as an annuity under the contract cease by reason of the death of an annuitant, and

(ii) as of the date of such cessation, there is unrecovered investment in the contract,  
the amount of such unrecovered investment (in excess of any amount specified in subsection (e)(5) which was not included in gross income) shall be allowed as a deduction to the annuitant for his last taxable year.

(B) PAYMENTS TO OTHER PERSONS.—In the case of any contract which provides for payments meeting the requirements of subparagraphs (B) and (C) of subsection (c)(2), the deduction under subparagraph (A) shall be allowed to the person entitled to such payments for the taxable year in which such payments are received.

(C) NET OPERATING LOSS DEDUCTIONS PROVIDED.—For purposes of section 172, a deduction allowed under this paragraph shall be treated as if it were attributable to a trade or business of the taxpayer.

(4) UNRECOVERED INVESTMENT.—For purposes of this subsection, the unrecovered investment in the contract as of any date is—

(A) the investment in the contract (determined without regard to subsection (c)(2)) as of the annuity starting date, reduced by

(B) the aggregate amount received under the contract on or after such annuity starting date and before the date as of which the determination is being made, to the extent such amount was excludable from gross income under this subtitle.

(c) DEFINITIONS.—

(1) INVESTMENT IN THE CONTRACT.—For purposes of subsection (b), the investment in the contract as of the annuity starting date is—

(A) the aggregate amount of premiums or other consideration paid for the contract, minus

(B) the aggregate amount received under the contract before such date, to the extent that such amount was excludable from gross income under this subtitle or prior income tax laws.

(2) ADJUSTMENT IN INVESTMENT WHERE THERE IS REFUND FEATURE.—If—

(A) the expected return under the contract depends in whole or in part on the life expectancy of one or more individuals;

(B) the contract provides for payments to be made to a beneficiary (or to the estate of an annuitant) on or after the death of the annuitant or annuitants; and

(C) such payments are in the nature of a refund of the consideration paid,

then the value (computed without discount for interest) of such payments on the annuity starting date shall be subtracted from the amount determined under paragraph (1). Such value shall be computed in accordance with actuarial tables prescribed by the Secretary. For purposes of this paragraph and of subsection (e)(2)(A), the term “refund of the consideration paid” includes amounts payable after the death of an annuitant by reason of a provision in the contract for a life annuity with minimum period of payments certain, but (if part of the consideration was contributed by an employer) does not include that part of any payment to a beneficiary (or to the estate of the annuitant) which is not attributable to the consideration paid by the employee for the contract as determined under paragraph (1)(A).

(3) EXPECTED RETURN.—For purposes of subsection (b), the expected return under the contract shall be determined as follows:

(A) LIFE EXPECTANCY.—If the expected return under the contract, for the period on and after the annuity starting date, depends in whole or in part on the life expectancy of one or more individuals, the expected return shall be computed with reference to actuarial tables prescribed by the Secretary.

(B) INSTALLMENT PAYMENTS.—If subparagraph (A) does not apply, the expected return is the aggregate of the amounts receivable under the contract as an annuity.

(4) ANNUITY STARTING DATE.—For purposes of this section, the annuity starting date in the case of any contract is the first day of the first period for which an amount is received as an annuity under the contract.

(d) SPECIAL RULES FOR QUALIFIED EMPLOYER RETIREMENT PLANS.—

(1) SIMPLIFIED METHOD OF TAXING ANNUITY PAYMENTS.—

(A) IN GENERAL.—In the case of any amount received as an annuity under a qualified employer retirement plan—

(i) subsection (b) shall not apply, and



(ii) the investment in the contract shall be recovered as provided in this paragraph.

(B) METHOD OF RECOVERING INVESTMENT IN CONTRACT.—

(i) IN GENERAL.—Gross income shall not include so much of any monthly annuity payment under a qualified employer retirement plan as does not exceed the amount obtained by dividing—

(I) the investment in the contract (as of the annuity starting date), by

(II) the number of anticipated payments determined under the table contained in clause (iii) (or, in the case of a contract to which subsection (c)(3)(B) applies, the number of monthly annuity payments under such contract).

(ii) CERTAIN RULES MADE APPLICABLE.—Rules similar to the rules of paragraphs (2) and (3) of subsection (b) shall apply for purposes of this paragraph.

(iii) NUMBER OF ANTICIPATED PAYMENTS.—If the annuity is payable over the life of a single individual, the number of anticipated payments shall be determined as follows:

(iv) NUMBER OF ANTICIPATED PAYMENTS WHERE MORE THAN ONE LIFE.—If the annuity is payable over the lives of more than 1 individual, the number of anticipated payments shall be determined as follows:

(C) ADJUSTMENT FOR REFUND FEATURE NOT APPLICABLE.—For purposes of this paragraph, investment in the contract shall be determined under subsection (c)(1) without regard to subsection (c)(2).

(D) SPECIAL RULE WHERE LUMP SUM PAID IN CONNECTION WITH COMMENCEMENT OF ANNUITY PAYMENTS.—If, in connection with the commencement of annuity payments under any qualified employer retirement plan, the taxpayer receives a lump-sum payment—

(i) such payment shall be taxable under subsection (e) as if received before the annuity starting date, and

(ii) the investment in the contract for purposes of this paragraph shall be determined as if such payment had been so received.

(E) EXCEPTION.—This paragraph shall not apply in any case where the primary annuitant has attained age 75 on the annuity starting date unless there are fewer than 5 years of guaranteed payments under the annuity.

(F) ADJUSTMENT WHERE ANNUITY PAYMENTS NOT ON MONTHLY BASIS.—In any case where the annuity payments are not made on a monthly basis, appropriate adjustments in the application of this paragraph shall be made to take into account the period on the basis of which such payments are made.

(G) QUALIFIED EMPLOYER RETIREMENT PLAN.—For purposes of this paragraph, the term “qualified employer retirement plan” means any plan or contract described in paragraph (1), (2), or (3) of section 4974(c).

(2) TREATMENT OF EMPLOYEE CONTRIBUTIONS UNDER DEFINED CONTRIBUTION PLANS.—For purposes of this section, employee

contributions (and any income allocable thereto) under a defined contribution plan may be treated as a separate contract.  
 (e) AMOUNTS NOT RECEIVED AS ANNUITIES.—

(1) APPLICATION OF SUBSECTION.—

(A) IN GENERAL.—This subsection shall apply to any amount which—

(i) is received under an annuity, endowment, or life insurance contract, and

(ii) is not received as an annuity,  
 if no provision of this subtitle (other than this subsection) applies with respect to such amount.

(B) DIVIDENDS.—For purposes of this section, any amount received which is in the nature of a dividend or similar distribution shall be treated as an amount not received as an annuity.

(2) GENERAL RULE.—Any amount to which this subsection applies—

(A) if received on or after the annuity starting date, shall be included in gross income, or

(B) if received before the annuity starting date—

(i) shall be included in gross income to the extent allocable to income on the contract, and

(ii) shall not be included in gross income to the extent allocable to the investment in the contract.

(3) ALLOCATION OF AMOUNTS TO INCOME AND INVESTMENT.—  
 For purposes of paragraph (2)(B)—

(A) ALLOCATION TO INCOME.—Any amount to which this subsection applies shall be treated as allocable to income on the contract to the extent that such amount does not exceed the excess (if any) of—

(i) the cash value of the contract (determined without regard to any surrender charge) immediately before the amount is received, over

(ii) the investment in the contract at such time.

(B) ALLOCATION TO INVESTMENT.—Any amount to which this subsection applies shall be treated as allocable to investment in the contract to the extent that such amount is not allocated to income under subparagraph (A).

(4) SPECIAL RULES FOR APPLICATION OF PARAGRAPH (2)(B).—  
 For purposes of paragraph (2)(B)—

(A) LOANS TREATED AS DISTRIBUTIONS.—If, during any taxable year, an individual—

(i) receives (directly or indirectly) any amount as a loan under any contract to which this subsection applies, or

(ii) assigns or pledges (or agrees to assign or pledge) any portion of the value of any such contract,  
 such amount or portion shall be treated as received under the contract as an amount not received as an annuity. The preceding sentence shall not apply for purposes of determining investment in the contract, except that the investment in the contract shall be increased by any amount included in gross income by reason of the amount treated as received under the preceding sentence.

(B) TREATMENT OF POLICYHOLDER DIVIDENDS.—Any amount described in paragraph (1)(B) shall not be included in gross income under paragraph (2)(B)(i) to the extent such amount is retained by the insurer as a premium or other consideration paid for the contract.

(C) TREATMENT OF TRANSFERS WITHOUT ADEQUATE CONSIDERATION.—

(i) IN GENERAL.—If an individual who holds an annuity contract transfers it without full and adequate consideration, such individual shall be treated as receiving an amount equal to the excess of—

(I) the cash surrender value of such contract at the time of transfer, over

(II) the investment in such contract at such time,

under the contract as an amount not received as an annuity.

(ii) EXCEPTION FOR CERTAIN TRANSFERS BETWEEN SPOUSES OR FORMER SPOUSES.—Clause (i) shall not apply to any transfer to which section 1041(a) (relating to transfers of property between spouses or incident to divorce) applies.

(iii) ADJUSTMENT TO INVESTMENT IN CONTRACT OF TRANSFEREE.—If under clause (i) an amount is included in the gross income of the transferor of an annuity contract, the investment in the contract of the transferee in such contract shall be increased by the amount so included.

(5) RETENTION OF EXISTING RULES IN CERTAIN CASES.—

(A) IN GENERAL.—In any case to which this paragraph applies—

(i) paragraphs (2)(B) and (4)(A) shall not apply, and

(ii) if paragraph (2)(A) does not apply,

the amount shall be included in gross income, but only to the extent it exceeds the investment in the contract.

(B) EXISTING CONTRACTS.—This paragraph shall apply to contracts entered into before August 14, 1982. Any amount allocable to investment in the contract after August 13, 1982, shall be treated as from a contract entered into after such date.

(C) CERTAIN LIFE INSURANCE AND ENDOWMENT CONTRACTS.—Except as provided in paragraph (10) and except to the extent prescribed by the Secretary by regulations, this paragraph shall apply to any amount not received as an annuity which is received under a life insurance or endowment contract.

(D) CONTRACTS UNDER QUALIFIED PLANS.—Except as provided in paragraph (8), this paragraph shall apply to any amount received—

(i) from a trust described in section 401(a) which is exempt from tax under section 501(a),

(ii) from a contract—

(I) purchased by a trust described in clause (i),

(II) purchased as part of a plan described in section 403(a),

(III) described in section 403(b), or

(IV) provided for employees of a life insurance company under a plan described in section 818(a)(3), or

(iii) from an individual retirement account or an individual retirement annuity.

Any dividend described in section 404(k) which is received by a participant or beneficiary shall, for purposes of this subparagraph, be treated as paid under a separate contract to which clause (ii)(I) applies.

(E) FULL REFUNDS, SURRENDERS, REDEMPTIONS, AND MATURITIES.—This paragraph shall apply to—

(i) any amount received, whether in a single sum or otherwise, under a contract in full discharge of the obligation under the contract which is in the nature of a refund of the consideration paid for the contract, and

(ii) any amount received under a contract on its complete surrender, redemption, or maturity.

In the case of any amount to which the preceding sentence applies, the rule of paragraph (2)(A) shall not apply.

(6) INVESTMENT IN THE CONTRACT.—For purposes of this subsection, the investment in the contract as of any date is—

(A) the aggregate amount of premiums or other consideration paid for the contract before such date, minus

(B) the aggregate amount received under the contract before such date, to the extent that such amount was excludable from gross income under this subtitle or prior income tax laws.

(8) EXTENSION OF PARAGRAPH (2)(B) TO QUALIFIED PLANS.—

(A) IN GENERAL.—Notwithstanding any other provision of this subsection, in the case of any amount received before the annuity starting date from a trust or contract described in paragraph (5)(D), paragraph (2)(B) shall apply to such amounts.

(B) ALLOCATION OF AMOUNT RECEIVED.—For purposes of paragraph (2)(B), the amount allocated to the investment in the contract shall be the portion of the amount described in subparagraph (A) which bears the same ratio to such amount as the investment in the contract bears to the account balance. The determination under the preceding sentence shall be made as of the time of the distribution or at such other time as the Secretary may prescribe.

(C) TREATMENT OF FORFEITABLE RIGHTS.—If an employee does not have a nonforfeitable right to any amount under any trust or contract to which subparagraph (A) applies, such amount shall not be treated as part of the account balance.

(D) INVESTMENT IN THE CONTRACT BEFORE 1987.—In the case of a plan which on May 5, 1986, permitted withdrawal of any employee contributions before separation from service, subparagraph (A) shall apply only to the extent that amounts received before the annuity starting date (when increased by amounts previously received

under the contract after December 31, 1986) exceed the investment in the contract as of December 31, 1986.

(9) EXTENSION OF PARAGRAPH (2)(B) TO QUALIFIED TUITION PROGRAMS AND COVERDELL EDUCATION SAVINGS ACCOUNTS.—Notwithstanding any other provision of this subsection, paragraph (2)(B) shall apply to amounts received under a qualified tuition program (as defined in section 529(b)) or under a Coverdell education savings account (as defined in section 530(b)). The rule of paragraph (8)(B) shall apply for purposes of this paragraph.

(10) TREATMENT OF MODIFIED ENDOWMENT CONTRACTS.—

(A) IN GENERAL.—Notwithstanding paragraph (5)(C), in the case of any modified endowment contract (as defined in section 7702A)—

- (i) paragraphs (2)(B) and (4)(A) shall apply, and
- (ii) in applying paragraph (4)(A), “any person” shall be substituted for “an individual”.

(B) TREATMENT OF CERTAIN BURIAL CONTRACTS.—Notwithstanding subparagraph (A), paragraph (4)(A) shall not apply to any assignment (or pledge) of a modified endowment contract if such assignment (or pledge) is solely to cover the payment of expenses referred to in section 7702(e)(2)(C)(iii) and if the maximum death benefit under such contract does not exceed \$25,000.

(11) SPECIAL RULES FOR CERTAIN COMBINATION CONTRACTS PROVIDING LONG-TERM CARE INSURANCE.—Notwithstanding paragraphs (2), (5)(C), and (10), in the case of any charge against the cash value of an annuity contract or the cash surrender value of a life insurance contract made as payment for coverage under a qualified long-term care insurance contract which is part of or a rider on such annuity or life insurance contract—

- (A) the investment in the contract shall be reduced (but not below zero) by such charge, and
- (B) such charge shall not be includible in gross income.

(12) ANTI-ABUSE RULES.—

(A) IN GENERAL.—For purposes of determining the amount includible in gross income under this subsection—

- (i) all modified endowment contracts issued by the same company to the same policyholder during any calendar year shall be treated as 1 modified endowment contract, and
- (ii) all annuity contracts issued by the same company to the same policyholder during any calendar year shall be treated as 1 annuity contract.

The preceding sentence shall not apply to any contract described in paragraph (5)(D).

(B) REGULATORY AUTHORITY.—The Secretary may by regulations prescribe such additional rules as may be necessary or appropriate to prevent avoidance of the purposes of this subsection through serial purchases of contracts or otherwise.

(f) SPECIAL RULES FOR COMPUTING EMPLOYEES’ CONTRIBUTIONS.—In computing, for purposes of subsection (c)(1)(A), the aggregate amount of premiums or other consideration paid for the contract,

and for purposes of subsection (e)(6), the aggregate premiums or other consideration paid, amounts contributed by the employer shall be included, but only to the extent that—

(1) such amounts were includible in the gross income of the employee under this subtitle or prior income tax laws; or

(2) if such amounts had been paid directly to the employee at the time they were contributed, they would not have been includible in the gross income of the employee under the law applicable at the time of such contribution.

Paragraph (2) shall not apply to amounts which were contributed by the employer after December 31, 1962, and which would not have been includible in the gross income of the employee by reason of the application of section 911 if such amounts had been paid directly to the employee at the time of contribution. The preceding sentence shall not apply to amounts which were contributed by the employer, as determined under regulations prescribed by the Secretary, to provide pension or annuity credits, to the extent such credits are attributable to services performed before January 1, 1963, and are provided pursuant to pension or annuity plan provisions in existence on March 12, 1962, and on that date applicable to such services, or to the extent such credits are attributable to services performed as a foreign missionary (within the meaning of section 403(b)(2)(D)(iii), as in effect before the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001).

(g) RULES FOR TRANSFEREE WHERE TRANSFER WAS FOR VALUE.—Where any contract (or any interest therein) is transferred (by assignment or otherwise) for a valuable consideration, to the extent that the contract (or interest therein) does not, in the hands of the transferee, have a basis which is determined by reference to the basis in the hands of the transferor, then—

(1) for purposes of this section, only the actual value of such consideration, plus the amount of the premiums and other consideration paid by the transferee after the transfer, shall be taken into account in computing the aggregate amount of the premiums or other consideration paid for the contract;

(2) for purposes of subsection (c)(1)(B), there shall be taken into account only the aggregate amount received under the contract by the transferee before the annuity starting date, to the extent that such amount was excludable from gross income under this subtitle or prior income tax laws; and

(3) the annuity starting date is the first day of the first period for which the transferee received an amount under the contract as an annuity.

For purposes of this subsection, the term “transferee” includes a beneficiary of, or the estate of, the transferee.

(h) OPTION TO RECEIVE ANNUITY IN LIEU OF LUMP SUM.—If—

(1) a contract provides for payment of a lump sum in full discharge of an obligation under the contract, subject to an option to receive an annuity in lieu of such lump sum;

(2) the option is exercised within 60 days after the day on which such lump sum first became payable; and

(3) part or all of such lump sum would (but for this subsection) be includible in gross income by reason of subsection (e)(1),

then, for purposes of this subtitle, no part of such lump sum shall be considered as includible in gross income at the time such lump sum first became payable.

(j) INTEREST.—Notwithstanding any other provision of this section, if any amount is held under an agreement to pay interest thereon, the interest payments shall be included in gross income.

(l) FACE-AMOUNT CERTIFICATES.—For purposes of this section, the term “endowment contract” includes a face-amount certificate, as defined in section 2(a)(15) of the Investment Company Act of 1940 (15 U.S.C., sec. 80a–2), issued after December 31, 1954.

(m) SPECIAL RULES APPLICABLE TO EMPLOYEE ANNUITIES AND DISTRIBUTIONS UNDER EMPLOYEE PLANS.—

(2) COMPUTATION OF CONSIDERATION PAID BY THE EMPLOYEE.—In computing—

(A) the aggregate amount of premiums or other consideration paid for the contract for purposes of subsection (c)(1)(A) (relating to the investment in the contract), and

(B) the aggregate premiums or other consideration paid for purposes of subsection (e)(6) (relating to certain amounts not received as an annuity),

any amount allowed as a deduction with respect to the contract under section 404 which was paid while the employee was an employee within the meaning of section 401(c)(1) shall be treated as consideration contributed by the employer, and there shall not be taken into account any portion of the premiums or other consideration for the contract paid while the employee was an owner-employee which is properly allocable (as determined under regulations prescribed by the Secretary) to the cost of life, accident, health, or other insurance.

(3) LIFE INSURANCE CONTRACTS.—

(A) This paragraph shall apply to any life insurance contract—

(i) purchased as a part of a plan described in section 403(a), or

(ii) purchased by a trust described in section 401(a) which is exempt from tax under section 501(a) if the proceeds of such contract are payable directly or indirectly to a participant in such trust or to a beneficiary of such participant.

(B) Any contribution to a plan described in subparagraph (A)(i) or a trust described in subparagraph (A)(ii) which is allowed as a deduction under section 404, and any income of a trust described in subparagraph (A)(ii), which is determined in accordance with regulations prescribed by the Secretary to have been applied to purchase the life insurance protection under a contract described in subparagraph (A), is includible in the gross income of the participant for the taxable year when so applied.

(C) In the case of the death of an individual insured under a contract described in subparagraph (A), an amount equal to the cash surrender value of the contract immediately before the death of the insured shall be treated as a payment under such plan or a distribution by such trust, and the excess of the amount payable by reason of the death of the insured over such cash surrender value

shall not be includible in gross income under this section and shall be treated as provided in section 101.

(5) PENALTIES APPLICABLE TO CERTAIN AMOUNTS RECEIVED BY 5-PERCENT OWNERS.—

(A) This paragraph applies to amounts which are received from a qualified trust described in section 401(a) or under a plan described in section 403(a) at any time by an individual who is, or has been, a 5-percent owner, or by a successor of such an individual, but only to the extent such amounts are determined, under regulations prescribed by the Secretary, to exceed the benefits provided for such individual under the plan formula.

(B) If a person receives an amount to which this paragraph applies, his tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of the amount so received which is includible in his gross income for such taxable year.

(C) For purposes of this paragraph, the term “5-percent owner” means any individual who, at any time during the 5 plan years preceding the plan year ending in the taxable year in which the amount is received, is a 5-percent owner (as defined in section 416(i)(1)(B)).

(6) OWNER-EMPLOYEE DEFINED.—For purposes of this subsection, the term “owner-employee” has the meaning assigned to it by section 401(c)(3) and includes an individual for whose benefit an individual retirement account or annuity described in section 408(a) or (b) is maintained. For purposes of the preceding sentence, the term “owner-employee” shall include an employee within the meaning of section 401(c)(1).

(7) MEANING OF DISABLED.—For purposes of this section, an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be disabled unless he furnishes proof of the existence thereof in such form and manner as the Secretary may require.

(10) DETERMINATION OF INVESTMENT IN THE CONTRACT IN THE CASE OF QUALIFIED DOMESTIC RELATIONS ORDERS.—Under regulations prescribed by the Secretary, in the case of a distribution or payment made to an alternate payee who is the spouse or former spouse of the participant pursuant to a qualified domestic relations order (as defined in section 414(p)), the investment in the contract as of the date prescribed in such regulations shall be allocated on a pro rata basis between the present value of such distribution or payment and the present value of all other benefits payable with respect to the participant to which such order relates.

(n) ANNUITIES UNDER RETIRED SERVICEMAN’S FAMILY PROTECTION PLAN OR SURVIVOR BENEFIT PLAN.—Subsection (b) shall not apply in the case of amounts received after December 31, 1965, as an annuity under chapter 73 of title 10 of the United States Code, but all such amounts shall be excluded from gross income until there has been so excluded (under section 122(b)(1) or this section, including



amounts excluded before January 1, 1966) an amount equal to the consideration for the contract (as defined by section 122(b)(2)), plus any amount treated pursuant to section 101(b)(2)(D) (as in effect on the day before the date of the enactment of the Small Business Job Protection Act of 1996) as additional consideration paid by the employee. Thereafter all amounts so received shall be included in gross income.

(o) SPECIAL RULES FOR DISTRIBUTIONS FROM QUALIFIED PLANS TO WHICH EMPLOYEE MADE DEDUCTIBLE CONTRIBUTIONS.—

(1) TREATMENT OF CONTRIBUTIONS.—For purposes of this section and sections 402 and 403, notwithstanding section 414(h), any deductible employee contribution made to a qualified employer plan or government plan shall be treated as an amount contributed by the employer which is not includible in the gross income of the employee.

(3) AMOUNTS CONSTRUCTIVELY RECEIVED.—

(A) IN GENERAL.—For purposes of this subsection, rules similar to the rules provided by subsection (p) (other than the exception contained in paragraph (2) thereof) shall apply.

(B) PURCHASE OF LIFE INSURANCE.—To the extent any amount of accumulated deductible employee contributions of an employee are applied to the purchase of life insurance contracts, such amount shall be treated as distributed to the employee in the year so applied.

(4) SPECIAL RULE FOR TREATMENT OF ROLLOVER AMOUNTS.—For purposes of sections 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16), the Secretary shall prescribe regulations providing for such allocations of amounts attributable to accumulated deductible employee contributions, and for such other rules, as may be necessary to insure that such accumulated deductible employee contributions do not become eligible for additional tax benefits (or freed from limitations) through the use of rollovers.

(5) DEFINITIONS AND SPECIAL RULES.—For purposes of this subsection—

(A) DEDUCTIBLE EMPLOYEE CONTRIBUTIONS.—The term “deductible employee contributions” means any qualified voluntary employee contribution (as defined in section 219(e)(2)) made after December 31, 1981, in a taxable year beginning after such date and made for a taxable year beginning before January 1, 1987, and allowable as a deduction under section 219(a) for such taxable year.

(B) ACCUMULATED DEDUCTIBLE EMPLOYEE CONTRIBUTIONS.—The term “accumulated deductible employee contributions” means the deductible employee contributions—

(i) increased by the amount of income and gain allocable to such contributions, and

(ii) reduced by the sum of the amount of loss and expense allocable to such contributions and the amounts distributed with respect to the employee which are attributable to such contributions (or income or gain allocable to such contributions).

(C) QUALIFIED EMPLOYER PLAN.—The term “qualified employer plan” has the meaning given to such term by subsection (p)(3)(A)(i).

(D) GOVERNMENT PLAN.—The term “government plan” has the meaning given such term by subsection (p)(3)(B).

(6) ORDERING RULES.—Unless the plan specifies otherwise, any distribution from such plan shall not be treated as being made from the accumulated deductible employee contributions, until all other amounts to the credit of the employee have been distributed.

(p) LOANS TREATED AS DISTRIBUTIONS.—For purposes of this section—

(1) TREATMENT AS DISTRIBUTIONS.—

(A) LOANS.—If during any taxable year a participant or beneficiary receives (directly or indirectly) any amount as a loan from a qualified employer plan, such amount shall be treated as having been received by such individual as a distribution under such plan.

(B) ASSIGNMENTS OR PLEDGES.—If during any taxable year a participant or beneficiary assigns (or agrees to assign) or pledges (or agrees to pledge) any portion of his interest in a qualified employer plan, such portion shall be treated as having been received by such individual as a loan from such plan.

(2) EXCEPTION FOR CERTAIN LOANS.—

(A) GENERAL RULE.—Paragraph (1) shall not apply to any loan to the extent that such loan (when added to the outstanding balance of all other loans from such plan whether made on, before, or after August 13, 1982), does not exceed the lesser of—

(i) \$50,000, reduced by the excess (if any) of—

(I) the highest outstanding balance of loans from the plan during the 1-year period ending on the day before the date on which such loan was made, over

(II) the outstanding balance of loans from the plan on the date on which such loan was made, or

(ii) the greater of (I) one-half of the present value of the nonforfeitable accrued benefit of the employee under the plan, or (II) \$10,000.

For purposes of clause (ii), the present value of the nonforfeitable accrued benefit shall be determined without regard to any accumulated deductible employee contributions (as defined in subsection (o)(5)(B)).

(B) REQUIREMENT THAT LOAN BE REPAYABLE WITHIN 5 YEARS.—

(i) IN GENERAL.—Subparagraph (A) shall not apply to any loan unless such loan, by its terms, is required to be repaid within 5 years.

(ii) EXCEPTION FOR HOME LOANS.—Clause (i) shall not apply to any loan used to acquire any dwelling unit which within a reasonable time is to be used (determined at the time the loan is made) as the principal residence of the participant.

(C) REQUIREMENT OF LEVEL AMORTIZATION.—Except as provided in regulations, this paragraph shall not apply to any loan unless substantially level amortization of such loan (with payments not less frequently than quarterly) is required over the term of the loan.

(D) PROHIBITION OF LOANS THROUGH CREDIT CARDS AND OTHER SIMILAR ARRANGEMENTS.—Subparagraph (A) shall not apply to any loan which is made through the use of any credit card or any other similar arrangement.

(E) RELATED EMPLOYERS AND RELATED PLANS.—For purposes of this paragraph—

(i) the rules of subsections (b), (c), and (m) of section 414 shall apply, and

(ii) all plans of an employer (determined after the application of such subsections) shall be treated as 1 plan.

(3) DENIAL OF INTEREST DEDUCTIONS IN CERTAIN CASES.—

(A) IN GENERAL.—No deduction otherwise allowable under this chapter shall be allowed under this chapter for any interest paid or accrued on any loan to which paragraph (1) does not apply by reason of paragraph (2) during the period described in subparagraph (B).

(B) PERIOD TO WHICH SUBPARAGRAPH (A) APPLIES.—For purposes of subparagraph (A), the period described in this subparagraph is the period—

(i) on or after the 1st day on which the individual to whom the loan is made is a key employee (as defined in section 416(i)), or

(ii) such loan is secured by amounts attributable to elective deferrals described in subparagraph (A) or (C) of section 402(g)(3).

(4) QUALIFIED EMPLOYER PLAN, ETC.—For purposes of this subsection—

(A) QUALIFIED EMPLOYER PLAN.—

(i) IN GENERAL.—The term “qualified employer plan” means—

(I) a plan described in section 401(a) which includes a trust exempt from tax under section 501(a),

(II) an annuity plan described in section 403(a), and

(III) a plan under which amounts are contributed by an individual’s employer for an annuity contract described in section 403(b).

(ii) SPECIAL RULE.—The term “qualified employer plan” shall include any plan which was (or was determined to be) a qualified employer plan or a government plan.

(B) GOVERNMENT PLAN.—The term “government plan” means any plan, whether or not qualified, established and maintained for its employees by the United States, by a State or political subdivision thereof, or by an agency or instrumentality of any of the foregoing.

(5) SPECIAL RULES FOR LOANS, ETC., FROM CERTAIN CONTRACTS.—For purposes of this subsection, any amount received

as a loan under a contract purchased under a qualified employer plan (and any assignment or pledge with respect to such a contract) shall be treated as a loan under such employer plan.

(q) 10-PERCENT PENALTY FOR PREMATURE DISTRIBUTIONS FROM ANNUITY CONTRACTS.—

(1) IMPOSITION OF PENALTY.—If any taxpayer receives any amount under an annuity contract, the taxpayer's tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income.

(2) SUBSECTION NOT TO APPLY TO CERTAIN DISTRIBUTIONS.—Paragraph (1) shall not apply to any distribution—

(A) made on or after the date on which the taxpayer attains age 59½,

(B) made on or after the death of the holder (or, where the holder is not an individual, the death of the primary annuitant (as defined in subsection (s)(6)(B))),

(C) attributable to the taxpayer's becoming disabled within the meaning of subsection (m)(7),

(D) which is a part of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the taxpayer or the joint lives (or joint life expectancies) of such taxpayer and his designated beneficiary,

(E) from a plan, contract, account, trust, or annuity described in subsection (e)(5)(D),

(F) allocable to investment in the contract before August 14, 1982, or

(G) under a qualified funding asset (within the meaning of section 130(d), but without regard to whether there is a qualified assignment),

(H) to which subsection (t) applies (without regard to paragraph (2) thereof),

(I) under an immediate annuity contract (within the meaning of section 72(u)(4)), or

(J) which is purchased by an employer upon the termination of a plan described in section 401(a) or 403(a) and which is held by the employer until such time as the employee separates from service.

(3) CHANGE IN SUBSTANTIALLY EQUAL PAYMENTS.—If—

(A) paragraph (1) does not apply to a distribution by reason of paragraph (2)(D), and

(B) the series of payments under such paragraph are subsequently modified (other than by reason of death or disability)—

(i) before the close of the 5-year period beginning on the date of the first payment and after the taxpayer attains age 59½, or

(ii) before the taxpayer attains age 59½,

the taxpayer's tax for the 1st taxable year in which such modification occurs shall be increased by an amount, determined under regulations, equal to the tax which (but for paragraph (2)(D)) would have been imposed, plus interest for the deferral period (within the meaning of subsection (t)(4)(B)).

(r) CERTAIN RAILROAD RETIREMENT BENEFITS TREATED AS RECEIVED UNDER EMPLOYER PLANS.—

(1) IN GENERAL.—Notwithstanding any other provision of law, any benefit provided under the Railroad Retirement Act of 1974 (other than a tier 1 railroad retirement benefit) shall be treated for purposes of this title as a benefit provided under an employer plan which meets the requirements of section 401(a).

(2) TIER 2 TAXES TREATED AS CONTRIBUTIONS.—

(A) IN GENERAL.—For purposes of paragraph (1)—

(i) the tier 2 portion of the tax imposed by section 3201 (relating to tax on employees) shall be treated as an employee contribution,

(ii) the tier 2 portion of the tax imposed by section 3211 (relating to tax on employee representatives) shall be treated as an employee contribution, and

(iii) the tier 2 portion of the tax imposed by section 3221 (relating to tax on employers) shall be treated as an employer contribution.

(B) TIER 2 PORTION.—For purposes of subparagraph

(A)—

(i) AFTER 1984.—With respect to compensation paid after 1984, the tier 2 portion shall be the taxes imposed by sections 3201(b), 3211(b), and 3221(b).

(ii) AFTER SEPTEMBER 30, 1981, AND BEFORE 1985.—With respect to compensation paid before 1985 for services rendered after September 30, 1981, the tier 2 portion shall be—

(I) so much of the tax imposed by section 3201 as is determined at the 2 percent rate, and

(II) so much of the taxes imposed by sections 3211 and 3221 as is determined at the 11.75 percent rate.

With respect to compensation paid for services rendered after December 31, 1983, and before 1985, subclause (I) shall be applied by substituting “2.75 percent” for “2 percent”, and subclause (II) shall be applied by substituting “12.75 percent” for “11.75 percent”.

(iii) BEFORE OCTOBER 1, 1981.—With respect to compensation paid for services rendered during any period before October 1, 1981, the tier 2 portion shall be the excess (if any) of—

(I) the tax imposed for such period by section 3201, 3211, or 3221, as the case may be (other than any tax imposed with respect to man-hours), over

(II) the tax which would have been imposed by such section for such period had the rates of the comparable taxes imposed by chapter 21 for such period applied under such section.

(C) CONTRIBUTIONS NOT ALLOCABLE TO SUPPLEMENTAL ANNUITY OR WINDFALL BENEFITS.—For purposes of paragraph (1), no amount treated as an employee contribution under this paragraph shall be allocated to—

- (i) any supplemental annuity paid under section 2(b) of the Railroad Retirement Act of 1974, or
- (ii) any benefit paid under section 3(h), 4(e), or 4(h) of such Act.

(3) TIER 1 RAILROAD RETIREMENT BENEFIT.—For purposes of paragraph (1), the term “tier 1 railroad retirement benefit” has the meaning given such term by section 86(d)(4).

(s) REQUIRED DISTRIBUTIONS WHERE HOLDER DIES BEFORE ENTIRE INTEREST IS DISTRIBUTED.—

(1) IN GENERAL.—A contract shall not be treated as an annuity contract for purposes of this title unless it provides that—

(A) if any holder of such contract dies on or after the annuity starting date and before the entire interest in such contract has been distributed, the remaining portion of such interest will be distributed at least as rapidly as under the method of distributions being used as of the date of his death, and

(B) if any holder of such contract dies before the annuity starting date, the entire interest in such contract will be distributed within 5 years after the death of such holder.

(2) EXCEPTION FOR CERTAIN AMOUNTS PAYABLE OVER LIFE OF BENEFICIARY.—If—

(A) any portion of the holder’s interest is payable to (or for the benefit of) a designated beneficiary,

(B) such portion will be distributed (in accordance with regulations) over the life of such designated beneficiary (or over a period not extending beyond the life expectancy of such beneficiary), and

(C) such distributions begin not later than 1 year after the date of the holder’s death or such later date as the Secretary may by regulations prescribe, then for purposes of paragraph (1), the portion referred to in subparagraph (A) shall be treated as distributed on the day on which such distributions begin.

(3) SPECIAL RULE WHERE SURVIVING SPOUSE BENEFICIARY.—If the designated beneficiary referred to in paragraph (2)(A) is the surviving spouse of the holder of the contract, paragraphs (1) and (2) shall be applied by treating such spouse as the holder of such contract.

(4) DESIGNATED BENEFICIARY.—For purposes of this subsection, the term “designated beneficiary” means any individual designated a beneficiary by the holder of the contract.

(5) EXCEPTION FOR CERTAIN ANNUITY CONTRACTS.—This subsection shall not apply to any annuity contract—

(A) which is provided—

(i) under a plan described in section 401(a) which includes a trust exempt from tax under section 501, or

(ii) under a plan described in section 403(a),

(B) which is described in section 403(b),

(C) which is an individual retirement annuity or provided under an individual retirement account or annuity, or

(D) which is a qualified funding asset (as defined in section 130(d), but without regard to whether there is a qualified assignment).

(6) SPECIAL RULE WHERE HOLDER IS CORPORATION OR OTHER NON-INDIVIDUAL.—

(A) IN GENERAL.—For purposes of this subsection, if the holder of the contract is not an individual, the primary annuitant shall be treated as the holder of the contract.

(B) PRIMARY ANNUITANT.—For purposes of subparagraph (A), the term “primary annuitant” means the individual, the events in the life of whom are of primary importance in affecting the timing or amount of the payout under the contract.

(7) TREATMENT OF CHANGES IN PRIMARY ANNUITANT WHERE HOLDER OF CONTRACT IS NOT AN INDIVIDUAL.—For purposes of this subsection, in the case of a holder of an annuity contract which is not an individual, if there is a change in a primary annuitant (as defined in paragraph (6)(B)), such change shall be treated as the death of the holder.

(t) 10-PERCENT ADDITIONAL TAX ON EARLY DISTRIBUTIONS FROM QUALIFIED RETIREMENT PLANS.—

(1) IMPOSITION OF ADDITIONAL TAX.—If any taxpayer receives any amount from a qualified retirement plan (as defined in section 4974(c)), the taxpayer’s tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income.

(2) SUBSECTION NOT TO APPLY TO CERTAIN DISTRIBUTIONS.—Except as provided in paragraphs (3) and (4), paragraph (1) shall not apply to any of the following distributions:

(A) IN GENERAL.—Distributions which are—

(i) made on or after the date on which the employee attains age 59½,

(ii) made to a beneficiary (or to the estate of the employee) on or after the death of the employee,

(iii) attributable to the employee’s being disabled within the meaning of subsection (m)(7),

(iv) part of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of such employee and his designated beneficiary,

(v) made to an employee after separation from service after attainment of age 55,

(vi) dividends paid with respect to stock of a corporation which are described in section 404(k),

(vii) made on account of a levy under section 6331 on the qualified retirement plan, or

(viii) payments under a phased retirement annuity under section 8366a(a)(5) or 8412a(a)(5) of title 5, United States Code, or a composite retirement annuity under section 8366a(a)(1) or 8412a(a)(1) of such title.

(B) MEDICAL EXPENSES.—Distributions made to the employee (other than distributions described in subparagraph (A), (C), or (D)) to the extent such distributions do not exceed the amount allowable as a deduction under section 213 to the employee for amounts paid during the taxable year for medical care (determined without regard to

whether the employee itemizes deductions for such taxable year).

(C) PAYMENTS TO ALTERNATE PAYEES PURSUANT TO QUALIFIED DOMESTIC RELATIONS ORDERS.—Any distribution to an alternate payee pursuant to a qualified domestic relations order (within the meaning of section 414(p)(1)).

(D) DISTRIBUTIONS TO UNEMPLOYED INDIVIDUALS FOR HEALTH INSURANCE PREMIUMS.—

(i) IN GENERAL.—Distributions from an individual retirement plan to an individual after separation from employment—

(I) if such individual has received unemployment compensation for 12 consecutive weeks under any Federal or State unemployment compensation law by reason of such separation,

(II) if such distributions are made during any taxable year during which such unemployment compensation is paid or the succeeding taxable year, and

(III) to the extent such distributions do not exceed the amount paid during the taxable year for insurance described in section 213(d)(1)(D) with respect to the individual and the individual's spouse and dependents (as defined in section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof).

(ii) DISTRIBUTIONS AFTER REEMPLOYMENT.—Clause (i) shall not apply to any distribution made after the individual has been employed for at least 60 days after the separation from employment to which clause (i) applies.

(iii) SELF-EMPLOYED INDIVIDUALS.—To the extent provided in regulations, a self-employed individual shall be treated as meeting the requirements of clause (i)(I) if, under Federal or State law, the individual would have received unemployment compensation but for the fact the individual was self-employed.

(E) DISTRIBUTIONS FROM INDIVIDUAL RETIREMENT PLANS FOR HIGHER EDUCATION EXPENSES.—Distributions to an individual from an individual retirement plan to the extent such distributions do not exceed the qualified higher education expenses (as defined in paragraph (7)) of the taxpayer for the taxable year. Distributions shall not be taken into account under the preceding sentence if such distributions are described in subparagraph (A), (C), or (D) or to the extent paragraph (1) does not apply to such distributions by reason of subparagraph (B).

(F) DISTRIBUTIONS FROM CERTAIN PLANS FOR FIRST HOME PURCHASES.—Distributions to an individual from an individual retirement plan which are qualified first-time homebuyer distributions (as defined in paragraph (8)). Distributions shall not be taken into account under the preceding sentence if such distributions are described in subparagraph (A), (C), (D), or (E) or to the extent paragraph (1)



does not apply to such distributions by reason of subparagraph (B).

(G) DISTRIBUTIONS FROM RETIREMENT PLANS TO INDIVIDUALS CALLED TO ACTIVE DUTY.—

(i) IN GENERAL.—Any qualified reservist distribution.

(ii) AMOUNT DISTRIBUTED MAY BE REPAID.—Any individual who receives a qualified reservist distribution may, at any time during the 2-year period beginning on the day after the end of the active duty period, make one or more contributions to an individual retirement plan of such individual in an aggregate amount not to exceed the amount of such distribution. The dollar limitations otherwise applicable to contributions to individual retirement plans shall not apply to any contribution made pursuant to the preceding sentence. No deduction shall be allowed for any contribution pursuant to this clause.

(iii) QUALIFIED RESERVIST DISTRIBUTION.—For purposes of this subparagraph, the term “qualified reservist distribution” means any distribution to an individual if—

(I) such distribution is from an individual retirement plan, or from amounts attributable to employer contributions made pursuant to elective deferrals described in subparagraph (A) or (C) of section 402(g)(3) or section 501(c)(18)(D)(iii),

(II) such individual was (by reason of being a member of a reserve component (as defined in section 101 of title 37, United States Code)) ordered or called to active duty for a period in excess of 179 days or for an indefinite period, and

(III) such distribution is made during the period beginning on the date of such order or call and ending at the close of the active duty period.

(iv) APPLICATION OF SUBPARAGRAPH.—This subparagraph applies to individuals ordered or called to active duty after September 11, 2001. In no event shall the 2-year period referred to in clause (ii) end before the date which is 2 years after the date of the enactment of this subparagraph.

(H) DISTRIBUTIONS FROM RETIREMENT PLANS IN CASE OF BIRTH OF CHILD OR ADOPTION.—

(i) IN GENERAL.—Any qualified birth or adoption distribution.

(ii) LIMITATION.—The aggregate amount which may be treated as qualified birth or adoption distributions by any individual with respect to any birth or adoption shall not exceed \$5,000.

(iii) QUALIFIED BIRTH OR ADOPTION DISTRIBUTION.—For purposes of this subparagraph—

(I) IN GENERAL.—The term “qualified birth or adoption distribution” means any distribution from an applicable eligible retirement plan to an individual if made during the 1-year period begin-

ning on the date on which a child of the individual is born or on which the legal adoption by the individual of an eligible adoptee is finalized.

(II) ELIGIBLE ADOPTEE.—The term “eligible adoptee” 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.

(iv) TREATMENT OF PLAN DISTRIBUTIONS.—

(I) IN GENERAL.—If a distribution to an individual would (without regard to clause (ii)) be a qualified birth or adoption distribution, a plan shall not be treated as failing to meet any requirement of this title merely because the plan treats the distribution as a qualified birth or adoption distribution, unless the aggregate amount of such distributions from all plans maintained by the employer (and any member of any controlled group which includes the employer) to such individual exceeds \$5,000.

(II) CONTROLLED GROUP.—For purposes of subclause (I), the term “controlled group” means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414.

(v) AMOUNT DISTRIBUTED MAY BE REPAID.—

(I) IN GENERAL.—Any individual who receives a qualified birth or adoption distribution [may make] *may, at any time during the 3-year period beginning on the day after the date on which such distribution was received, make one or more contributions in an aggregate amount not to exceed the amount of such distribution to an applicable eligible retirement plan of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made under section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), as the case may be.*

(II) LIMITATION ON CONTRIBUTIONS TO APPLICABLE ELIGIBLE RETIREMENT PLANS OTHER THAN IRAS.—The aggregate amount of contributions made by an individual under subclause (I) to any applicable eligible retirement plan which is not an individual retirement plan shall not exceed the aggregate amount of qualified birth or adoption distributions which are made from such plan to such individual. Subclause (I) shall not apply to contributions to any applicable eligible retirement plan which is not an individual retirement plan unless the individual is eligible to make contributions (other than those described in subclause (I)) to such applicable eligible retirement plan.

(III) TREATMENT OF REPAYMENTS OF DISTRIBUTIONS FROM APPLICABLE ELIGIBLE RETIREMENT PLANS OTHER THAN IRAS.—If a contribution is made under subclause (I) with respect to a quali-

fied birth or adoption distribution from an applicable eligible retirement plan other than an individual retirement plan, then the taxpayer shall, to the extent of the amount of the contribution, be treated as having received such distribution in an eligible rollover distribution (as defined in section 402(c)(4)) and as having transferred the amount to the applicable eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.

(IV) TREATMENT OF REPAYMENTS FOR DISTRIBUTIONS FROM IRAS.—If a contribution is made under subclause (I) with respect to a qualified birth or adoption distribution from an individual retirement plan, then, to the extent of the amount of the contribution, such distribution shall be treated as a distribution described in section 408(d)(3) and as having been transferred to the applicable eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.

(vi) DEFINITION AND SPECIAL RULES.—For purposes of this subparagraph—

(I) APPLICABLE ELIGIBLE RETIREMENT PLAN.—The term “applicable eligible retirement plan” means an eligible retirement plan (as defined in section 402(c)(8)(B)) other than a defined benefit plan.

(II) EXEMPTION OF DISTRIBUTIONS FROM TRUSTEE TO TRUSTEE TRANSFER AND WITHHOLDING RULES.—For purposes of sections 401(a)(31), 402(f), and 3405, a qualified birth or adoption distribution shall not be treated as an eligible rollover distribution.

(III) TAXPAYER MUST INCLUDE TIN.—A distribution shall not be treated as a qualified birth or adoption distribution with respect to any child or eligible adoptee unless the taxpayer includes the name, age, and TIN of such child or eligible adoptee on the taxpayer’s return of tax for the taxable year.

(IV) DISTRIBUTIONS TREATED AS MEETING PLAN DISTRIBUTION REQUIREMENTS.—Any qualified birth or adoption distribution shall be treated as meeting the requirements of sections 401(k)(2)(B)(i), **403(b)(7)(A)(ii)** 403(b)(7)(A)(i), 403(b)(11), and 457(d)(1)(A).

(I) DISTRIBUTIONS FROM RETIREMENT PLAN IN CASE OF DOMESTIC ABUSE.—

(i) IN GENERAL.—Any eligible distribution to a domestic abuse victim.

(ii) LIMITATION.—The aggregate amount which may be treated as an eligible distribution to a domestic abuse victim by any individual shall not exceed an amount equal to the lesser of—

- (I) \$10,000, or
- (II) 50 percent of the present value of the non-forfeitable accrued benefit of the employee under the plan.
- (iii) **ELIGIBLE DISTRIBUTION TO A DOMESTIC ABUSE VICTIM.**—For purposes of this subparagraph—
  - (I) **IN GENERAL.**—A distribution shall be treated as an eligible distribution to a domestic abuse victim if such distribution is from an applicable eligible retirement plan to an individual and made during the 1-year period beginning on any date on which the individual is a victim of domestic abuse by a spouse or domestic partner.
  - (II) **DOMESTIC ABUSE.**—The term “domestic abuse” means physical, psychological, sexual, emotional, or economic abuse, including efforts to control, isolate, humiliate, or intimidate the victim, or to undermine the victim’s ability to reason independently, including by means of abuse of the victim’s child or another family member living in the household.
- (iv) **TREATMENT OF PLAN DISTRIBUTIONS.**—
  - (I) **IN GENERAL.**—If a distribution to an individual would (without regard to clause (ii)) be an eligible distribution to a domestic abuse victim, a plan shall not be treated as failing to meet any requirement of this title merely because the plan treats the distribution as an eligible distribution to a domestic abuse victim, unless the aggregate amount of such distributions from all plans maintained by the employer (and any member of any controlled group which includes the employer) to such individual exceeds the limitation under clause (ii).
  - (II) **CONTROLLED GROUP.**—For purposes of subclause (I), the term “controlled group” means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414.
- (v) **AMOUNT DISTRIBUTED MAY BE REPAID.**—
  - (I) **IN GENERAL.**—Any individual who receives a distribution described in clause (i) may, at any time during the 3-year period beginning on the day after the date on which such distribution was received, make one or more contributions in an aggregate amount not to exceed the amount of such distribution to an applicable eligible retirement plan of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made under section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), as the case may be.
  - (II) **LIMITATION ON CONTRIBUTIONS TO APPLICABLE ELIGIBLE RETIREMENT PLANS OTHER THAN IRAS.**—The aggregate amount of contributions made by an individual under subclause (I) to any

*applicable eligible retirement plan which is not an individual retirement plan shall not exceed the aggregate amount of eligible distributions to a domestic abuse victim which are made from such plan to such individual. Subclause (I) shall not apply to contributions to any applicable eligible retirement plan which is not an individual retirement plan unless the individual is eligible to make contributions (other than those described in subclause (I)) to such applicable eligible retirement plan.*

*(III) TREATMENT OF REPAYMENTS OF DISTRIBUTIONS FROM APPLICABLE ELIGIBLE RETIREMENT PLANS OTHER THAN IRAS.—If a contribution is made under subclause (I) with respect to an eligible distribution to a domestic abuse victim from an applicable eligible retirement plan other than an individual retirement plan, then the taxpayer shall, to the extent of the amount of the contribution, be treated as having received such distribution in an eligible rollover distribution (as defined in section 402(c)(4)) and as having transferred the amount to the applicable eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.*

*(IV) TREATMENT OF REPAYMENTS FOR DISTRIBUTIONS FROM IRAS.—If a contribution is made under subclause (I) with respect to an eligible distribution to a domestic abuse victim from an individual retirement plan, then, to the extent of the amount of the contribution, such distribution shall be treated as a distribution described in section 408(d)(3) and as having been transferred to the applicable eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.*

*(vi) DEFINITION AND SPECIAL RULES.—For purposes of this subparagraph:*

*(I) APPLICABLE ELIGIBLE RETIREMENT PLAN.—The term “applicable eligible retirement plan” means an eligible retirement plan (as defined in section 402(c)(8)(B)) other than a defined benefit plan.*

*(II) EXEMPTION OF DISTRIBUTIONS FROM TRUSTEE TO TRUSTEE TRANSFER AND WITHHOLDING RULES.—For purposes of sections 401(a)(31), 402(f), and 3405, an eligible distribution to a domestic abuse victim shall not be treated as an eligible rollover distribution.*

*(III) DISTRIBUTIONS TREATED AS MEETING PLAN DISTRIBUTION REQUIREMENTS; SELF-CERTIFICATION.—Any distribution which the employee or participant certifies as being an eligible distribution to a domestic abuse victim shall be treated as meeting the requirements of sections*

*401(k)(2)(B)(i), 403(b)(7)(A)(i), 403(b)(11), and 457(d)(1)(A).*

(3) LIMITATIONS.—

(A) CERTAIN EXCEPTIONS NOT TO APPLY TO INDIVIDUAL RETIREMENT PLANS.—Subparagraphs (A)(v) and (C) of paragraph (2) shall not apply to distributions from an individual retirement plan.

(B) PERIODIC PAYMENTS UNDER QUALIFIED PLANS MUST BEGIN AFTER SEPARATION.—Paragraph (2)(A)(iv) shall not apply to any amount paid from a trust described in section 401(a) which is exempt from tax under section 501(a) or from a contract described in section 72(e)(5)(D)(ii) unless the series of payments begins after the employee separates from service.

(4) CHANGE IN SUBSTANTIALLY EQUAL PAYMENTS.—

(A) IN GENERAL.—If—

(i) paragraph (1) does not apply to a distribution by reason of paragraph (2)(A)(iv), and

(ii) the series of payments under such paragraph are subsequently modified (other than by reason of death or disability or a distribution to which paragraph (10) applies)—

(I) before the close of the 5-year period beginning with the date of the first payment and after the employee attains age 59½, or

(II) before the employee attains age 59½,

the taxpayer's tax for the 1st taxable year in which such modification occurs shall be increased by an amount, determined under regulations, equal to the tax which (but for paragraph (2)(A)(iv)) would have been imposed, plus interest for the deferral period.

(B) DEFERRAL PERIOD.—For purposes of this paragraph, the term “deferral period” means the period beginning with the taxable year in which (without regard to paragraph (2)(A)(iv)) the distribution would have been includible in gross income and ending with the taxable year in which the modification described in subparagraph (A) occurs.

(5) EMPLOYEE.—For purposes of this subsection, the term “employee” includes any participant, and in the case of an individual retirement plan, the individual for whose benefit such plan was established.

(6) SPECIAL RULES FOR SIMPLE RETIREMENT ACCOUNTS.—In the case of any amount received from a simple retirement account (within the meaning of section 408(p)) during the 2-year period beginning on the date such individual first participated in any qualified salary reduction arrangement maintained by the individual's employer under section 408(p)(2), paragraph (1) shall be applied by substituting “25 percent” for “10 percent”.

(7) QUALIFIED HIGHER EDUCATION EXPENSES.—For purposes of paragraph (2)(E)—

(A) IN GENERAL.—The term “qualified higher education expenses” means qualified higher education expenses (as defined in section 529(e)(3)) for education furnished to—

(i) the taxpayer,  
 (ii) the taxpayer's spouse, or  
 (iii) any child (as defined in section 152(f)(1)) or grandchild of the taxpayer or the taxpayer's spouse, at an eligible educational institution (as defined in section 529(e)(5)).

(B) COORDINATION WITH OTHER BENEFITS.—The amount of qualified higher education expenses for any taxable year shall be reduced as provided in section 25A(g)(2).

(8) QUALIFIED FIRST-TIME HOMEBUYER DISTRIBUTIONS.—For purposes of paragraph (2)(F)—

(A) IN GENERAL.—The term “qualified first-time homebuyer distribution” means any payment or distribution received by an individual to the extent such payment or distribution is used by the individual before the close of the 120th day after the day on which such payment or distribution is received to pay qualified acquisition costs with respect to a principal residence of a first-time homebuyer who is such individual, the spouse of such individual, or any child, grandchild, or ancestor of such individual or the individual's spouse.

(B) LIFETIME DOLLAR LIMITATION.—The aggregate amount of payments or distributions received by an individual which may be treated as qualified first-time homebuyer distributions for any taxable year shall not exceed the excess (if any) of—

- (i) \$10,000, over
- (ii) the aggregate amounts treated as qualified first-time homebuyer distributions with respect to such individual for all prior taxable years.

(C) QUALIFIED ACQUISITION COSTS.—For purposes of this paragraph, the term “qualified acquisition costs” means the costs of acquiring, constructing, or reconstructing a residence. Such term includes any usual or reasonable settlement, financing, or other closing costs.

(D) FIRST-TIME HOMEBUYER; OTHER DEFINITIONS.—For purposes of this paragraph—

(i) FIRST-TIME HOMEBUYER.—The term “first-time homebuyer” means any individual if—

(I) such individual (and if married, such individual's spouse) had no present ownership interest in a principal residence during the 2-year period ending on the date of acquisition of the principal residence to which this paragraph applies, and

(II) subsection (h) or (k) of section 1034 (as in effect on the day before the date of the enactment of this paragraph) did not suspend the running of any period of time specified in section 1034 (as so in effect) with respect to such individual on the day before the date the distribution is applied pursuant to subparagraph (A).

(ii) PRINCIPAL RESIDENCE.—The term “principal residence” has the same meaning as when used in section 121.

(iii) DATE OF ACQUISITION.—The term “date of acquisition” means the date—

(I) on which a binding contract to acquire the principal residence to which subparagraph (A) applies is entered into, or

(II) on which construction or reconstruction of such a principal residence is commenced.

(E) SPECIAL RULE WHERE DELAY IN ACQUISITION.—If any distribution from any individual retirement plan fails to meet the requirements of subparagraph (A) solely by reason of a delay or cancellation of the purchase or construction of the residence, the amount of the distribution may be contributed to an individual retirement plan as provided in section 408(d)(3)(A)(i) (determined by substituting “120th day” for “60th day” in such section), except that—

(i) section 408(d)(3)(B) shall not be applied to such contribution, and

(ii) such amount shall not be taken into account in determining whether section 408(d)(3)(B) applies to any other amount.

(9) SPECIAL RULE FOR ROLLOVERS TO SECTION 457 PLANS.—For purposes of this subsection, a distribution from an eligible deferred compensation plan (as defined in section 457(b)) of an eligible employer described in section 457(e)(1)(A) shall be treated as a distribution from a qualified retirement plan described in 4974(c)(1) to the extent that such distribution is attributable to an amount transferred to an eligible deferred compensation plan from a qualified retirement plan (as defined in section 4974(c)).

(10) DISTRIBUTIONS TO **[QUALIFIED]** PUBLIC SAFETY EMPLOYEES **[IN GOVERNMENTAL PLANS]**.—

(A) IN GENERAL.—In the case of a distribution to a qualified public safety employee from a governmental plan (within the meaning of section **[414(d)]** *414(d)*) or a distribution from a plan described in clause (iii), (iv), or (vi) of section 402(c)(8)(B) to an employee who provides firefighting services, paragraph (2)(A)(v) shall be applied by substituting “age 50” for “age 55”.

(B) QUALIFIED PUBLIC SAFETY EMPLOYEE.—For purposes of this paragraph, the term “qualified public safety employee” means—

(i) any employee of a State or political subdivision of a State who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State or political subdivision, or

(ii) any Federal law enforcement officer described in section 8331(20) or 8401(17) of title 5, United States Code, any Federal customs and border protection officer described in section 8331(31) or 8401(36) of such title, any Federal firefighter described in section 8331(21) or 8401(14) of such title, any air traffic controller described in 8331(30) or 8401(35) of such title, any nuclear materials courier described in section 8331(27) or 8401(33) of such title, any member of the



United States Capitol Police, any member of the Supreme Court Police, or any diplomatic security special agent of the Department of State.

(u) TREATMENT OF ANNUITY CONTRACTS NOT HELD BY NATURAL PERSONS.—

(1) IN GENERAL.—If any annuity contract is held by a person who is not a natural person—

(A) such contract shall not be treated as an annuity contract for purposes of this subtitle (other than subchapter L), and

(B) the income on the contract for any taxable year of the policyholder shall be treated as ordinary income received or accrued by the owner during such taxable year. For purposes of this paragraph, holding by a trust or other entity as an agent for a natural person shall not be taken into account.

(2) INCOME ON THE CONTRACT.—

(A) IN GENERAL.—For purposes of paragraph (1), the term “income on the contract” means, with respect to any taxable year of the policyholder, the excess of—

(i) the sum of the net surrender value of the contract as of the close of the taxable year plus all distributions under the contract received during the taxable year or any prior taxable year, reduced by

(ii) the sum of the amount of net premiums under the contract for the taxable year and prior taxable years and amounts includible in gross income for prior taxable years with respect to such contract under this subsection.

Where necessary to prevent the avoidance of this subsection, the Secretary may substitute “fair market value of the contract” for “net surrender value of the contract” each place it appears in the preceding sentence.

(B) NET PREMIUMS.—For purposes of this paragraph, the term “net premiums” means the amount of premiums paid under the contract reduced by any policyholder dividends.

(3) EXCEPTIONS.—This subsection shall not apply to any annuity contract which—

(A) is acquired by the estate of a decedent by reason of the death of the decedent,

(B) is held under a plan described in section 401(a) or 403(a), under a program described in section 403(b), or under an individual retirement plan,

(C) is a qualified funding asset (as defined in section 130(d), but without regard to whether there is a qualified assignment),

(D) is purchased by an employer upon the termination of a plan described in section 401(a) or 403(a) and is held by the employer until all amounts under such contract are distributed to the employee for whom such contract was purchased or the employee’s beneficiary, or

(E) is an immediate annuity.

(4) IMMEDIATE ANNUITY.—For purposes of this subsection, the term “immediate annuity” means an annuity—

(A) which is purchased with a single premium or annuity consideration,

(B) the annuity starting date (as defined in subsection (c)(4)) of which commences no later than 1 year from the date of the purchase of the annuity, and

(C) which provides for a series of substantially equal periodic payments (to be made not less frequently than annually) during the annuity period.

(v) 10-PERCENT ADDITIONAL TAX FOR TAXABLE DISTRIBUTIONS FROM MODIFIED ENDOWMENT CONTRACTS.—

(1) IMPOSITION OF ADDITIONAL TAX.—If any taxpayer receives any amount under a modified endowment contract (as defined in section 7702A), the taxpayer's tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income.

(2) SUBSECTION NOT TO APPLY TO CERTAIN DISTRIBUTIONS.—Paragraph (1) shall not apply to any distribution—

(A) made on or after the date on which the taxpayer attains age 59½,

(B) which is attributable to the taxpayer's becoming disabled (within the meaning of subsection (m)(7)), or

(C) which is part of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the taxpayer or the joint lives (or joint life expectancies) of such taxpayer and his beneficiary.

(w) APPLICATION OF BASIS RULES TO NONRESIDENT ALIENS.—

(1) IN GENERAL.—Notwithstanding any other provision of this section, for purposes of determining the portion of any distribution which is includible in gross income of a distributee who is a citizen or resident of the United States, the investment in the contract shall not include any applicable nontaxable contributions or applicable nontaxable earnings.

(2) APPLICABLE NONTAXABLE CONTRIBUTION.—For purposes of this subsection, the term “applicable nontaxable contribution” means any employer or employee contribution—

(A) which was made with respect to compensation—

(i) for labor or personal services performed by an employee who, at the time the labor or services were performed, was a nonresident alien for purposes of the laws of the United States in effect at such time, and

(ii) which is treated as from sources without the United States, and

(B) which was not subject to income tax (and would have been subject to income tax if paid as cash compensation when the services were rendered) under the laws of the United States or any foreign country.

(3) APPLICABLE NONTAXABLE EARNINGS.—For purposes of this subsection, the term “applicable nontaxable earnings” means earnings—

(A) which are paid or accrued with respect to any employer or employee contribution which was made with respect to compensation for labor or personal services performed by an employee,

(B) with respect to which the employee was at the time the earnings were paid or accrued a nonresident alien for purposes of the laws of the United States, and

(C) which were not subject to income tax under the laws of the United States or any foreign country.

(4) REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this subsection, including regulations treating contributions and earnings as not subject to tax under the laws of any foreign country where appropriate to carry out the purposes of this subsection.

(x) CROSS REFERENCE.—For limitation on adjustments to basis of annuity contracts sold, see section 1021.

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### PART III—ITEMS SPECIFICALLY EXCLUDED FROM GROSS INCOME

Sec. 101. Certain death payments.

\* \* \* \* \*

Sec. 139C. *Certain disability-related first responder retirement payments.*

\* \* \* \* \*

#### SEC. 139C. CERTAIN DISABILITY-RELATED FIRST RESPONDER RETIREMENT PAYMENTS.

(a) *IN GENERAL.*—In the case of an individual who receives qualified first responder retirement payments for any taxable year, gross income shall not include so much of such payments as do not exceed the annualized excludable disability amount with respect to such individual.

(b) *QUALIFIED FIRST RESPONDER RETIREMENT PAYMENTS.*—For purposes of this section, the term “qualified first responder retirement payments” means, with respect to any taxable year, any pension or annuity which but for this section would be includible in gross income for such taxable year and which is received—

(1) from a plan described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B), and

(2) in connection with such individual’s qualified first responder service.

(c) *ANNUALIZED EXCLUDABLE DISABILITY AMOUNT.*—For purposes of this section—

(1) *IN GENERAL.*—The term “annualized excludable disability amount” means, with respect to any individual, the service-connected excludable disability amounts which are properly attributable to the 12-month period immediately preceding the date on which such individual attains retirement age.

(2) *SERVICE-CONNECTED EXCLUDABLE DISABILITY AMOUNT.*—The term “service-connected excludable disability amount” means periodic payments received by an individual which—

(A) are not includible in such individual’s gross income under section 104(a)(1),

(B) are received in connection with such individual’s qualified first responder service, and

(C) terminate when such individual attains retirement age.

(3) *SPECIAL RULE FOR PARTIAL-YEAR PAYMENTS.*—In the case of an individual who only receives service-connected excludable disability amounts properly attributable to a portion of the 12-month period described in paragraph (1), such paragraph shall be applied by multiplying such amounts by the ratio of 365 to the number of days in such period to which such amounts were properly attributable.

(d) *QUALIFIED FIRST RESPONDER SERVICE.*—For purposes of this section, the term “qualified first responder service” means service as a law enforcement officer, firefighter, paramedic, or emergency medical technician.

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## PART VII—ADDITIONAL ITEMIZED DEDUCTIONS FOR INDIVIDUALS

\* \* \* \* \*

### SEC. 219. RETIREMENT SAVINGS.

(a) *ALLOWANCE OF DEDUCTION.*—In the case of an individual, there shall be allowed as a deduction an amount equal to the qualified retirement contributions of the individual for the taxable year.

(b) *MAXIMUM AMOUNT OF DEDUCTION.*—

(1) *IN GENERAL.*—The amount allowable as a deduction under subsection (a) to any individual for any taxable year shall not exceed the lesser of—

(A) the deductible amount, or

(B) an amount equal to the compensation includible in the individual’s gross income for such taxable year.

(2) *SPECIAL RULE FOR EMPLOYER CONTRIBUTIONS UNDER SIMPLIFIED EMPLOYEE PENSIONS.*—This section shall not apply with respect to an employer contribution to a simplified employee pension.

(3) *PLANS UNDER SECTION 501(C)(18).*—Notwithstanding paragraph (1), the amount allowable as a deduction under subsection (a) with respect to any contributions on behalf of an employee to a plan described in section 501(c)(18) shall not exceed the lesser of—

(A) \$7,000, or

(B) an amount equal to 25 percent of the compensation (as defined in section 415(c)(3)) includible in the individual’s gross income for such taxable year.

(4) *SPECIAL RULE FOR SIMPLE RETIREMENT ACCOUNTS.*—This section shall not apply with respect to any amount contributed to a simple retirement account established under section 408(p).

(5) *DEDUCTIBLE AMOUNT.*—For purposes of paragraph (1)(A)—

(A) *IN GENERAL.*—The deductible amount is \$5,000.

(B) *CATCH-UP CONTRIBUTIONS FOR INDIVIDUALS 50 OR OLDER.*—

(i) *IN GENERAL.*—In the case of an individual who has attained the age of 50 before the close of the taxable year, the deductible amount for such taxable year shall be increased by the applicable amount.

(ii) APPLICABLE AMOUNT.—For purposes of clause (i), the applicable amount is \$1,000.

(C) COST-OF-LIVING ADJUSTMENT.—

(i) IN GENERAL.—In the case of any taxable year beginning in a calendar year after 2008, the \$5,000 amount under subparagraph (A) shall be increased by an amount equal to—

(I) such dollar amount, multiplied by

(II) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting “calendar year 2007” for “calendar year 2016” in subparagraph (A)(ii) thereof.

(ii) ROUNDING RULES.—If any amount after adjustment under clause (i) is not a multiple of \$500, such amount shall be rounded to the next lower multiple of \$500.

(iii) INDEXING OF CATCH-UP LIMITATION.—*In the case of any taxable year beginning in a calendar year after 2022, the \$1,000 amount under subparagraph (B)(ii) shall be increased by an amount equal to—*

*(I) such dollar amount, multiplied by*

*(II) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting “calendar year 2021” for “calendar year 2016” in subparagraph (A)(ii) thereof.*

*If any amount after adjustment under the preceding sentence is not a multiple of \$100, such amount shall be rounded to the next lower multiple of \$100.*

(c) KAY BAILEY HUTCHISON SPOUSAL IRA.—

(1) IN GENERAL.—In the case of an individual to whom this paragraph applies for the taxable year, the limitation of paragraph (1) of subsection (b) shall be equal to the lesser of—

(A) the dollar amount in effect under subsection (b)(1)(A) for the taxable year, or

(B) the sum of—

(i) the compensation includible in such individual’s gross income for the taxable year, plus

(ii) the compensation includible in the gross income of such individual’s spouse for the taxable year reduced by—

(I) the amount allowed as a deduction under subsection (a) to such spouse for such taxable year,

(II) the amount of any designated nondeductible contribution (as defined in section 408(o)) on behalf of such spouse for such taxable year, and

(III) the amount of any contribution on behalf of such spouse to a Roth IRA under section 408A for such taxable year.

(2) INDIVIDUALS TO WHOM PARAGRAPH (1) APPLIES.—Paragraph (1) shall apply to any individual if—

(A) such individual files a joint return for the taxable year, and

- (B) the amount of compensation (if any) includible in such individual's gross income for the taxable year is less than the compensation includible in the gross income of such individual's spouse for the taxable year.
- (d) OTHER LIMITATIONS AND RESTRICTIONS.—
- (2) RECONTRIBUTED AMOUNTS.—No deduction shall be allowed under this section with respect to a rollover contribution described in section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16).
- (3) AMOUNTS CONTRIBUTED UNDER ENDOWMENT CONTRACT.—In the case of an endowment contract described in section 408(b), no deduction shall be allowed under this section for that portion of the amounts paid under the contract for the taxable year which is properly allocable, under regulations prescribed by the Secretary, to the cost of life insurance.
- (4) DENIAL OF DEDUCTION FOR AMOUNT CONTRIBUTED TO INHERITED ANNUITIES OR ACCOUNTS.—No deduction shall be allowed under this section with respect to any amount paid to an inherited individual retirement account or individual retirement annuity (within the meaning of section 408(d)(3)(C)(ii)).
- (e) QUALIFIED RETIREMENT CONTRIBUTION.—For purposes of this section, the term “qualified retirement contribution” means—
- (1) any amount paid in cash for the taxable year by or on behalf of an individual to an individual retirement plan for such individual's benefit, and
- (2) any amount contributed on behalf of any individual to a plan described in section 501(c)(18).
- (f) OTHER DEFINITIONS AND SPECIAL RULES.—
- (1) COMPENSATION.—For purposes of this section, the term “compensation” includes earned income (as defined in section 401(c)(2)). The term “compensation” does not include any amount received as a pension or annuity and does not include any amount received as deferred compensation. For purposes of this paragraph, section 401(c)(2) shall be applied as if the term trade or business for purposes of section 1402 included service described in subsection (c)(6). The term “compensation” includes any differential wage payment (as defined in section 3401(h)(2)). The term “compensation” shall include any amount which is included in the individual's gross income and paid to the individual to aid the individual in the pursuit of graduate or postdoctoral study.
- (2) MARRIED INDIVIDUALS.—The maximum deduction under subsection (b) shall be computed separately for each individual, and this section shall be applied without regard to any community property laws.
- (3) TIME WHEN CONTRIBUTIONS DEEMED MADE.—For purposes of this section, a taxpayer shall be deemed to have made a contribution to an individual retirement plan on the last day of the preceding taxable year if the contribution is made on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (not including extensions thereof).
- (5) EMPLOYER PAYMENTS.—For purposes of this title, any amount paid by an employer to an individual retirement plan shall be treated as payment of compensation to the employee

(other than a self-employed individual who is an employee within the meaning of section 401(c)(1)) includible in his gross income in the taxable year for which the amount was contributed, whether or not a deduction for such payment is allowable under this section to the employee.

(6) EXCESS CONTRIBUTIONS TREATED AS CONTRIBUTION MADE DURING SUBSEQUENT YEAR FOR WHICH THERE IS AN UNUSED LIMITATION.—

(A) IN GENERAL.—If for the taxable year the maximum amount allowable as a deduction under this section for contributions to an individual retirement plan exceeds the amount contributed, then the taxpayer shall be treated as having made an additional contribution for the taxable year in an amount equal to the lesser of—

- (i) the amount of such excess, or
- (ii) the amount of the excess contributions for such taxable year (determined under section 4973(b)(2) without regard to subparagraph (C) thereof).

(B) AMOUNT CONTRIBUTED.—For purposes of this paragraph, the amount contributed—

- (i) shall be determined without regard to this paragraph, and
- (ii) shall not include any rollover contribution.

(C) SPECIAL RULE WHERE EXCESS DEDUCTION WAS ALLOWED FOR CLOSED YEAR.—Proper reduction shall be made in the amount allowable as a deduction by reason of this paragraph for any amount allowed as a deduction under this section for a prior taxable year for which the period for assessing deficiency has expired if the amount so allowed exceeds the amount which should have been allowed for such prior taxable year.

(7) SPECIAL RULE FOR COMPENSATION EARNED BY MEMBERS OF THE ARMED FORCES FOR SERVICE IN A COMBAT ZONE.—For purposes of subsections (b)(1)(B) and (c), the amount of compensation includible in an individual's gross income shall be determined without regard to section 112.

(8) ELECTION NOT TO DEDUCT CONTRIBUTIONS.—For election not to deduct contributions to individual retirement plans, see section 408(o)(2)(B)(ii).

(g) LIMITATION ON DEDUCTION FOR ACTIVE PARTICIPANTS IN CERTAIN PENSION PLANS.—

(1) IN GENERAL.—If (for any part of any plan year ending with or within a taxable year) an individual or the individual's spouse is an active participant, each of the dollar limitations contained in subsections (b)(1)(A) and (c)(1)(A) for such taxable year shall be reduced (but not below zero) by the amount determined under paragraph (2).

(2) AMOUNT OF REDUCTION.—

(A) IN GENERAL.—The amount determined under this paragraph with respect to any dollar limitation shall be the amount which bears the same ratio to such limitation as—

- (i) the excess of—
  - (I) the taxpayer's adjusted gross income for such taxable year, over

- (II) the applicable dollar amount, bears to
      - (ii) \$10,000 (\$20,000 in the case of a joint return).
    - (B) NO REDUCTION BELOW \$200 UNTIL COMPLETE PHASE-OUT.—No dollar limitation shall be reduced below \$200 under paragraph (1) unless (without regard to this subparagraph) such limitation is reduced to zero.
    - (C) ROUNDING.—Any amount determined under this paragraph which is not a multiple of \$10 shall be rounded to the next lowest \$10.
  - (3) ADJUSTED GROSS INCOME; APPLICABLE DOLLAR AMOUNT.—For purposes of this subsection—
    - (A) ADJUSTED GROSS INCOME.—Adjusted gross income of any taxpayer shall be determined—
      - (i) after application of sections 86 and 469, and
      - (ii) without regard to sections 135, 137, 221, and 911 or the deduction allowable under this section.
    - (B) APPLICABLE DOLLAR AMOUNT.—The term “applicable dollar amount” means the following:
      - (i) In the case of a taxpayer filing a joint return, \$80,000.
      - (ii) In the case of any other taxpayer (other than a married individual filing a separate return), \$50,000.
      - (iii) In the case of a married individual filing a separate return, zero.
  - (4) SPECIAL RULE FOR MARRIED INDIVIDUALS FILING SEPARATELY AND LIVING APART.—A husband and wife who—
    - (A) file separate returns for any taxable year, and
    - (B) live apart at all times during such taxable year,
 shall not be treated as married individuals for purposes of this subsection.
  - (5) ACTIVE PARTICIPANT.—For purposes of this subsection, the term “active participant” means, with respect to any plan year, an individual—
    - (A) who is an active participant in—
      - (i) a plan described in section 401(a) which includes a trust exempt from tax under section 501(a),
      - (ii) an annuity plan described in section 403(a),
      - (iii) a plan established for its employees by the United States, by a State or political subdivision thereof, or by an agency or instrumentality of any of the foregoing,
      - (iv) an annuity contract described in section 403(b),
      - (v) a simplified employee pension (within the meaning of section 408(k)), or
      - (vi) any simple retirement account (within the meaning of section 408(p)), or
    - (B) who makes deductible contributions to a trust described in section 501(c)(18).
- The determination of whether an individual is an active participant shall be made without regard to whether or not such individual's rights under a plan, trust, or contract are nonforfeitable. An eligible deferred compensation plan (within the meaning of section 457(b)) shall not be treated as a plan described in subparagraph (A)(iii).



(6) CERTAIN INDIVIDUALS NOT TREATED AS ACTIVE PARTICIPANTS.—For purposes of this subsection, any individual described in any of the following subparagraphs shall not be treated as an active participant for any taxable year solely because of any participation so described:

(A) MEMBERS OF RESERVE COMPONENTS.—Participation in a plan described in subparagraph (A)(iii) of paragraph (5) by reason of service as a member of a reserve component of the Armed Forces (as defined in section 10101 of title 10), unless such individual has served in excess of 90 days on active duty (other than active duty for training) during the year.

(B) VOLUNTEER FIREFIGHTERS.—A volunteer firefighter—

(i) who is a participant in a plan described in subparagraph (A)(iii) of paragraph (5) based on his activity as a volunteer firefighter, and

(ii) whose accrued benefit as of the beginning of the taxable year is not more than an annual benefit of \$1,800 (when expressed as a single life annuity commencing at age 65).

(7) SPECIAL RULE FOR SPOUSES WHO ARE NOT ACTIVE PARTICIPANTS.—If this subsection applies to an individual for any taxable year solely because their spouse is an active participant, then, in applying this subsection to the individual (but not their spouse)—

(A) the applicable dollar amount under paragraph (3)(B)(i) shall be \$150,000; and

(B) the amount applicable under paragraph (2)(A)(ii) shall be \$10,000.

(8) INFLATION ADJUSTMENT.—In the case of any taxable year beginning in a calendar year after 2006, each of the dollar amounts in paragraphs (3)(B)(i), (3)(B)(ii), and (7)(A) shall be increased by an amount equal to—

(A) such dollar amount, multiplied by

(B) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting “calendar year 2005” for “calendar year 2016” in subparagraph (A)(ii) thereof.

Any increase determined under the preceding sentence shall be rounded to the nearest multiple of \$1,000.

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## **Subchapter D—DEFERRED COMPENSATION, ETC.**

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## **PART I—PENSION, PROFIT-SHARING, STOCK BONUS PLANS, ETC.**

\* \* \* \* \*

### **Subpart A—GENERAL RULE**

\* \* \* \* \*

**SEC. 401. QUALIFIED PENSION, PROFIT-SHARING, AND STOCK BONUS PLANS.**

(a) **REQUIREMENTS FOR QUALIFICATION.**—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

(1) if contributions are made to the trust by such employer, or employees, or both, or by another employer who is entitled to deduct his contributions under section 404(a)(3)(B) (relating to deduction for contributions to profit-sharing and stock bonus plans), or by a charitable remainder trust pursuant to a qualified gratuitous transfer (as defined in section 664(g)(1)), for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries (but this paragraph shall not be construed, in the case of a multiemployer plan, to prohibit the return of a contribution within 6 months after the plan administrator determines that the contribution was made by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) or the trust which is part of such plan is exempt from taxation under section 501(a), or the return of any withdrawal liability payment determined to be an overpayment within 6 months of such determination));

(3) if the plan of which such trust is a part satisfies the requirements of section 410 (relating to minimum participation standards); and

(4) if the contributions or benefits provided under the plan do not discriminate in favor of highly compensated employees (within the meaning of section 414(q)). For purposes of this paragraph, there shall be excluded from consideration employees described in section 410(b)(3)(A) and (C).

(5) **SPECIAL RULES RELATING TO NONDISCRIMINATION REQUIREMENTS.**—

(A) **SALARIED OR CLERICAL EMPLOYEES.**—A classification shall not be considered discriminatory within the meaning of paragraph (4) or section 410(b)(2)(A)(i) merely because it is limited to salaried or clerical employees.

(B) **CONTRIBUTIONS AND BENEFITS MAY BEAR UNIFORM RELATIONSHIP TO COMPENSATION.**—A plan shall not be considered discriminatory within the meaning of paragraph (4) merely because the contributions or benefits of, or on behalf of, the employees under the plan bear a uniform relationship to the compensation (within the meaning of section 414(s)) of such employees.

(C) **CERTAIN DISPARITY PERMITTED.**—A plan shall not be considered discriminatory within the meaning of paragraph (4) merely because the contributions or benefits of,

or on behalf of, the employees under the plan favor highly compensated employees (as defined in section 414(q)) in the manner permitted under subsection (l).

(D) INTEGRATED DEFINED BENEFIT PLAN.—

(i) IN GENERAL.—A defined benefit plan shall not be considered discriminatory within the meaning of paragraph (4) merely because the plan provides that the employer-derived accrued retirement benefit for any participant under the plan may not exceed the excess (if any) of—

(I) the participant's final pay with the employer, over

(II) the employer-derived retirement benefit created under Federal law attributable to service by the participant with the employer.

For purposes of this clause, the employer-derived retirement benefit created under Federal law shall be treated as accruing ratably over 35 years.

(ii) FINAL PAY.—For purposes of this subparagraph, the participant's final pay is the compensation (as defined in section 414(q)(4)) paid to the participant by the employer for any year—

(I) which ends during the 5-year period ending with the year in which the participant separated from service for the employer, and

(II) for which the participant's total compensation from the employer was highest.

(E) 2 OR MORE PLANS TREATED AS SINGLE PLAN.—For purposes of determining whether 2 or more plans of an employer satisfy the requirements of paragraph (4) when considered as a single plan—

(i) CONTRIBUTIONS.—If the amount of contributions on behalf of the employees allowed as a deduction under section 404 for the taxable year with respect to such plans, taken together, bears a uniform relationship to the compensation (within the meaning of section 414(s)) of such employees, the plans shall not be considered discriminatory merely because the rights of employees to, or derived from, the employer contributions under the separate plans do not become nonforfeitable at the same rate.

(ii) BENEFITS.—If the employees' rights to benefits under the separate plans do not become nonforfeitable at the same rate, but the levels of benefits provided by the separate plans satisfy the requirements of regulations prescribed by the Secretary to take account of the differences in such rates, the plans shall not be considered discriminatory merely because of the difference in such rates.

(F) SOCIAL SECURITY RETIREMENT AGE.—For purposes of testing for discrimination under paragraph (4)—

(i) the social security retirement age (as defined in section 415(b)(8)) shall be treated as a uniform retirement age, and

(ii) subsidized early retirement benefits and joint and survivor annuities shall not be treated as being unavailable to employees on the same terms merely because such benefits or annuities are based in whole or in part on an employee's social security retirement age (as so defined).

(G) GOVERNMENTAL PLANS.—Paragraphs (3) and (4) shall not apply to a governmental plan (within the meaning of section 414(d)).

(6) A plan shall be considered as meeting the requirements of paragraph (3) during the whole of any taxable year of the plan if on one day in each quarter it satisfied such requirements.

(7) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part satisfies the requirements of section 411 (relating to minimum vesting standards).

(8) A trust forming part of a defined benefit plan shall not constitute a qualified trust under this section unless the plan provides that forfeitures must not be applied to increase the benefits any employee would otherwise receive under the plan.

(9) REQUIRED DISTRIBUTIONS.—

(A) IN GENERAL.—A trust shall not constitute a qualified trust under this subsection unless the plan provides that the entire interest of each employee—

(i) will be distributed to such employee not later than the required beginning date, or

(ii) will be distributed, beginning not later than the required beginning date, in accordance with regulations, over the life of such employee or over the lives of such employee and a designated beneficiary (or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary).

(B) REQUIRED DISTRIBUTION WHERE EMPLOYEE DIES BEFORE ENTIRE INTEREST IS DISTRIBUTED.—

(i) WHERE DISTRIBUTIONS HAVE BEGUN UNDER SUBPARAGRAPH (A)(II).—A trust shall not constitute a qualified trust under this section unless the plan provides that if—

(I) the distribution of the employee's interest has begun in accordance with subparagraph (A)(ii), and

(II) the employee dies before his entire interest has been distributed to him,

the remaining portion of such interest will be distributed at least as rapidly as under the method of distributions being used under subparagraph (A)(ii) as of the date of his death.

(ii) 5-YEAR RULE FOR OTHER CASES.—A trust shall not constitute a qualified trust under this section unless the plan provides that, if an employee dies before the distribution of the employee's interest has begun in accordance with subparagraph (A)(ii), the entire in-

terest of the employee will be distributed within 5 years after the death of such employee.

(iii) EXCEPTION TO 5-YEAR RULE FOR CERTAIN AMOUNTS PAYABLE OVER LIFE OF BENEFICIARY.—If—

(I) any portion of the employee's interest is payable to (or for the benefit of) a designated beneficiary,

(II) such portion will be distributed (in accordance with regulations) over the life of such designated beneficiary (or over a period not extending beyond the life expectancy of such beneficiary), and

(III) such distributions begin not later than 1 year after the date of the employee's death or such later date as the Secretary may by regulations prescribe,

for purposes of clause (ii), the portion referred to in subclause (I) shall be treated as distributed on the date on which such distributions begin.

(iv) SPECIAL RULE FOR SURVIVING SPOUSE OF EMPLOYEE.—If the designated beneficiary referred to in clause (iii)(I) is the surviving spouse of the employee—

(I) the date on which the distributions are required to begin under clause (iii)(III) shall not be earlier than the date on which the employee would have attained **[age 72]** *the applicable age*, and

(II) if the surviving spouse dies before the distributions to such spouse begin, this subparagraph shall be applied as if the surviving spouse were the employee.

(C) REQUIRED BEGINNING DATE.—For purposes of this paragraph—

(i) IN GENERAL.—The term “required beginning date” means April 1 of the calendar year following the later of—

(I) the calendar year in which the employee attains **[age 72]** *the applicable age*, or

(II) the calendar year in which the employee retires.

(ii) EXCEPTION.—Subclause (II) of clause (i) shall not apply—

(I) except as provided in section 409(d), in the case of an employee who is a 5-percent owner (as defined in section 416) with respect to the plan year ending in the calendar year in which the employee attains **[age 72]** *the applicable age*, or

(II) for purposes of section 408(a)(6) or (b)(3).

(iii) ACTUARIAL ADJUSTMENT.—In the case of an **[employee to whom clause (i)(II) applies]** *employee (other than an employee to whom clause (i)(II) does not apply by reason of clause (ii))* who retires in a calendar year after the calendar year in which the employee attains age 70½, the employee's accrued benefit shall be actuarially increased to take into account the pe-

riod after age 70½ in which the employee was not receiving any benefits under the plan.

(iv) **EXCEPTION FOR GOVERNMENTAL AND CHURCH PLANS.**—Clauses (ii) and (iii) shall not apply in the case of a governmental plan or church plan. For purposes of this clause, the term “church plan” means a plan maintained by a church for church employees, and the term “church” means any church (as defined in section 3121(w)(3)(A)) or qualified church-controlled organization (as defined in section 3121(w)(3)(B)).

(v) **APPLICABLE AGE.**—

(I) *In the case of an individual who attains age 72 after December 31, 2021, and age 73 before January 1, 2029, the applicable age is 73.*

(II) *In the case of an individual who attains age 73 after December 31, 2028, and age 74 before January 1, 2032, the applicable age is 74.*

(III) *In the case of an individual who attains age 74 after December 31, 2031, the applicable age is 75.*

(D) **LIFE EXPECTANCY.**—For purposes of this paragraph, the life expectancy of an employee and the employee’s spouse (other than in the case of a life annuity) may be re-determined but not more frequently than annually.

(E) **DEFINITIONS AND RULES RELATING TO DESIGNATED BENEFICIARIES.**—For purposes of this paragraph—

(i) **DESIGNATED BENEFICIARY.**—The term “designated beneficiary” means any individual designated as a beneficiary by the employee.

(ii) **ELIGIBLE DESIGNATED BENEFICIARY.**—The term “eligible designated beneficiary” means, with respect to any employee, any designated beneficiary who is—

(I) the surviving spouse of the employee,

(II) subject to clause (iii), a child of the employee who has not reached majority (within the meaning of subparagraph (F)),

(III) disabled (within the meaning of section 72(m)(7)),

(IV) a chronically ill individual (within the meaning of section 7702B(c)(2), except that the requirements of subparagraph (A)(i) thereof shall only be treated as met if there is a certification that, as of such date, the period of inability described in such subparagraph with respect to the individual is an indefinite one which is reasonably expected to be lengthy in nature), or

(V) an individual not described in any of the preceding subclauses who is not more than 10 years younger than the employee.

The determination of whether a designated beneficiary is an eligible designated beneficiary shall be made as of the date of death of the employee.

(iii) **SPECIAL RULE FOR CHILDREN.**—Subject to subparagraph (F), an individual described in clause (ii)(II) shall cease to be an eligible designated beneficiary as

of the date the individual reaches majority and any remainder of the portion of the individual's interest to which subparagraph (H)(ii) applies shall be distributed within 10 years after such date.

(F) TREATMENT OF PAYMENTS TO CHILDREN.—Under regulations prescribed by the Secretary, for purposes of this paragraph, any amount paid to a child shall be treated as if it had been paid to the surviving spouse if such amount will become payable to the surviving spouse upon such child reaching majority (or other designated event permitted under regulations).

(G) TREATMENT OF INCIDENTAL DEATH BENEFIT DISTRIBUTIONS.—For purposes of this title, any distribution required under the incidental death benefit requirements of this subsection shall be treated as a distribution required under this paragraph.

(H) SPECIAL RULES FOR CERTAIN DEFINED CONTRIBUTION PLANS.—In the case of a defined contribution plan, if an employee dies before the distribution of the employee's entire interest—

(i) IN GENERAL.—Except in the case of a beneficiary who is not a designated beneficiary, subparagraph (B)(ii)—

(I) shall be applied by substituting “10 years” for “5 years”, and

(II) shall apply whether or not distributions of the employee's interests have begun in accordance with subparagraph (A).

(ii) EXCEPTION FOR ELIGIBLE DESIGNATED BENEFICIARIES.—Subparagraph (B)(iii) shall apply only in the case of an eligible designated beneficiary.

(iii) RULES UPON DEATH OF ELIGIBLE DESIGNATED BENEFICIARY.—If an eligible designated beneficiary dies before the portion of the employee's interest to which this subparagraph applies is entirely distributed, the exception under clause (ii) shall not apply to any beneficiary of such eligible designated beneficiary and the remainder of such portion shall be distributed within 10 years after the death of such eligible designated beneficiary.

(iv) SPECIAL RULE IN CASE OF CERTAIN TRUSTS FOR DISABLED OR CHRONICALLY ILL BENEFICIARIES.—In the case of an applicable multi-beneficiary trust, if under the terms of the trust—

(I) it is to be divided immediately upon the death of the employee into separate trusts for each beneficiary, or

(II) no individual (other than a eligible designated beneficiary described in subclause (III) or (IV) of subparagraph (E)(ii)) has any right to the employee's interest in the plan until the death of all such eligible designated beneficiaries with respect to the trust,

for purposes of a trust described in subclause (I), clause (ii) shall be applied separately with respect to the portion of

the employee's interest that is payable to any eligible designated beneficiary described in subclause (III) or (IV) of subparagraph (E)(ii); and, for purposes of a trust described in subclause (II), subparagraph (B)(iii) shall apply to the distribution of the employee's interest and any beneficiary who is not such an eligible designated beneficiary shall be treated as a beneficiary of the eligible designated beneficiary upon the death of such eligible designated beneficiary.

(v) APPLICABLE MULTI-BENEFICIARY TRUST.—For purposes of this subparagraph, the term “applicable multi-beneficiary trust” means a trust—

- (I) which has more than one beneficiary,
- (II) all of the beneficiaries of which are treated as designated beneficiaries for purposes of determining the distribution period pursuant to this paragraph, and
- (III) at least one of the beneficiaries of which is an eligible designated beneficiary described in subclause (III) or (IV) of subparagraph (E)(ii).

(vi) APPLICATION TO CERTAIN ELIGIBLE RETIREMENT PLANS.—For purposes of applying the provisions of this subparagraph in determining amounts required to be distributed pursuant to this paragraph, all eligible retirement plans (as defined in section 402(c)(8)(B), other than a defined benefit plan described in clause (iv) or (v) thereof or a qualified trust which is a part of a defined benefit plan) shall be treated as a defined contribution plan.

(I) TEMPORARY WAIVER OF MINIMUM REQUIRED DISTRIBUTION.—

(i) IN GENERAL.—The requirements of this paragraph shall not apply for calendar year 2020 to—

- (I) a defined contribution plan which is described in this subsection or in section 403(a) or 403(b),
- (II) a defined contribution plan which is an eligible deferred compensation plan described in section 457(b) but only if such plan is maintained by an employer described in section 457(e)(1)(A), or
- (III) an individual retirement plan.

(ii) SPECIAL RULE FOR REQUIRED BEGINNING DATES IN 2020.—Clause (i) shall apply to any distribution which is required to be made in calendar year 2020 by reason of—

- (I) a required beginning date occurring in such calendar year, and
- (II) such distribution not having been made before January 1, 2020.

(iii) SPECIAL RULES REGARDING WAIVER PERIOD.—For purposes of this paragraph—

- (I) the required beginning date with respect to any individual shall be determined without regard to this subparagraph for purposes of applying this paragraph for calendar years after 2020, and



(II) if clause (ii) of subparagraph (B) applies, the 5-year period described in such clause shall be determined without regard to calendar year 2020.

(J) *CERTAIN INCREASES IN PAYMENTS UNDER A COMMERCIAL ANNUITY.*—*Nothing in this section shall prohibit a commercial annuity (within the meaning of section 3405(e)(6)) that is issued in connection with any eligible retirement plan (within the meaning of section 402(c)(8)(B), other than a defined benefit plan) from providing one or more of the following types of payments on or after the annuity starting date:*

(i) *annuity payments that increase by a constant percentage, applied not less frequently than annually, at a rate that is less than 5 percent per year,*

(ii) *a lump sum payment that—*

*(I) results in a shortening of the payment period with respect to an annuity or a full or partial commutation of the future annuity payments, provided that such lump sum is determined using reasonable actuarial methods and assumptions, as determined in good faith by the issuer of the contract, or*

*(II) accelerates the receipt of annuity payments that are scheduled to be received within the ensuing 12 months, regardless of whether such acceleration shortens the payment period with respect to the annuity, reduces the dollar amount of benefits to be paid under the contract, or results in a suspension of annuity payments during the period being accelerated,*

*(iii) an amount which is in the nature of a dividend or similar distribution, provided that the issuer of the contract determines such amount based on a reasonable comparison of the actuarial factors assumed when calculating the initial annuity payments and the issuer's experience with respect to those factors, or*

*(iv) a final payment upon death that does not exceed the excess of the total amount of the consideration paid for the annuity payments, less the aggregate amount of prior distributions or payments from or under the contract.*

(10) *OTHER REQUIREMENTS.—*

(A) *PLANS BENEFITING OWNER-EMPLOYEES.*—*In the case of any plan which provides contributions or benefits for employees some or all of whom are owner-employees (as defined in subsection (c)(3)), a trust forming part of such plan shall constitute a qualified trust under this section only if the requirements of subsection (d) are also met.*

(B) *TOP-HEAVY PLANS.—*

(i) *IN GENERAL.*—*In the case of any top-heavy plan, a trust forming part of such plan shall constitute a qualified trust under this section only if the requirements of section 416 are met.*

(ii) *PLANS WHICH MAY BECOME TOP-HEAVY.*—*Except to the extent provided in regulations, a trust forming*

part of a plan (whether or not a top-heavy plan) shall constitute a qualified trust under this section only if such plan contains provisions—

(I) which will take effect if such plan becomes a top-heavy plan, and

(II) which meet the requirements of section 416.

(iii) EXEMPTION FOR GOVERNMENTAL PLANS.—This subparagraph shall not apply to any governmental plan.

(11) REQUIREMENT OF JOINT AND SURVIVOR ANNUITY AND PRERETIREMENT SURVIVOR ANNUITY.—

(A) IN GENERAL.—In the case of any plan to which this paragraph applies, except as provided in section 417, a trust forming part of such plan shall not constitute a qualified trust under this section unless—

(i) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant is provided in the form of a qualified joint and survivor annuity, and

(ii) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity is provided to the surviving spouse of such participant.

(B) PLANS TO WHICH PARAGRAPH APPLIES.—This paragraph shall apply to—

(i) any defined benefit plan,

(ii) any defined contribution plan which is subject to the funding standards of section 412, and

(iii) any participant under any other defined contribution plan unless—

(I) such plan provides that the participant's nonforfeitable accrued benefit (reduced by any security interest held by the plan by reason of a loan outstanding to such participant) is payable in full, on the death of the participant, to the participant's surviving spouse (or, if there is no surviving spouse or the surviving spouse consents in the manner required under section 417(a)(2), to a designated beneficiary),

(II) such participant does not elect a payment of benefits in the form of a life annuity, and

(III) with respect to such participant, such plan is not a direct or indirect transferee (in a transfer after December 31, 1984) of a plan which is described in clause (i) or (ii) or to which this clause applied with respect to the participant.

Clause (iii)(III) shall apply only with respect to the transferred assets (and income therefrom) if the plan separately accounts for such assets and any income therefrom.

(C) EXCEPTION FOR CERTAIN ESOP BENEFITS.—

(i) IN GENERAL.—In the case of—

(I) a tax credit employee stock ownership plan (as defined in section 409(a)), or

(II) an employee stock ownership plan (as defined in section 4975(e)(7)),

subparagraph (A) shall not apply to that portion of the employee's accrued benefit to which the requirements of section 409(h) apply.

(ii) NONFORFEITABLE BENEFIT MUST BE PAID IN FULL, ETC.—In the case of any participant, clause (i) shall apply only if the requirements of subclauses (I), (II), and (III) of subparagraph (B)(iii) are met with respect to such participant.

(D) SPECIAL RULE WHERE PARTICIPANT AND SPOUSE MARRIED LESS THAN 1 YEAR.—A plan shall not be treated as failing to meet the requirements of subparagraphs (B)(iii) or (C) merely because the plan provides that benefits will not be payable to the surviving spouse of the participant unless the participant and such spouse had been married throughout the 1-year period ending on the earlier of the participant's annuity starting date or the date of the participant's death.

(E) EXCEPTION FOR PLANS DESCRIBED IN SECTION 404(C).—This paragraph shall not apply to a plan which the Secretary has determined is a plan described in section 404(c) (or a continuation thereof) in which participation is substantially limited to individuals who, before January 1, 1976, ceased employment covered by the plan.

(F) CROSS REFERENCE.—For—

(i) provisions under which participants may elect to waive the requirements of this paragraph, and

(ii) other definitions and special rules for purposes of this paragraph,

see section 417.

(12) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that in the case of any merger or consolidation with, or transfer of assets or liabilities to, any other plan after September 2, 1974, each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence does not apply to any multiemployer plan with respect to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which title IV of the Employee Retirement Income Security Act of 1974 applies.

(13) ASSIGNMENT AND ALIENATION.—

(A) IN GENERAL.—A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be

treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

(B) SPECIAL RULES FOR DOMESTIC RELATIONS ORDERS.—Subparagraph (A) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order is determined to be a qualified domestic relations order.

(C) SPECIAL RULE FOR CERTAIN JUDGMENTS AND SETTLEMENTS.—Subparagraph (A) shall not apply to any offset of a participant's benefits provided under a plan against an amount that the participant is ordered or required to pay to the plan if—

(i) the order or requirement to pay arises—

(I) under a judgment of conviction for a crime involving such plan,

(II) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of subtitle B of title I of the Employee Retirement Income Security Act of 1974, or

(III) pursuant to a settlement agreement between the Secretary of Labor and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of such subtitle by a fiduciary or any other person,

(ii) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(iii) in a case in which the survivor annuity requirements of section 401(a)(11) apply with respect to distributions from the plan to the participant, if the participant has a spouse at the time at which the offset is to be made—

(I) either such spouse has consented in writing to such offset and such consent is witnessed by a notary public or representative of the plan (or it is established to the satisfaction of a plan representative that such consent may not be obtained by reason of circumstances described in section 417(a)(2)(B)), or an election to waive the right of the spouse to either a qualified joint and survivor annuity or a qualified preretirement survivor an-

nuity is in effect in accordance with the requirements of section 417(a),

(II) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of such subtitle, or

(III) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity under a qualified joint and survivor annuity provided pursuant to section 401(a)(11)(A)(i) and under a qualified preretirement survivor annuity provided pursuant to section 401(a)(11)(A)(ii), determined in accordance with subparagraph (D).

A plan shall not be treated as failing to meet the requirements of this subsection, subsection (k), section 403(b), or section 409(d) solely by reason of an offset described in this subparagraph.

(D) SURVIVOR ANNUITY.—

(i) IN GENERAL.—The survivor annuity described in subparagraph (C)(iii)(III) shall be determined as if—

(I) the participant terminated employment on the date of the offset,

(II) there was no offset,

(III) the plan permitted commencement of benefits only on or after normal retirement age,

(IV) the plan provided only the minimum-required qualified joint and survivor annuity, and

(V) the amount of the qualified preretirement survivor annuity under the plan is equal to the amount of the survivor annuity payable under the minimum-required qualified joint and survivor annuity.

(ii) DEFINITION.—For purposes of this subparagraph, the term “minimum-required qualified joint and survivor annuity” means the qualified joint and survivor annuity which is the actuarial equivalent of the participant’s accrued benefit (within the meaning of section 411(a)(7)) and under which the survivor annuity is 50 percent of the amount of the annuity which is payable during the joint lives of the participant and the spouse.

(14) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, unless the participant otherwise elects, the payment of benefits under the plan to the participant will begin not later than the 60th day after the latest of the close of the plan year in which—

(A) the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,

(B) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or

(C) the participant terminates his service with the employer.

In the case of a plan which provides for the payment of an early retirement benefit, a trust forming a part of such plan shall not constitute a qualified trust under this section unless a participant who satisfied the service requirements for such early retirement benefit, but separated from the service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially, reduced under regulations prescribed by the Secretary.

(15) A trust shall not constitute a qualified trust under this section unless under the plan of which such trust is a part—

(A) in the case of a participant or beneficiary who is receiving benefits under such plan, or

(B) in the case of a participant who is separated from the service and who has nonforfeitable rights to benefits, such benefits are not decreased by reason of any increase in the benefit levels payable under title II of the Social Security Act or any increase in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first receipt of such benefits or the date of such separation, as the case may be.

(16) A trust shall not constitute a qualified trust under this section if the plan of which such trust is a part provides for benefits or contributions which exceed the limitations of section 415.

(17) COMPENSATION LIMIT.—

(A) IN GENERAL.—A trust shall not constitute a qualified trust under this section unless, under the plan of which such trust is a part, the annual compensation of each employee taken into account under the plan for any year does not exceed \$200,000.

(B) COST-OF-LIVING ADJUSTMENT.—The Secretary shall adjust annually the \$200,000 amount in subparagraph (A) for increases in the cost-of-living at the same time and in the same manner as adjustments under section 415(d); except that the base period shall be the calendar quarter beginning July 1, 2001, and any increase which is not a multiple of \$5,000 shall be rounded to the next lowest multiple of \$5,000.

(19) A trust shall not constitute a qualified trust under this section if under the plan of which such trust is a part any part of a participant's accrued benefit derived from employer contributions (whether or not otherwise nonforfeitable), is forfeitable solely because of withdrawal by such participant of any amount attributable to the benefit derived from contributions made by such participant. The preceding sentence shall not apply to the accrued benefit of any participant unless, at the time of such withdrawal, such participant has a nonforfeitable right to at least 50 percent of such accrued benefit (as determined under section 411). The first sentence of this paragraph shall not apply to the extent that an accrued benefit is permitted to be forfeited in accordance with section 411(a)(3)(D)(iii) (relating to proportional forfeitures of benefits

accrued before September 2, 1974, in the event of withdrawal of certain mandatory contributions).

(20) A trust forming part of a pension plan shall not be treated as failing to constitute a qualified trust under this section merely because the pension plan of which such trust is a part makes 1 or more distributions within 1 taxable year to a distributee on account of a termination of the plan of which the trust is a part, or in the case of a profit-sharing or stock bonus plan, a complete discontinuance of contributions under such plan. This paragraph shall not apply to a defined benefit plan unless the employer maintaining such plan files a notice with the Pension Benefit Guaranty Corporation (at the time and in the manner prescribed by the Pension Benefit Guaranty Corporation) notifying the Corporation of such payment or distribution and the Corporation has approved such payment or distribution or, within 90 days after the date on which such notice was filed, has failed to disapprove such payment or distribution. For purposes of this paragraph, rules similar to the rules of section 402(a)(6)(B) (as in effect before its repeal by section 521 of the Unemployment Compensation Amendments of 1992) shall apply.

(22) If a defined contribution plan (other than a profit-sharing plan)—

(A) is established by an employer whose stock is not readily tradable on an established market, and

(B) after acquiring securities of the employer, more than 10 percent of the total assets of the plan are securities of the employer,

any trust forming part of such plan shall not constitute a qualified trust under this section unless the plan meets the requirements of subsection (e) of section 409. The requirements of subsection (e) of section 409 shall not apply to any employees of an employer who are participants in any defined contribution plan established and maintained by such employer if the stock of such employer is not readily tradable on an established market and the trade or business of such employer consists of publishing on a regular basis a newspaper for general circulation. For purposes of the preceding sentence, subsections (b), (c), (m), and (o) of section 414 shall not apply except for determining whether stock of the employer is not readily tradable on an established market.

(23) A stock bonus plan shall not be treated as meeting the requirements of this section unless such plan meets the requirements of subsections (h) and (o) of section 409, except that in applying section 409(h) for purposes of this paragraph, the term “employer securities” shall include any securities of the employer held by the plan.

(24) Any group trust which otherwise meets the requirements of this section shall not be treated as not meeting such requirements on account of the participation or inclusion in such trust of the moneys of any plan or governmental unit described in section 818(a)(6).

(25) REQUIREMENT THAT ACTUARIAL ASSUMPTIONS BE SPECIFIED.—A defined benefit plan shall not be treated as providing definitely determinable benefits unless, whenever the amount

of any benefit is to be determined on the basis of actuarial assumptions, such assumptions are specified in the plan in a way which precludes employer discretion.

(26) ADDITIONAL PARTICIPATION REQUIREMENTS.—

(A) IN GENERAL.—In the case of a trust which is a part of a defined benefit plan, such trust shall not constitute a qualified trust under this subsection unless on each day of the plan year such trust benefits at least the lesser of—

(i) 50 employees of the employer, or

(ii) the greater of—

(I) 40 percent of all employees of the employer,

or

(II) 2 employees (or if there is only 1 employee, such employee).

(B) TREATMENT OF EXCLUDABLE EMPLOYEES.—

(i) IN GENERAL.—A plan may exclude from consideration under this paragraph employees described in paragraphs (3) and (4)(A) of section 410(b).

(ii) SEPARATE APPLICATION FOR CERTAIN EXCLUDABLE EMPLOYEES.—If employees described in section 410(b)(4)(B) are covered under a plan which meets the requirements of subparagraph (A) separately with respect to such employees, such employees may be excluded from consideration in determining whether any plan of the employer meets such requirements if—

(I) the benefits for such employees are provided under the same plan as benefits for other employees,

(II) the benefits provided to such employees are not greater than comparable benefits provided to other employees under the plan, and

(III) no highly compensated employee (within the meaning of section 414(q)) is included in the group of such employees for more than 1 year.

(C) SPECIAL RULE FOR COLLECTIVE BARGAINING UNITS.—

Except to the extent provided in regulations, a plan covering only employees described in section 410(b)(3)(A) may exclude from consideration any employees who are not included in the unit or units in which the covered employees are included.

(D) PARAGRAPH NOT TO APPLY TO MULTIEMPLOYER PLANS.—Except to the extent provided in regulations, this paragraph shall not apply to employees in a multiemployer plan (within the meaning of section 414(f)) who are covered by collective bargaining agreements.

(E) SPECIAL RULE FOR CERTAIN DISPOSITIONS OR ACQUISITIONS.—Rules similar to the rules of section 410(b)(6)(C) shall apply for purposes of this paragraph.

(F) SEPARATE LINES OF BUSINESS.—At the election of the employer and with the consent of the Secretary, this paragraph may be applied separately with respect to each separate line of business of the employer. For purposes of this paragraph, the term “separate line of business” has the meaning given such term by section 414(r) (without regard to paragraph (2)(A) or (7) thereof).



(G) EXCEPTION FOR GOVERNMENTAL PLANS.—This paragraph shall not apply to a governmental plan (within the meaning of section 414(d)).

(H) REGULATIONS.—The Secretary may by regulation provide that any separate benefit structure, any separate trust, or any other separate arrangement is to be treated as a separate plan for purposes of applying this paragraph.

(I) PROTECTED PARTICIPANTS.—

(i) IN GENERAL.—A plan shall be deemed to satisfy the requirements of subparagraph (A) if—

(I) the plan is amended—

(aa) to cease all benefit accruals, or

(bb) to provide future benefit accruals only to a closed class of participants,

(II) the plan satisfies subparagraph (A) (without regard to this subparagraph) as of the effective date of the amendment, and

(III) the amendment was adopted before April 5, 2017, or the plan is described in clause (ii).

(ii) PLANS DESCRIBED.—A plan is described in this clause if the plan would be described in subsection (o)(1)(C), as applied for purposes of subsection (o)(1)(B)(iii)(IV) and by treating the effective date of the amendment as the date the class was closed for purposes of subsection (o)(1)(C).

(iii) SPECIAL RULES.—For purposes of clause (i)(II), in applying section 410(b)(6)(C), the amendments described in clause (i) shall not be treated as a significant change in coverage under section 410(b)(6)(C)(i)(II).

(iv) SPUN-OFF PLANS.—For purposes of this subparagraph, if a portion of a plan described in clause (i) is spun off to another employer, the treatment under clause (i) of the spun-off plan shall continue with respect to the other employer.

(27) DETERMINATIONS AS TO PROFIT-SHARING PLANS.—

(A) CONTRIBUTIONS NEED NOT BE BASED ON PROFITS.—

The determination of whether the plan under which any contributions are made is a profit-sharing plan shall be made without regard to current or accumulated profits of the employer and without regard to whether the employer is a tax-exempt organization.

(B) PLAN MUST DESIGNATE TYPE.—In the case of a plan which is intended to be a money purchase pension plan or a profit-sharing plan, a trust forming part of such plan shall not constitute a qualified trust under this subsection unless the plan designates such intent at such time and in such manner as the Secretary may prescribe.

(28) ADDITIONAL REQUIREMENTS RELATING TO EMPLOYEE STOCK OWNERSHIP PLANS.—

(A) IN GENERAL.—In the case of a trust which is part of an employee stock ownership plan (within the meaning of section 4975(e)(7)) or a plan which meets the requirements of section 409(a), such trust shall not constitute a qualified

trust under this section unless such plan meets the requirements of subparagraphs (B) and (C).

(B) DIVERSIFICATION OF INVESTMENTS.—

(i) IN GENERAL.—A plan meets the requirements of this subparagraph if each qualified participant in the plan may elect within 90 days after the close of each plan year in the qualified election period to direct the plan as to the investment of at least 25 percent of the participant's account in the plan (to the extent such portion exceeds the amount to which a prior election under this subparagraph applies). In the case of the election year in which the participant can make his last election, the preceding sentence shall be applied by substituting "50 percent" for "25 percent".

(ii) METHOD OF MEETING REQUIREMENTS.—A plan shall be treated as meeting the requirements of clause (i) if—

(I) the portion of the participant's account covered by the election under clause (i) is distributed within 90 days after the period during which the election may be made, or

(II) the plan offers at least 3 investment options (not inconsistent with regulations prescribed by the Secretary) to each participant making an election under clause (i) and within 90 days after the period during which the election may be made, the plan invests the portion of the participant's account covered by the election in accordance with such election.

(iii) QUALIFIED PARTICIPANT.—For purposes of this subparagraph, the term "qualified participant" means any employee who has completed at least 10 years of participation under the plan and has attained age 55.

(iv) QUALIFIED ELECTION PERIOD.—For purposes of this subparagraph, the term "qualified election period" means the 6-plan-year period beginning with the later of—

(I) the 1st plan year in which the individual first became a qualified participant, or

(II) the 1st plan year beginning after December 31, 1986.

For purposes of the preceding sentence, an employer may elect to treat an individual first becoming a qualified participant in the 1st plan year beginning in 1987 as having become a participant in the 1st plan year beginning in 1988.

(v) EXCEPTION.—This subparagraph shall not apply to an applicable defined contribution plan (as defined in paragraph (35)(E)).

(C) USE OF INDEPENDENT APPRAISER.—A plan meets the requirements of this subparagraph if all valuations of employer securities which are not readily tradable on an established securities market with respect to activities carried on by the plan are by an independent appraiser. For purposes of the preceding sentence, the term "independent

appraiser” means any appraiser meeting requirements similar to the requirements of the regulations prescribed under section 170(a)(1).

(29) BENEFIT LIMITATIONS.—In the case of a defined benefit plan (other than a multiemployer plan or a CSEC plan) to which the requirements of section 412 apply, the trust of which the plan is a part shall not constitute a qualified trust under this subsection unless the plan meets the requirements of section 436.

(30) LIMITATIONS ON ELECTIVE DEFERRALS.—In the case of a trust which is part of a plan under which elective deferrals (within the meaning of section 402(g)(3)) may be made with respect to any individual during a calendar year, such trust shall not constitute a qualified trust under this subsection unless the plan provides that the amount of such deferrals under such plan and all other plans, contracts, or arrangements of an employer maintaining such plan may not exceed the amount of the limitation in effect under section 402(g)(1)(A) for taxable years beginning in such calendar year.

(31) DIRECT TRANSFER OF ELIGIBLE ROLLOVER DISTRIBUTIONS.—

(A) IN GENERAL.—A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if the distributee of any eligible rollover distribution—

(i) elects to have such distribution paid directly to an eligible retirement plan, and

(ii) specifies the eligible retirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe),

such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

(B) CERTAIN MANDATORY DISTRIBUTIONS.—

(i) IN GENERAL.—In case of a trust which is part of an eligible plan, such trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if—

(I) a distribution described in clause (ii) in excess of \$1,000 is made, and

(II) the distributee does not make an election under subparagraph (A) and does not elect to receive the distribution directly,

the plan administrator shall make such transfer to an individual retirement plan of a designated trustee or issuer and shall notify the distributee in writing (either separately or as part of the notice under section 402(f)) that the distribution may be transferred to another individual retirement plan. *The Office of the Retirement Savings Lost and Found established by section 306 of the Securing a Strong Retirement Act shall not be treated as a trustee or issuer that is eligible to receive such distributions.*

(ii) ELIGIBLE PLAN.—For purposes of clause (i), the term “eligible plan” means a plan which provides that

any nonforfeitable accrued benefit for which the present value (as determined under section 411(a)(11)) does not exceed \$5,000 shall be immediately distributed to the participant.

(iii) *TREATMENT OF LESSER AMOUNTS.*—*In the case of a trust which is part of an eligible plan, such trust shall not be a qualified trust under this section unless such plan provides that, if a participant in the plan separates from the service covered by the plan and the nonforfeitable accrued benefit described in clause (ii) is not in excess of \$1,000, the plan administrator shall (either separately or as part of the notice under section 402(f)) notify the participant that the participant is entitled to such benefit or attempt to pay the benefit directly to the participant.*

(iv) *TRANSFERS TO RETIREMENT SAVINGS LOST AND FOUND.*—*If, after a plan administrator takes the action required under clause (iii), the participant does not—*

*(I) within 6 months of the notification under such clause, make an election under subparagraph (A) or elect to receive a distribution of the benefit directly, or*

*(II) accept any direct payment made under such clause within 6 months of the attempted payment, the plan administrator shall transfer the amount of such benefit to the Office of the Retirement Savings Lost and Found in accordance with section 4051(b) of the Employee Retirement Income Security Act of 1974.*

(v) *INCOME TAX TREATMENT OF TRANSFERS TO RETIREMENT SAVINGS LOST AND FOUND.*—*For purposes of determining the income tax treatment of transfers to the Office of the Retirement Savings Lost and Found under clause (iv)—*

*(I) such a transfer shall be treated as a transfer to an individual retirement plan under clause (i), and*

*(II) the distribution of such amounts by the Office of the Retirement Savings Lost and Found shall be treated as a distribution from an individual retirement plan.*

(C) *LIMITATION.*—*Subparagraphs (A) and (B) shall apply only to the extent that the eligible rollover distribution would be includible in gross income if not transferred as provided in subparagraph (A) (determined without regard to sections 402(c), 403(a)(4), 403(b)(8), and 457(e)(16)). The preceding sentence shall not apply to such distribution if the plan to which such distribution is transferred—*

*(i) is a qualified trust which is part of a plan which is a defined contribution plan and agrees to separately account for amounts so transferred, including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible, or*

*(ii) is an eligible retirement plan described in clause (i) or (ii) of section 402(c)(8)(B).*

(D) ELIGIBLE ROLLOVER DISTRIBUTION.—For purposes of this paragraph, the term “eligible rollover distribution” has the meaning given such term by section 402(f)(2)(A).

(E) ELIGIBLE RETIREMENT PLAN.—For purposes of this paragraph, the term “eligible retirement plan” has the meaning given such term by section 402(c)(8)(B), except that a qualified trust shall be considered an eligible retirement plan only if it is a defined contribution plan, the terms of which permit the acceptance of rollover distributions.

(32) TREATMENT OF FAILURE TO MAKE CERTAIN PAYMENTS IF PLAN HAS LIQUIDITY SHORTFALL.—

(A) IN GENERAL.—A trust forming part of a pension plan to which section 430(j)(4) or 433(f)(5) applies shall not be treated as failing to constitute a qualified trust under this section merely because such plan ceases to make any payment described in subparagraph (B) during any period that such plan has a liquidity shortfall (as defined in section 430(j)(4) or 433(f)(5)).

(B) PAYMENTS DESCRIBED.—A payment is described in this subparagraph if such payment is—

(i) any payment, in excess of the monthly amount paid under a single life annuity (plus any social security supplements described in the last sentence of section 411(a)(9)), to a participant or beneficiary whose annuity starting date (as defined in section 417(f)(2)) occurs during the period referred to in subparagraph (A),

(ii) any payment for the purchase of an irrevocable commitment from an insurer to pay benefits, and

(iii) any other payment specified by the Secretary by regulations.

(C) PERIOD OF SHORTFALL.—For purposes of this paragraph, a plan has a liquidity shortfall during the period that there is an underpayment of an installment under section 430(j)(3) or 433(f) by reason of section 430(j)(4)(A) or 433(f)(5), respectively.

(33) PROHIBITION ON BENEFIT INCREASES WHILE SPONSOR IS IN BANKRUPTCY.—

(A) IN GENERAL.—A trust which is part of a plan to which this paragraph applies shall not constitute a qualified trust under this section if an amendment to such plan is adopted while the employer is a debtor in a case under title 11, United States Code, or similar Federal or State law, if such amendment increases liabilities of the plan by reason of—

(i) any increase in benefits,

(ii) any change in the accrual of benefits, or

(iii) any change in the rate at which benefits become nonforfeitable under the plan,

with respect to employees of the debtor, and such amendment is effective prior to the effective date of such employer's plan of reorganization.

(B) EXCEPTIONS.—This paragraph shall not apply to any plan amendment if—

(i) the plan, were such amendment to take effect, would have a funding target attainment percentage (as defined in section 430(d)(2)) of 100 percent or more,

(ii) the Secretary determines that such amendment is reasonable and provides for only de minimis increases in the liabilities of the plan with respect to employees of the debtor,

(iii) such amendment only repeals an amendment described in section 412(d)(2), or

(iv) such amendment is required as a condition of qualification under this part.

(C) PLANS TO WHICH THIS PARAGRAPH APPLIES.—This paragraph shall apply only to plans (other than multiemployer plans or CSEC plans) covered under section 4021 of the Employee Retirement Income Security Act of 1974.

(D) EMPLOYER.—For purposes of this paragraph, the term “employer” means the employer referred to in section 412(b)(1), without regard to section 412(b)(2).

(34) BENEFITS OF MISSING PARTICIPANTS ON PLAN TERMINATION.—In the case of a plan covered by title IV of the Employee Retirement Income Security Act of 1974, a trust forming part of such plan shall not be treated as failing to constitute a qualified trust under this section merely because the pension plan of which such trust is a part, upon its termination, transfers benefits of missing participants to the Pension Benefit Guaranty Corporation in accordance with section 4050 of such Act.

(35) DIVERSIFICATION REQUIREMENTS FOR CERTAIN DEFINED CONTRIBUTION PLANS.—

(A) IN GENERAL.—A trust which is part of an applicable defined contribution plan shall not be treated as a qualified trust unless the plan meets the diversification requirements of subparagraphs (B), (C), and (D).

(B) EMPLOYEE CONTRIBUTIONS AND ELECTIVE DEFERRALS INVESTED IN EMPLOYER SECURITIES.—In the case of the portion of an applicable individual’s account attributable to employee contributions and elective deferrals which is invested in employer securities, a plan meets the requirements of this subparagraph if the applicable individual may elect to direct the plan to divest any such securities and to reinvest an equivalent amount in other investment options meeting the requirements of subparagraph (D).

(C) EMPLOYER CONTRIBUTIONS INVESTED IN EMPLOYER SECURITIES.—In the case of the portion of the account attributable to employer contributions other than elective deferrals which is invested in employer securities, a plan meets the requirements of this subparagraph if each applicable individual who—

(i) is a participant who has completed at least 3 years of service, or

(ii) is a beneficiary of a participant described in clause (i) or of a deceased participant,

may elect to direct the plan to divest any such securities and to reinvest an equivalent amount in other investment options meeting the requirements of subparagraph (D).

(D) INVESTMENT OPTIONS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if the plan offers not less than 3 investment options, other than employer securities, to which an applicable individual may direct the proceeds from the divestment of employer securities pursuant to this paragraph, each of which is diversified and has materially different risk and return characteristics.

(ii) TREATMENT OF CERTAIN RESTRICTIONS AND CONDITIONS.—

(I) TIME FOR MAKING INVESTMENT CHOICES.—A plan shall not be treated as failing to meet the requirements of this subparagraph merely because the plan limits the time for divestment and reinvestment to periodic, reasonable opportunities occurring no less frequently than quarterly.

(II) CERTAIN RESTRICTIONS AND CONDITIONS NOT ALLOWED.—Except as provided in regulations, a plan shall not meet the requirements of this subparagraph if the plan imposes restrictions or conditions with respect to the investment of employer securities which are not imposed on the investment of other assets of the plan. This subclause shall not apply to any restrictions or conditions imposed by reason of the application of securities laws.

(E) APPLICABLE DEFINED CONTRIBUTION PLAN.—For purposes of this paragraph—

(i) IN GENERAL.—The term “applicable defined contribution plan” means any defined contribution plan which holds any publicly traded employer securities.

(ii) EXCEPTION FOR CERTAIN ESOPS.—Such term does not include an employee stock ownership plan if—

(I) there are no contributions to such plan (or earnings thereunder) which are held within such plan and are subject to subsection (k) or (m), and

(II) such plan is a separate plan for purposes of section 414(l) with respect to any other defined benefit plan or defined contribution plan maintained by the same employer or employers.

(iii) EXCEPTION FOR ONE PARTICIPANT PLANS.—Such term does not include a one-participant retirement plan.

(iv) ONE-PARTICIPANT RETIREMENT PLAN.—For purposes of clause (iii), the term “one-participant retirement plan” means a retirement plan that on the first day of the plan year—

(I) covered only one individual (or the individual and the individual’s spouse) and the individual (or the individual and the individual’s spouse) owned 100 percent of the plan sponsor (whether or not incorporated), or

(II) covered only one or more partners (or partners and their spouses) in the plan sponsor.

(F) CERTAIN PLANS TREATED AS HOLDING PUBLICLY TRADED EMPLOYER SECURITIES.—

(i) IN GENERAL.—Except as provided in regulations or in clause (ii), a plan holding employer securities which are not publicly traded employer securities shall be treated as holding publicly traded employer securities if any employer corporation, or any member of a controlled group of corporations which includes such employer corporation, has issued a class of stock which is a publicly traded employer security.

(ii) EXCEPTION FOR CERTAIN CONTROLLED GROUPS WITH PUBLICLY TRADED SECURITIES.—Clause (i) shall not apply to a plan if—

(I) no employer corporation, or parent corporation of an employer corporation, has issued any publicly traded employer security, and

(II) no employer corporation, or parent corporation of an employer corporation, has issued any special class of stock which grants particular rights to, or bears particular risks for, the holder or issuer with respect to any corporation described in clause (i) which has issued any publicly traded employer security.

(iii) DEFINITIONS.—For purposes of this subparagraph, the term—

(I) “controlled group of corporations” has the meaning given such term by section 1563(a), except that “50 percent” shall be substituted for “80 percent” each place it appears,

(II) “employer corporation” means a corporation which is an employer maintaining the plan, and

(III) “parent corporation” has the meaning given such term by section 424(e).

(G) OTHER DEFINITIONS.—For purposes of this paragraph—

(i) APPLICABLE INDIVIDUAL.—The term “applicable individual” means—

(I) any participant in the plan, and

(II) any beneficiary who has an account under the plan with respect to which the beneficiary is entitled to exercise the rights of a participant.

(ii) ELECTIVE DEFERRAL.—The term “elective deferral” means an employer contribution described in section 402(g)(3)(A).

(iii) EMPLOYER SECURITY.—The term “employer security” has the meaning given such term by section 407(d)(1) of the Employee Retirement Income Security Act of 1974.

(iv) EMPLOYEE STOCK OWNERSHIP PLAN.—The term “employee stock ownership plan” has the meaning given such term by section 4975(e)(7).

(v) PUBLICLY TRADED EMPLOYER SECURITIES.—The term “publicly traded employer securities” means em-



employer securities which are readily tradable on an established securities market.

(vi) YEAR OF SERVICE.—The term “year of service” has the meaning given such term by section 411(a)(5).

(H) TRANSITION RULE FOR SECURITIES ATTRIBUTABLE TO EMPLOYER CONTRIBUTIONS.—

(i) RULES PHASED IN OVER 3 YEARS.—

(I) IN GENERAL.—In the case of the portion of an account to which subparagraph (C) applies and which consists of employer securities acquired in a plan year beginning before January 1, 2007, subparagraph (C) shall only apply to the applicable percentage of such securities. This subparagraph shall be applied separately with respect to each class of securities.

(II) EXCEPTION FOR CERTAIN PARTICIPANTS AGED 55 OR OVER.—Subclause (I) shall not apply to an applicable individual who is a participant who has attained age 55 and completed at least 3 years of service before the first plan year beginning after December 31, 2005.

(ii) APPLICABLE PERCENTAGE.—For purposes of clause (i), the applicable percentage shall be determined as follows:

(36) DISTRIBUTIONS DURING WORKING RETIREMENT.—

(A) IN GENERAL.—A trust forming part of a pension plan shall not be treated as failing to constitute a qualified trust under this section solely because the plan provides that a distribution may be made from such trust to an employee who has attained age 59½ and who is not separated from employment at the time of such distribution.

(B) CERTAIN EMPLOYEES IN THE BUILDING AND CONSTRUCTION INDUSTRY.—Subparagraph (A) shall be applied by substituting “age 55” for “age 59½” in the case of a multiemployer plan described in section 4203(b)(1)(B)(i) of the Employee Retirement Income Security Act of 1974, with respect to individuals who were participants in such plan on or before April 30, 2013, if—

(i) the trust to which subparagraph (A) applies was in existence before January 1, 1970, and

(ii) before December 31, 2011, at a time when the plan provided that distributions may be made to an employee who has attained age 55 and who is not separated from employment at the time of such distribution, the plan received at least 1 written determination from the Internal Revenue Service that the trust to which subparagraph (A) applies constituted a qualified trust under this section.

(37) DEATH BENEFITS UNDER USERRA-QUALIFIED ACTIVE MILITARY SERVICE.—A trust shall not constitute a qualified trust unless the plan provides that, in the case of a participant who dies while performing qualified military service (as defined in section 414(u)), the survivors of the participant are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) provided under the

plan had the participant resumed and then terminated employment on account of death.

(38) PORTABILITY OF LIFETIME INCOME.—

(A) IN GENERAL.—Except as may be otherwise provided by regulations, a trust forming part of a defined contribution plan shall not be treated as failing to constitute a qualified trust under this section solely by reason of allowing—

(i) qualified distributions of a lifetime income investment, or

(ii) distributions of a lifetime income investment in the form of a qualified plan distribution annuity contract,

on or after the date that is 90 days prior to the date on which such lifetime income investment is no longer authorized to be held as an investment option under the plan.

(B) DEFINITIONS.—For purposes of this subsection—

(i) the term “qualified distribution” means a direct trustee-to-trustee transfer described in paragraph (31)(A) to an eligible retirement plan (as defined in section 402(c)(8)(B)),

(ii) the term “lifetime income investment” means an investment option which is designed to provide an employee with election rights—

(I) which are not uniformly available with respect to other investment options under the plan, and

(II) which are to a lifetime income feature available through a contract or other arrangement offered under the plan (or under another eligible retirement plan (as so defined), if paid by means of a direct trustee-to-trustee transfer described in paragraph (31)(A) to such other eligible retirement plan),

(iii) the term “lifetime income feature” means—

(I) a feature which 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

(II) 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, and

(iv) the term “qualified plan distribution annuity contract” means an annuity contract purchased for a participant and distributed to the participant by a plan or contract described in subparagraph (B) of section 402(c)(8) (without regard to clauses (i) and (ii) thereof).

Paragraphs (11), (12), (13), (14), (15), (19), and (20) shall apply only in the case of a plan to which section 411 (relating to minimum

vesting standards) applies without regard to subsection (e)(2) of such section.

(b) CERTAIN PLAN AMENDMENTS.—

(1) CERTAIN RETROACTIVE CHANGES IN PLAN.—A stock bonus, pension, profit-sharing, or annuity plan shall be considered as satisfying the requirements of subsection (a) for the period beginning with the date on which it was put into effect, or for the period beginning with the earlier of the date on which there was adopted or put into effect any amendment which caused the plan to fail to satisfy such requirements, and ending with the time prescribed by law for filing the return of the employer for his taxable year in which such plan or amendment was adopted (including extensions thereof) or such later time as the Secretary may designate, if all provisions of the plan which are necessary to satisfy such requirements are in effect by the end of such period and have been made effective for all purposes for the whole of such period.

(2) ADOPTION OF PLAN.—If an employer adopts a stock bonus, pension, profit-sharing, or annuity plan after the close of a taxable year but before the time prescribed by law for filing the return 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. *In the case of an individual who owns the entire interest in an unincorporated trade or business, and who is the only employee of such trade or business, any elective deferrals (as defined in section 402(g)(3)) under a qualified cash or deferred arrangement to which the preceding sentence applies, which are made by such individual before the time for filing the return of such individual for the taxable year (determined without regard to any extensions) ending after or with the end of the plan's first year, shall be treated as having been made before the end of such first plan year.*

(3) RETROACTIVE PLAN AMENDMENTS THAT INCREASE BENEFIT ACCRUALS.—If—

(A) *an employer amends a stock bonus, pension, profit-sharing, or annuity plan to increase benefits accrued under the plan effective for the preceding plan year (other than increasing the amount of matching contributions (as defined in subsection (m)(4)(A))),*

(B) *such amendment would not otherwise cause the plan to fail to meet any of the requirements of this subchapter, and*

(C) *such amendment is adopted before the time prescribed by law for filing the return of the employer for a taxable year (including extensions thereof) during which such amendment is effective,*  
*the employer may elect to treat such amendment as having been adopted as of the last day of the plan year in which the amendment is effective.*

(c) DEFINITIONS AND RULES RELATING TO SELF-EMPLOYED INDIVIDUALS AND OWNER-EMPLOYEES.—For purposes of this section—

(1) SELF-EMPLOYED INDIVIDUAL TREATED AS EMPLOYEE.—

(A) IN GENERAL.—The term “employee” includes, for any taxable year, an individual who is a self-employed individual for such taxable year.

(B) SELF-EMPLOYED INDIVIDUAL.—The term “self-employed individual” means, with respect to any taxable year, an individual who has earned income (as defined in paragraph (2)) for such taxable year. To the extent provided in regulations prescribed by the Secretary, such term also includes, for any taxable year—

(i) an individual who would be a self-employed individual within the meaning of the preceding sentence but for the fact that the trade or business carried on by such individual did not have net profits for the taxable year, and

(ii) an individual who has been a self-employed individual within the meaning of the preceding sentence for any prior taxable year.

(2) EARNED INCOME.—

(A) IN GENERAL.—The term “earned income” means the net earnings from self-employment (as defined in section 1402(a)), but such net earnings shall be determined—

(i) only with respect to a trade or business in which personal services of the taxpayer are a material income-producing factor,

(ii) without regard to paragraphs (4) and (5) of section 1402(c),

(iii) in the case of any individual who is treated as an employee under subparagraph (A), (C), or (D) of section 3121(d)(3), without regard to section 1402(c)(2),

(iv) without regard to items which are not included in gross income for purposes of this chapter, and the deductions properly allocable to or chargeable against such items,

(v) with regard to the deductions allowed by section 404 to the taxpayer, and

(vi) with regard to the deduction allowed to the taxpayer by section 164(f).

For purposes of this subparagraph, section 1402, as in effect for a taxable year ending on December 31, 1962, shall be treated as having been in effect for all taxable years ending before such date. For purposes of this part only (other than sections 419 and 419A), this subparagraph shall be applied as if the term “trade or business” for purposes of section 1402 included service described in section 1402(c)(6).

(C) INCOME FROM DISPOSITION OF CERTAIN PROPERTY.—For purposes of this section, the term “earned income” includes gains (other than any gain which is treated under any provision of this chapter as gain from the sale or exchange of a capital asset) and net earnings derived from the sale or other disposition of, the transfer of any interest in, or the licensing of the use of property (other than good will) by an individual whose personal efforts created such property.

(3) OWNER-EMPLOYEE.—The term “owner-employee” means an employee who—

(A) owns the entire interest in an unincorporated trade or business, or

(B) in the case of a partnership, is a partner who owns more than 10 percent of either the capital interest or the profits interest in such partnership.

To the extent provided in regulations prescribed by the Secretary, such term also means an individual who has been an owner-employee within the meaning of the preceding sentence.

(4) EMPLOYER.—An individual who owns the entire interest in an unincorporated trade or business shall be treated as his own employer. A partnership shall be treated as the employer of each partner who is an employee within the meaning of paragraph (1).

(5) CONTRIBUTIONS ON BEHALF OF OWNER-EMPLOYEES.—The term “contribution on behalf of an owner-employee” includes, except as the context otherwise requires, a contribution under a plan—

(A) by the employer for an owner-employee, and

(B) by an owner-employee as an employee.

(6) SPECIAL RULE FOR CERTAIN FISHERMEN.—For purposes of this subsection, the term “self-employed individual” includes an individual described in section 3121(b)(20) (relating to certain fishermen).

(d) CONTRIBUTION LIMIT ON OWNER-EMPLOYEES.—A trust forming part of a pension or profit-sharing plan which provides contributions or benefits for employees some or all of whom are owner-employees shall constitute a qualified trust under this section only if, in addition to meeting the requirements of subsection (a), the plan provides that contributions on behalf of any owner-employee may be made only with respect to the earned income of such owner-employee which is derived from the trade or business with respect to which such plan is established.

(f) CERTAIN CUSTODIAL ACCOUNTS AND CONTRACTS.—For purposes of this title, a custodial account, an annuity contract, or a contract (other than a life, health or accident, property, casualty, or liability insurance contract) issued by an insurance company qualified to do business in a State shall be treated as a qualified trust under this section if—

(1) the custodial account or contract would, except for the fact that it is not a trust, constitute a qualified trust under this section, and

(2) in the case of a custodial account the assets thereof are held by a bank (as defined in section 408(n)) or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which he will hold the assets will be consistent with the requirements of this section.

For purposes of this title, in the case of a custodial account or contract treated as a qualified trust under this section by reason of this subsection, the person holding the assets of such account or holding such contract shall be treated as the trustee thereof.

(g) ANNUITY DEFINED.—For purposes of this section and sections 402, 403, and 404, the term “annuity” includes a face-amount certificate, as defined in section 2(a)(15) of the Investment Company

Act of 1940 (15 U.S.C., sec. 80a-2); but does not include any contract or certificate issued after December 31, 1962, which is transferable, if any person other than the trustee of a trust described in section 401(a) which is exempt from tax under section 501(a) is the owner of such contract or certificate.

(h) **MEDICAL, ETC., BENEFITS FOR RETIRED EMPLOYEES AND THEIR SPOUSES AND DEPENDENTS.**—Under regulations prescribed by the Secretary, and subject to the provisions of section 420, a pension or annuity plan may provide for the payment of benefits for sickness, accident, hospitalization, and medical expenses of retired employees, their spouses and their dependents, but only if—

(1) such benefits are subordinate to the retirement benefits provided by the plan,

(2) a separate account is established and maintained for such benefits,

(3) the employer's contributions to such separate account are reasonable and ascertainable,

(4) it is impossible, at any time prior to the satisfaction of all liabilities under the plan to provide such benefits, for any part of the corpus or income of such separate account to be (within the taxable year or thereafter) used for, or diverted to, any purpose other than the providing of such benefits,

(5) notwithstanding the provisions of subsection (a)(2), upon the satisfaction of all liabilities under the plan to provide such benefits, any amount remaining in such separate account must, under the terms of the plan, be returned to the employer, and

(6) in the case of an employee who is a key employee, a separate account is established and maintained for such benefits payable to such employee (and his spouse and dependents) and such benefits (to the extent attributable to plan years beginning after March 31, 1984, for which the employee is a key employee) are only payable to such employee (and his spouse and dependents) from such separate account.

For purposes of paragraph (6), the term "key employee" means any employee, who at any time during the plan year or any preceding plan year during which contributions were made on behalf of such employee, is or was a key employee as defined in section 416(i). In no event shall the requirements of paragraph (1) be treated as met if the aggregate actual contributions for medical benefits, when added to actual contributions for life insurance protection under the plan, exceed 25 percent of the total actual contributions to the plan (other than contributions to fund past service credits) after the date on which the account is established. For purposes of this subsection, the term "dependent" shall include any individual who is a child (as defined in section 152(f)(1)) of a retired employee who as of the end of the calendar year has not attained age 27.

(i) **CERTAIN UNION-NEGOTIATED PENSION PLANS.**—In the case of a trust forming part of a pension plan which has been determined by the Secretary to constitute a qualified trust under subsection (a) and to be exempt from taxation under section 501(a) for a period beginning after contributions were first made to or for such trust, if it is shown to the satisfaction of the Secretary that—

(1) such trust was created pursuant to a collective bargaining agreement between employee representatives and one or more employers,

(2) any disbursements of contributions, made to or for such trust before the time as of which the Secretary determined that the trust constituted a qualified trust, substantially complied with the terms of the trust, and the plan of which the trust is a part, as subsequently qualified, and

(3) before the time as of which the Secretary determined that the trust constitutes a qualified trust, the contributions to or for such trust were not used in a manner which would jeopardize the interests of its beneficiaries,

then such trust shall be considered as having constituted a qualified trust under subsection (a) and as having been exempt from taxation under section 501(a) for the period beginning on the date on which contributions were first made to or for such trust and ending on the date such trust first constituted (without regard to this subsection) a qualified trust under subsection (a).

(k) CASH OR DEFERRED ARRANGEMENTS.—

(1) GENERAL RULE.—A profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan shall not be considered as not satisfying the requirements of subsection (a) merely because the plan includes a qualified cash or deferred arrangement.

(2) QUALIFIED CASH OR DEFERRED ARRANGEMENT.—A qualified cash or deferred arrangement is any arrangement which is part of a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan which meets the requirements of subsection (a)—

(A) under which a covered employee may elect to have the employer make payments as contributions to a trust under the plan on behalf of the employee, or to the employee directly in cash;

(B) under which amounts held by the trust which are attributable to employer contributions made pursuant to the employee's election—

(i) may not be distributable to participants or other beneficiaries earlier than—

(I) severance from employment, death, or disability,

(II) an event described in paragraph (10),

(III) in the case of a profit-sharing or stock bonus plan, the attainment of age 59½,

(IV) subject to the provisions of paragraph (14), upon hardship of the employee,

(V) in the case of a qualified reservist distribution (as defined in section 72(t)(2)(G)(iii)), the date on which a period referred to in subclause (III) of such section begins, or

(VI) except as may be otherwise provided by regulations, with respect to amounts invested in a lifetime income investment (as defined in subsection (a)(38)(B)(ii)), the date that is 90 days prior to the date that such lifetime income invest-

ment may no longer be held as an investment option under the arrangement,

(ii) will not be distributable merely by reason of the completion of a stated period of participation or the lapse of a fixed number of years, and

(iii) except as may be otherwise provided by regulations, in the case of amounts described in clause (i)(VI), will be distributed only in the form of a qualified distribution (as defined in subsection (a)(38)(B)(i)) or a qualified plan distribution annuity contract (as defined in subsection (a)(38)(B)(iv)),

(C) which provides that an employee's right to his accrued benefit derived from employer contributions made to the trust pursuant to his election is nonforfeitable, and

(D) which does not require, as a condition of participation in the arrangement, that an employee complete a period of service with the employer (or employers) maintaining the plan extending beyond the close of the earlier of—

(i) the period permitted under section 410(a)(1) (determined without regard to subparagraph (B)(i) thereof), or

(ii) subject to the provisions of paragraph (15), the first period of **[3]** 2 consecutive 12-month periods during each of which the employee has at least 500 hours of service.

(3) APPLICATION OF PARTICIPATION AND DISCRIMINATION STANDARDS.—

(A) A cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement unless—

(i) those employees eligible to benefit under the arrangement satisfy the provisions of section 410(b)(1), and

(ii) the actual deferral percentage for eligible highly compensated employees (as defined in paragraph (5)) for the plan year bears a relationship to the actual deferral percentage for all other eligible employees for the preceding plan year which meets either of the following tests:

(I) The actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage of all other eligible employees multiplied by 1.25.

(II) The excess of the actual deferral percentage for the group of eligible highly compensated employees over that of all other eligible employees is not more than 2 percentage points, and the actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage of all other eligible employees multiplied by 2.

If 2 or more plans which include cash or deferred arrangements are considered as 1 plan for purposes of section 401(a)(4) or 410(b), the cash or deferred arrangements included in such plans shall be treated as 1 arrangement for purposes of this subparagraph.



If any highly compensated employee is a participant under 2 or more cash or deferred arrangements of the employer, for purposes of determining the deferral percentage with respect to such employee, all such cash or deferred arrangements shall be treated as 1 cash or deferred arrangement. An arrangement may apply clause (ii) by using the plan year rather than the preceding plan year if the employer so elects, except that if such an election is made, it may not be changed except as provided by the Secretary.

(B) For purposes of subparagraph (A), the actual deferral percentage for a specified group of employees for a plan year shall be the average of the ratios (calculated separately for each employee in such group) of—

(i) the amount of employer contributions actually paid over to the trust on behalf of each such employee for such plan year, to

(ii) the employee's compensation for such plan year.

(C) A cash or deferred arrangement shall be treated as meeting the requirements of subsection (a)(4) with respect to contributions if the requirements of subparagraph (A)(ii) are met.

(D) For purposes of subparagraph (B), the employer contributions on behalf of any employee—

(i) shall include any employer contributions made pursuant to the employee's election under paragraph (2), and

(ii) under such rules as the Secretary may prescribe, may, at the election of the employer, include—

(I) matching contributions (as defined in 401(m)(4)(A)) which meet the requirements of paragraph (2)(B) and (C), and

(II) qualified nonelective contributions (within the meaning of section 401(m)(4)(C)).

(E) For purposes of this paragraph, in the case of the first plan year of any plan (other than a successor plan), the amount taken into account as the actual deferral percentage of nonhighly compensated employees for the preceding plan year shall be—

(i) 3 percent, or

(ii) if the employer makes an election under this subclause, the actual deferral percentage of nonhighly compensated employees determined for such first plan year.

(F) SPECIAL RULE FOR EARLY PARTICIPATION.—If an employer elects to apply section 410(b)(4)(B) in determining whether a cash or deferred arrangement meets the requirements of subparagraph (A)(i), the employer may, in determining whether the arrangement meets the requirements of subparagraph (A)(ii), exclude from consideration all eligible employees (other than highly compensated employees) who have not met the minimum age and service requirements of section 410(a)(1)(A).

(G) GOVERNMENTAL PLAN.—A governmental plan (within the meaning of section 414(d)) shall be treated as meeting the requirements of this paragraph.

## (4) OTHER REQUIREMENTS.—

(A) BENEFITS (OTHER THAN MATCHING CONTRIBUTIONS) MUST NOT BE CONTINGENT ON ELECTION TO DEFER.—A cash or deferred arrangement of any employer shall not be treated as a qualified cash or deferred arrangement if any other benefit (*other than a de minimis financial incentive*) is conditioned (directly or indirectly) on the employee electing to have the employer make or not make contributions under the arrangement in lieu of receiving cash. The preceding sentence shall not apply to any matching contribution (as defined in section 401(m)) made by reason of such an election.

(B) ELIGIBILITY OF STATE AND LOCAL GOVERNMENTS AND TAX-EXEMPT ORGANIZATIONS.—

(i) TAX-EXEMPTS ELIGIBLE.—Except as provided in clause (ii), any organization exempt from tax under this subtitle may include a qualified cash or deferred arrangement as part of a plan maintained by it.

(ii) GOVERNMENTS INELIGIBLE.—A cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement if it is part of a plan maintained by a State or local government or political subdivision thereof, or any agency or instrumentality thereof. This clause shall not apply to a rural cooperative plan or to a plan of an employer described in clause (iii).

(iii) TREATMENT OF INDIAN TRIBAL GOVERNMENTS.—An employer which is an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency or instrumentality of an Indian tribal government or subdivision thereof, or a corporation chartered under Federal, State, or tribal law which is owned in whole or in part by any of the foregoing may include a qualified cash or deferred arrangement as part of a plan maintained by the employer.

(C) COORDINATION WITH OTHER PLANS.—Except as provided in section 401(m), any employer contribution made pursuant to an employee's election under a qualified cash or deferred arrangement shall not be taken into account for purposes of determining whether any other plan meets the requirements of section 401(a) or 410(b). This subparagraph shall not apply for purposes of determining whether a plan meets the average benefit requirement of section 410(b)(2)(A)(ii).

(5) HIGHLY COMPENSATED EMPLOYEE.—For purposes of this subsection, the term “highly compensated employee” has the meaning given such term by section 414(q).

(6) PRE-ERISA MONEY PURCHASE PLAN.—For purposes of this subsection, the term “pre-ERISA money purchase plan” means a pension plan—

(A) which is a defined contribution plan (as defined in section 414(i)),

(B) which was in existence on June 27, 1974, and which, on such date, included a salary reduction arrangement, and

(C) under which neither the employee contributions nor the employer contributions may exceed the levels provided for by the contribution formula in effect under the plan on such date.

(7) RURAL COOPERATIVE PLAN.—For purposes of this subsection—

(A) IN GENERAL.—The term “rural cooperative plan” means any pension plan—

(i) which is a defined contribution plan (as defined in section 414(i)), and

(ii) which is established and maintained by a rural cooperative.

(B) RURAL COOPERATIVE DEFINED.—For purposes of subparagraph (A), the term “rural cooperative” means—

(i) any organization which—

(I) is engaged primarily in providing electric service on a mutual or cooperative basis, or

(II) is engaged primarily in providing electric service to the public in its area of service and which is exempt from tax under this subtitle or which is a State or local government (or an agency or instrumentality thereof), other than a municipality (or an agency or instrumentality thereof),

(ii) any organization described in paragraph (4) or (6) of section 501(c) and at least 80 percent of the members of which are organizations described in clause (i),

(iii) a cooperative telephone company described in section 501(c)(12),

(iv) any organization which—

(I) is a mutual irrigation or ditch company described in section 501(c)(12) (without regard to the 85 percent requirement thereof), or

(II) is a district organized under the laws of a State as a municipal corporation for the purpose of irrigation, water conservation, or drainage, and

(v) an organization which is a national association of organizations described in clause (i), (ii), (iii), or (iv).

(C) SPECIAL RULE FOR CERTAIN DISTRIBUTIONS.—A rural cooperative plan which includes a qualified cash or deferred arrangement shall not be treated as violating the requirements of section 401(a) or of paragraph (2) merely by reason of a hardship distribution or a distribution to a participant after attainment of age 59½. For purposes of this section, the term “hardship distribution” means a distribution described in paragraph (2)(B)(i)(IV) (without regard to the limitation of its application to profit-sharing or stock bonus plans).

(8) ARRANGEMENT NOT DISQUALIFIED IF EXCESS CONTRIBUTIONS DISTRIBUTED.—

(A) IN GENERAL.—A cash or deferred arrangement shall not be treated as failing to meet the requirements of

clause (ii) of paragraph (3)(A) for any plan year if, before the close of the following plan year—

(i) the amount of the excess contributions for such plan year (and any income allocable to such contributions through the end of such year) is distributed, or

(ii) to the extent provided in regulations, the employee elects to treat the amount of the excess contributions as an amount distributed to the employee and then contributed by the employee to the plan.

Any distribution of excess contributions (and income) may be made without regard to any other provision of law.

(B) EXCESS CONTRIBUTIONS.—For purposes of subparagraph (A), the term “excess contributions” means, with respect to any plan year, the excess of—

(i) the aggregate amount of employer contributions actually paid over to the trust on behalf of highly compensated employees for such plan year, over

(ii) the maximum amount of such contributions permitted under the limitations of clause (ii) of paragraph (3)(A) (determined by reducing contributions made on behalf of highly compensated employees in order of the actual deferral percentages beginning with the highest of such percentages).

(C) METHOD OF DISTRIBUTING EXCESS CONTRIBUTIONS.—

Any distribution of the excess contributions for any plan year shall be made to highly compensated employees on the basis of the amount of contributions by, or on behalf of, each of such employees.

(D) ADDITIONAL TAX UNDER SECTION 72(T) NOT TO APPLY.—No tax shall be imposed under section 72(t) on any amount required to be distributed under this paragraph.

(E) TREATMENT OF MATCHING CONTRIBUTIONS FORFEITED BY REASON OF EXCESS DEFERRAL OR CONTRIBUTION OR PERMISSIBLE WITHDRAWAL.—For purposes of paragraph (2)(C), a matching contribution (within the meaning of subsection (m)) shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is treated as an excess contribution under subparagraph (B), an excess deferral under section 402(g)(2)(A), a permissible withdrawal under section 414(w), or an excess aggregate contribution under section 401(m)(6)(B).

(F) CROSS REFERENCE.—For excise tax on certain excess contributions, see section 4979.

(9) COMPENSATION.—For purposes of this subsection, the term “compensation” has the meaning given such term by section 414(s).

(10) DISTRIBUTIONS UPON TERMINATION OF PLAN.—

(A) IN GENERAL.—An event described in this subparagraph is the termination of the plan without establishment or maintenance of another defined contribution plan (other than an employee stock ownership plan as defined in section 4975(e)(7)).

(B) DISTRIBUTIONS MUST BE LUMP SUM DISTRIBUTIONS.—

(i) IN GENERAL.—A termination shall not be treated as described in subparagraph (A) with respect to any employee unless the employee receives a lump sum distribution by reason of the termination.

(ii) LUMP-SUM DISTRIBUTION.—For purposes of this subparagraph, the term “lump-sum distribution” has the meaning given such term by section 402(e)(4)(D) (without regard to subclauses (I), (II), (III), and (IV) of clause (i) thereof). Such term includes a distribution of an annuity contract from—

(I) a trust which forms a part of a plan described in section 401(a) and which is exempt from tax under section 501(a), or

(II) an annuity plan described in section 403(a).

(11) ADOPTION OF SIMPLE PLAN TO MEET NONDISCRIMINATION TESTS.—

(A) IN GENERAL.—A cash or deferred arrangement maintained by an eligible employer shall be treated as meeting the requirements of paragraph (3)(A)(ii) if such arrangement meets—

(i) the contribution requirements of subparagraph

(B),

(ii) the exclusive plan requirements of subparagraph (C), and

(iii) the vesting requirements of section 408(p)(3).

(B) CONTRIBUTION REQUIREMENTS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if, under the arrangement—

(I) an employee may elect to have the employer make elective contributions for the year on behalf of the employee to a trust under the plan in an amount which is expressed as a percentage of compensation of the employee but which in no event exceeds the amount in effect under section 408(p)(2)(A)(ii),

(II) the employer is required to make a matching contribution to the trust for the year in an amount equal to so much of the amount the employee elects under subclause (I) as does not exceed 3 percent of compensation for the year, and

(III) no other contributions may be made other than contributions described in subclause (I) or (II).

(ii) EMPLOYER MAY ELECT 2-PERCENT NONELECTIVE CONTRIBUTION.—An employer shall be treated as meeting the requirements of clause (i)(II) for any year if, in lieu of the contributions described in such clause, the employer elects (pursuant to the terms of the arrangement) to make nonelective contributions of 2 percent of compensation for each employee who is eligible to participate in the arrangement and who has at least \$5,000 of compensation from the employer for the year. If an employer makes an election under this subparagraph for any year, the employer shall notify employees of such election within a reasonable period of

time before the 60th day before the beginning of such year.

(iii) ADMINISTRATIVE REQUIREMENTS.—

(I) IN GENERAL.—Rules similar to the rules of subparagraphs (B) and (C) of section 408(p)(5) shall apply for purposes of this subparagraph.

(II) NOTICE OF ELECTION PERIOD.—The requirements of this subparagraph shall not be treated as met with respect to any year unless the employer notifies each employee eligible to participate, within a reasonable period of time before the 60th day before the beginning of such year (and, for the first year the employee is so eligible, the 60th day before the first day such employee is so eligible), of the rules similar to the rules of section 408(p)(5)(C) which apply by reason of subclause (I).

(C) EXCLUSIVE PLAN REQUIREMENT.—The requirements of this subparagraph are met for any year to which this paragraph applies if no contributions were made, or benefits were accrued, for services during such year under any qualified plan of the employer on behalf of any employee eligible to participate in the cash or deferred arrangement, other than contributions described in subparagraph (B).

(D) DEFINITIONS AND SPECIAL RULE.—

(i) DEFINITIONS.—For purposes of this paragraph, any term used in this paragraph which is also used in section 408(p) shall have the meaning given such term by such section.

(ii) COORDINATION WITH TOP-HEAVY RULES.—A plan meeting the requirements of this paragraph for any year shall not be treated as a top-heavy plan under section 416 for such year if such plan allows only contributions required under this paragraph.

(12) ALTERNATIVE METHODS OF MEETING NONDISCRIMINATION REQUIREMENTS.—

(A) IN GENERAL.—A cash or deferred arrangement shall be treated as meeting the requirements of paragraph (3)(A)(ii) if such arrangement—

(i) meets the contribution requirements of subparagraph (B) and the notice requirements of subparagraph (D), or

(ii) meets the contribution requirements of subparagraph (C).

(B) MATCHING CONTRIBUTIONS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if, under the arrangement, the employer makes matching contributions on behalf of each employee who is not a highly compensated employee in an amount equal to—

(I) 100 percent of the elective contributions of the employee to the extent such elective contributions do not exceed 3 percent of the employee's compensation, and

(II) 50 percent of the elective contributions of the employee to the extent that such elective contributions exceed 3 percent but do not exceed 5 percent of the employee's compensation.

(ii) RATE FOR HIGHLY COMPENSATED EMPLOYEES.—The requirements of this subparagraph are not met if, under the arrangement, the rate of matching contribution with respect to any elective contribution of a highly compensated employee at any rate of elective contribution is greater than that with respect to an employee who is not a highly compensated employee.

(iii) ALTERNATIVE PLAN DESIGNS.—If the rate of any matching contribution with respect to any rate of elective contribution is not equal to the percentage required under clause (i), an arrangement shall not be treated as failing to meet the requirements of clause (i) if—

(I) the rate of an employer's matching contribution does not increase as an employee's rate of elective contributions increase, and

(II) the aggregate amount of matching contributions at such rate of elective contribution is at least equal to the aggregate amount of matching contributions which would be made if matching contributions were made on the basis of the percentages described in clause (i).

(C) NONELECTIVE CONTRIBUTIONS.—The requirements of this subparagraph are met if, under the arrangement, the employer is required, without regard to whether the employee makes an elective contribution or employee contribution, to make a contribution to a defined contribution plan on behalf of each employee who is not a highly compensated employee and who is eligible to participate in the arrangement in an amount equal to at least 3 percent of the employee's compensation.

(D) NOTICE REQUIREMENT.—An arrangement meets the requirements of this paragraph if, under the arrangement, each employee eligible to participate is, within a reasonable period before any year, given written notice of the employee's rights and obligations under the arrangement which—

(i) is sufficiently accurate and comprehensive to apprise the employee of such rights and obligations, and

(ii) is written in a manner calculated to be understood by the average employee eligible to participate.

(E) OTHER REQUIREMENTS.—

(i) WITHDRAWAL AND VESTING RESTRICTIONS.—An arrangement shall not be treated as meeting the requirements of subparagraph (B) or (C) of this paragraph unless the requirements of subparagraphs (B) and (C) of paragraph (2) are met with respect to all employer contributions (including matching contributions) taken into account in determining whether the requirements of subparagraphs (B) and (C) of this paragraph are met.

(ii) SOCIAL SECURITY AND SIMILAR CONTRIBUTIONS NOT TAKEN INTO ACCOUNT.—An arrangement shall not be treated as meeting the requirements of subparagraph (B) or (C) unless such requirements are met without regard to subsection (I), and, for purposes of subsection (I), employer contributions under subparagraph (B) or (C) shall not be taken into account.

(F) TIMING OF PLAN AMENDMENT FOR EMPLOYER MAKING NONELECTIVE CONTRIBUTIONS.—

(i) IN GENERAL.—Except as provided in clause (ii), a plan may be amended after the beginning of a plan year to provide that the requirements of subparagraph (C) shall apply to the arrangement for the plan year, but only if the amendment is adopted—

(I) at any time before the 30th day before the close of the plan year, or

(II) at any time before the last day under paragraph (8)(A) for distributing excess contributions for the plan year.

(ii) EXCEPTION WHERE PLAN PROVIDED FOR MATCHING CONTRIBUTIONS.—Clause (i) shall not apply to any plan year if the plan provided at any time during the plan year that the requirements of subparagraph (B) or paragraph (13)(D)(i)(I) applied to the plan year.

(iii) 4-PERCENT CONTRIBUTION REQUIREMENT.—Clause (i)(II) shall not apply to an arrangement unless the amount of the contributions described in subparagraph (C) which the employer is required to make under the arrangement for the plan year with respect to any employee is an amount equal to at least 4 percent of the employee's compensation.

(G) OTHER PLANS.—An arrangement shall be treated as meeting the requirements under subparagraph (A)(i) if any other plan maintained by the employer meets such requirements with respect to employees eligible under the arrangement.

(13) ALTERNATIVE METHOD FOR AUTOMATIC CONTRIBUTION ARRANGEMENTS TO MEET NONDISCRIMINATION REQUIREMENTS.—

(A) IN GENERAL.—A qualified automatic contribution arrangement shall be treated as meeting the requirements of paragraph (3)(A)(ii).

(B) QUALIFIED AUTOMATIC CONTRIBUTION ARRANGEMENT.—For purposes of this paragraph, the term “qualified automatic contribution arrangement” means a cash or deferred arrangement—

(i) which is described in subparagraph (D)(i)(I) and meets the applicable requirements of subparagraphs (C) through (E), or

(ii) which is described in subparagraph (D)(i)(II) and meets the applicable requirements of subparagraphs (C) and (D).

(C) AUTOMATIC DEFERRAL.—

(i) IN GENERAL.—The requirements of this subparagraph are met if, under the arrangement, each employee eligible to participate in the arrangement is



treated as having elected to have the employer make elective contributions in an amount equal to a qualified percentage of compensation.

(ii) **ELECTION OUT.**—The election treated as having been made under clause (i) shall cease to apply with respect to any employee if such employee makes an affirmative election—

(I) to not have such contributions made, or

(II) to make elective contributions at a level specified in such affirmative election.

(iii) **QUALIFIED PERCENTAGE.**—For purposes of this subparagraph, the term “qualified percentage” means, with respect to any employee, any percentage determined under the arrangement if such percentage is applied uniformly, does not exceed 15 percent (10 percent during the period described in subclause (I)), and is at least—

(I) 3 percent during the period ending on the last day of the first plan year which begins after the date on which the first elective contribution described in clause (i) is made with respect to such employee,

(II) 4 percent during the first plan year following the plan year described in subclause (I),

(III) 5 percent during the second plan year following the plan year described in subclause (I), and

(IV) 6 percent during any subsequent plan year.

(iv) **AUTOMATIC DEFERRAL FOR CURRENT EMPLOYEES NOT REQUIRED.**—Clause (i) may be applied without taking into account any employee who—

(I) was eligible to participate in the arrangement (or a predecessor arrangement) immediately before the date on which such arrangement becomes a qualified automatic contribution arrangement (determined after application of this clause), and

(II) had an election in effect on such date either to participate in the arrangement or to not participate in the arrangement.

(D) **MATCHING OR NONELECTIVE CONTRIBUTIONS.**—

(i) **IN GENERAL.**—The requirements of this subparagraph are met if, under the arrangement, the employer—

(I) makes matching contributions on behalf of each employee who is not a highly compensated employee in an amount equal to the sum of 100 percent of the elective contributions of the employee to the extent that such contributions do not exceed 1 percent of compensation plus 50 percent of so much of such contributions as exceed 1 percent but do not exceed 6 percent of compensation, or

(II) is required, without regard to whether the employee makes an elective contribution or em-

ployee contribution, to make a contribution to a defined contribution plan on behalf of each employee who is not a highly compensated employee and who is eligible to participate in the arrangement in an amount equal to at least 3 percent of the employee's compensation.

(ii) APPLICATION OF RULES FOR MATCHING CONTRIBUTIONS.—The rules of clauses (ii) and (iii) of paragraph (12)(B) shall apply for purposes of clause (i)(I).

(iii) WITHDRAWAL AND VESTING RESTRICTIONS.—An arrangement shall not be treated as meeting the requirements of clause (i) unless, with respect to employer contributions (including matching contributions) taken into account in determining whether the requirements of clause (i) are met—

(I) any employee who has completed at least 2 years of service (within the meaning of section 411(a)) has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from such employer contributions, and

(II) the requirements of subparagraph (B) of paragraph (2) are met with respect to all such employer contributions.

(iv) APPLICATION OF CERTAIN OTHER RULES.—The rules of subparagraphs (E)(ii) and (F) of paragraph (12) shall apply for purposes of subclauses (I) and (II) of clause (i).

(E) NOTICE REQUIREMENTS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if, within a reasonable period before each plan year, each employee eligible to participate in the arrangement for such year receives written notice of the employee's rights and obligations under the arrangement which—

(I) is sufficiently accurate and comprehensive to apprise the employee of such rights and obligations, and

(II) is written in a manner calculated to be understood by the average employee to whom the arrangement applies.

(ii) TIMING AND CONTENT REQUIREMENTS.—A notice shall not be treated as meeting the requirements of clause (i) with respect to an employee unless—

(I) the notice explains the employee's right under the arrangement to elect not to have elective contributions made on the employee's behalf (or to elect to have such contributions made at a different percentage),

(II) in the case of an arrangement under which the employee may elect among 2 or more investment options, the notice explains how contributions made under the arrangement will be invested in the absence of any investment election by the employee, and

(III) the employee has a reasonable period of time after receipt of the notice described in subclauses (I) and (II) and before the first elective contribution is made to make either such election.

(F) TIMING OF PLAN AMENDMENT FOR EMPLOYER MAKING NONELECTIVE CONTRIBUTIONS.—

(i) IN GENERAL.—Except as provided in clause (ii), a plan may be amended after the beginning of a plan year to provide that the requirements of subparagraph (D)(i)(II) shall apply to the arrangement for the plan year, but only if the amendment is adopted—

(I) at any time before the 30th day before the close of the plan year, or

(II) at any time before the last day under paragraph (8)(A) for distributing excess contributions for the plan year.

(ii) EXCEPTION WHERE PLAN PROVIDED FOR MATCHING CONTRIBUTIONS.—Clause (i) shall not apply to any plan year if the plan provided at any time during the plan year that the requirements of subparagraph (D)(i)(I) or paragraph (12)(B) applied to the plan year.

(iii) 4-PERCENT CONTRIBUTION REQUIREMENT.—Clause (i)(II) shall not apply to an arrangement unless the amount of the contributions described in subparagraph (D)(i)(II) which the employer is required to make under the arrangement for the plan year with respect to any employee is an amount equal to at least 4 percent of the employee's compensation.

(14) SPECIAL RULES RELATING TO HARDSHIP WITHDRAWALS.—For purposes of paragraph (2)(B)(i)(IV)—

(A) AMOUNTS WHICH MAY BE WITHDRAWN.—The following amounts may be distributed upon hardship of the employee:

(i) Contributions to a profit-sharing or stock bonus plan to which section 402(e)(3) applies.

(ii) Qualified nonelective contributions (as defined in subsection (m)(4)(C)).

(iii) Qualified matching contributions described in paragraph (3)(D)(ii)(I).

(iv) Earnings on any contributions described in clause (i), (ii), or (iii).

(B) NO REQUIREMENT TO TAKE AVAILABLE LOAN.—A distribution shall not be treated as failing to be made upon the hardship of an employee solely because the employee does not take any available loan under the plan.

(C) EMPLOYEE CERTIFICATION.—*In determining whether a distribution is upon the hardship of an employee, the administrator of the plan may rely on a certification by the employee that the distribution is on account of a financial need of a type that is deemed in regulations prescribed by the Secretary to be an immediate and heavy financial need and that such distribution is not in excess of the amount required to satisfy such financial need.*

(15) SPECIAL RULES FOR PARTICIPATION REQUIREMENT FOR LONG-TERM, PART-TIME WORKERS.—For purposes of paragraph (2)(D)(ii)—

(A) AGE REQUIREMENT MUST BE MET.—Paragraph (2)(D)(ii) shall not apply to an employee unless the employee has met the requirement of section 410(a)(1)(A)(i) by the close of the last of the 12-month periods described in such paragraph.

(B) NONDISCRIMINATION AND TOP-HEAVY RULES NOT TO APPLY.—

(i) NONDISCRIMINATION RULES.—In the case of employees who are eligible to participate in the arrangement solely by reason of paragraph (2)(D)(ii)—

(I) notwithstanding subsection (a)(4), an employer shall not be required to make nonelective or matching contributions on behalf of such employees even if such contributions are made on behalf of other employees eligible to participate in the arrangement, and

(II) an employer may elect to exclude such employees from the application of subsection (a)(4), paragraphs (3), (12), and (13), subsection (m)(2), and section 410(b).

(ii) TOP-HEAVY RULES.—An employer may elect to exclude all employees who are eligible to participate in a plan maintained by the employer solely by reason of paragraph (2)(D)(ii) from the application of the vesting and benefit requirements under subsections (b) and (c) of section 416.

(iii) VESTING.—For purposes of determining whether an employee described in clause (i) has a nonforfeitable right to employer contributions (other than contributions described in paragraph (3)(D)(i)) under the arrangement, each 12-month period for which the employee has at least 500 hours of service shall be treated as a year of service, and section 411(a)(6) shall be applied by substituting “at least 500 hours of service” for “more than 500 hours of service” in subparagraph (A) thereof.

(iv) EMPLOYEES WHO BECOME FULL-TIME EMPLOYEES.—This subparagraph (other than clause (iii)) shall cease to apply to any employee as of the first plan year beginning after the plan year in which the employee meets the requirements of section 410(a)(1)(A)(ii) without regard to paragraph (2)(D)(ii).

(C) EXCEPTION FOR EMPLOYEES UNDER COLLECTIVELY BARGAINED PLANS, ETC.—Paragraph (2)(D)(ii) shall not apply to employees described in section 410(b)(3).

(D) SPECIAL RULES.—

(i) TIME OF PARTICIPATION.—The rules of section 410(a)(4) shall apply to an employee eligible to participate in an arrangement solely by reason of paragraph (2)(D)(ii).

(ii) 12-MONTH PERIODS.—12-month periods shall be determined in the same manner as under the last sentence of section 410(a)(3)(A).

(l) PERMITTED DISPARITY IN PLAN CONTRIBUTIONS OR BENEFITS.—  
(1) IN GENERAL.—The requirements of this subsection are met with respect to a plan if—

(A) in the case of a defined contribution plan, the requirements of paragraph (2) are met, and

(B) in the case of a defined benefit plan, the requirements of paragraph (3) are met.

(2) DEFINED CONTRIBUTION PLAN.—

(A) IN GENERAL.—A defined contribution plan meets the requirements of this paragraph if the excess contribution percentage does not exceed the base contribution percentage by more than the lesser of—

(i) the base contribution percentage, or

(ii) the greater of—

(I) 5.7 percentage points, or

(II) the percentage equal to the portion of the rate of tax under section 3111(a) (in effect as of the beginning of the year) which is attributable to old-age insurance.

(B) CONTRIBUTION PERCENTAGES.—For purposes of this paragraph—

(i) EXCESS CONTRIBUTION PERCENTAGE.—The term “excess contribution percentage” means the percentage of compensation which is contributed by the employer under the plan with respect to that portion of each participant’s compensation in excess of the integration level.

(ii) BASE CONTRIBUTION PERCENTAGE.—The term “base contribution percentage” means the percentage of compensation contributed by the employer under the plan with respect to that portion of each participant’s compensation not in excess of the integration level.

(3) DEFINED BENEFIT PLAN.—A defined benefit plan meets the requirements of this paragraph if—

(A) EXCESS PLANS.—

(i) IN GENERAL.—In the case of a plan other than an offset plan—

(I) the excess benefit percentage does not exceed the base benefit percentage by more than the maximum excess allowance,

(II) any optional form of benefit, preretirement benefit, actuarial factor, or other benefit or feature provided with respect to compensation in excess of the integration level is provided with respect to compensation not in excess of such level, and

(III) benefits are based on average annual compensation.

(ii) BENEFIT PERCENTAGES.—For purposes of this subparagraph, the excess and base benefit percentages shall be computed in the same manner as the excess and base contribution percentages under paragraph

(2)(B), except that such determination shall be made on the basis of benefits attributable to employer contributions rather than contributions.

(B) OFFSET PLANS.—In the case of an offset plan, the plan provides that—

(i) a participant's accrued benefit attributable to employer contributions (within the meaning of section 411(c)(1)) may not be reduced (by reason of the offset) by more than the maximum offset allowance, and

(ii) benefits are based on average annual compensation.

(4) DEFINITIONS RELATING TO PARAGRAPH (3).—For purposes of paragraph (3)—

(A) MAXIMUM EXCESS ALLOWANCE.—The maximum excess allowance is equal to—

(i) in the case of benefits attributable to any year of service with the employer taken into account under the plan,  $\frac{3}{4}$  of a percentage point, and

(ii) in the case of total benefits,  $\frac{3}{4}$  of a percentage point, multiplied by the participant's years of service (not in excess of 35) with the employer taken into account under the plan.

In no event shall the maximum excess allowance exceed the base benefit percentage.

(B) MAXIMUM OFFSET ALLOWANCE.—The maximum offset allowance is equal to—

(i) in the case of benefits attributable to any year of service with the employer taken into account under the plan,  $\frac{3}{4}$  percent of the participant's final average compensation, and

(ii) in the case of total benefits,  $\frac{3}{4}$  percent of the participant's final average compensation, multiplied by the participant's years of service (not in excess of 35) with the employer taken into account under the plan.

In no event shall the maximum offset allowance exceed 50 percent of the benefit which would have accrued without regard to the offset reduction.

(C) REDUCTIONS.—

(i) IN GENERAL.—The Secretary shall prescribe regulations requiring the reduction of the  $\frac{3}{4}$  percentage factor under subparagraph (A) or (B)—

(I) in the case of a plan other than an offset plan which has an integration level in excess of covered compensation, or

(II) with respect to any participant in an offset plan who has final average compensation in excess of covered compensation.

(ii) BASIS OF REDUCTIONS.—Any reductions under clause (i) shall be based on the percentages of compensation replaced by the employer-derived portions of primary insurance amounts under the Social Security Act for participants with compensation in excess of covered compensation.

(D) OFFSET PLAN.—The term "offset plan" means any plan with respect to which the benefit attributable to em-

ployer contributions for each participant is reduced by an amount specified in the plan.

(5) OTHER DEFINITIONS AND SPECIAL RULES.—For purposes of this subsection—

(A) INTEGRATION LEVEL.—

(i) IN GENERAL.—The term “integration level” means the amount of compensation specified under the plan (by dollar amount or formula) at or below which the rate at which contributions or benefits are provided (expressed as a percentage) is less than such rate above such amount.

(ii) LIMITATION.—The integration level for any year may not exceed the contribution and benefit base in effect under section 230 of the Social Security Act for such year.

(iii) LEVEL TO APPLY TO ALL PARTICIPANTS.—A plan’s integration level shall apply with respect to all participants in the plan.

(iv) MULTIPLE INTEGRATION LEVELS.—Under rules prescribed by the Secretary, a defined benefit plan may specify multiple integration levels.

(B) COMPENSATION.—The term “compensation” has the meaning given such term by section 414(s).

(C) AVERAGE ANNUAL COMPENSATION.—The term “average annual compensation” means the participant’s highest average annual compensation for—

(i) any period of at least 3 consecutive years, or

(ii) if shorter, the participant’s full period of service.

(D) FINAL AVERAGE COMPENSATION.—

(i) IN GENERAL.—The term “final average compensation” means the participant’s average annual compensation for—

(I) the 3-consecutive year period ending with the current year, or

(II) if shorter, the participant’s full period of service.

(ii) LIMITATION.—A participant’s final average compensation shall be determined by not taking into account in any year compensation in excess of the contribution and benefit base in effect under section 230 of the Social Security Act for such year.

(E) COVERED COMPENSATION.—

(i) IN GENERAL.—The term “covered compensation” means, with respect to an employee, the average of the contribution and benefit bases in effect under section 230 of the Social Security Act for each year in the 35-year period ending with the year in which the employee attains the social security retirement age.

(ii) COMPUTATION FOR ANY YEAR.—For purposes of clause (i), the determination for any year preceding the year in which the employee attains the social security retirement age shall be made by assuming that there is no increase in the bases described in clause (i) after the determination year and before the employee attains the social security retirement age.

(iii) SOCIAL SECURITY RETIREMENT AGE.—For purposes of this subparagraph, the term “social security retirement age” has the meaning given such term by section 415(b)(8).

(F) REGULATIONS.—The Secretary shall prescribe such regulations as are necessary or appropriate to carry out the purposes of this subsection, including—

(i) in the case of a defined benefit plan which provides for unreduced benefits commencing before the social security retirement age (as defined in section 415(b)(8)), rules providing for the reduction of the maximum excess allowance and the maximum offset allowance, and

(ii) in the case of an employee covered by 2 or more plans of the employer which fail to meet the requirements of subsection (a)(4) (without regard to this subsection), rules preventing the multiple use of the disparity permitted under this subsection with respect to any employee.

For purposes of clause (i), unreduced benefits shall not include benefits for disability (within the meaning of section 223(d) of the Social Security Act).

(6) SPECIAL RULE FOR PLAN MAINTAINED BY RAILROADS.—In determining whether a plan which includes employees of a railroad employer who are entitled to benefits under the Railroad Retirement Act of 1974 meets the requirements of this subsection, rules similar to the rules set forth in this subsection shall apply. Such rules shall take into account the employer-derived portion of the employees’ tier 2 railroad retirement benefits and any supplemental annuity under the Railroad Retirement Act of 1974.

(m) NONDISCRIMINATION TEST FOR MATCHING CONTRIBUTIONS AND EMPLOYEE CONTRIBUTIONS.—

(1) IN GENERAL.—A defined contribution plan shall be treated as meeting the requirements of subsection (a)(4) with respect to the amount of any matching contribution or employee contribution for any plan year only if the contribution percentage requirement of paragraph (2) of this subsection is met for such plan year.

(2) REQUIREMENTS.—

(A) CONTRIBUTION PERCENTAGE REQUIREMENT.—A plan meets the contribution percentage requirement of this paragraph for any plan year only if the contribution percentage for eligible highly compensated employees for such plan year does not exceed the greater of—

(i) 125 percent of such percentage for all other eligible employees for the preceding plan year, or

(ii) the lesser of 200 percent of such percentage for all other eligible employees for the preceding plan year, or such percentage for all other eligible employees for the preceding plan year plus 2 percentage points.

This subparagraph may be applied by using the plan year rather than the preceding plan year if the employer so



elects, except that if such an election is made, it may not be changed except as provided by the Secretary.

(B) MULTIPLE PLANS TREATED AS A SINGLE PLAN.—If two or more plans of an employer to which matching contributions, employee contributions, or elective deferrals are made are treated as one plan for purposes of section 410(b), such plans shall be treated as one plan for purposes of this subsection. If a highly compensated employee participates in two or more plans of an employer to which contributions to which this subsection applies are made, all such contributions shall be aggregated for purposes of this subsection.

(3) CONTRIBUTION PERCENTAGE.—For purposes of paragraph (2), the contribution percentage for a specified group of employees for a plan year shall be the average of the ratios (calculated separately for each employee in such group) of—

(A) the sum of the matching contributions and employee contributions paid under the plan on behalf of each such employee for such plan year, to

(B) the employee's compensation (within the meaning of section 414(s)) for such plan year.

Under regulations, an employer may elect to take into account (in computing the contribution percentage) elective deferrals and qualified nonelective contributions under the plan or any other plan of the employer. If matching contributions are taken into account for purposes of subsection (k)(3)(A)(ii) for any plan year, such contributions shall not be taken into account under subparagraph (A) for such year. Rules similar to the rules of subsection (k)(3)(E) shall apply for purposes of this subsection.

(4) DEFINITIONS.—For purposes of this subsection—

(A) MATCHING CONTRIBUTION.—The term “matching contribution” means—

(i) any employer contribution made to a defined contribution plan on behalf of an employee on account of an employee contribution made by such employee, **[and]**

(ii) any employer contribution made to a defined contribution plan on behalf of an employee on account of an employee's elective deferral~~...~~, and

(iii) *subject to the requirements of paragraph (13), any employer contribution made to a defined contribution plan on behalf of an employee on account of a qualified student loan payment.*

(B) ELECTIVE DEFERRAL.—The term “elective deferral” means any employer contribution described in section 402(g)(3).

(C) QUALIFIED NONELECTIVE CONTRIBUTIONS.—The term “qualified nonelective contribution” means any employer contribution (other than a matching contribution) with respect to which—

(i) the employee may not elect to have the contribution paid to the employee in cash instead of being contributed to the plan, and

(ii) the requirements of subparagraphs (B) and (C) of subsection (k)(2) are met.

(D) **QUALIFIED STUDENT LOAN PAYMENT.**—*The term “qualified student loan payment” means a payment made by an employee in repayment of a qualified education loan (as defined section 221(d)(1)) incurred by the employee to pay qualified higher education expenses, but only—*

*(i) to the extent such payments in the aggregate for the year do not exceed an amount equal to—*

*(I) the limitation applicable under section 402(g) for the year (or, if lesser, the employee’s compensation (as defined in section 415(c)(3)) for the year), reduced by*

*(II) the elective deferrals made by the employee for such year, and*

*(ii) if the employee certifies to the employer making the matching contribution under this paragraph that such payment has been made on such loan.*

*For purposes of this subparagraph, the term “qualified higher education expenses” means the cost of attendance (as defined in section 472 of the Higher Education Act of 1965, as in effect on the day before the date of the enactment of the Taxpayer Relief Act of 1997) at an eligible educational institution (as defined in section 221(d)(2)).*

**(5) EMPLOYEES TAKEN INTO CONSIDERATION.—**

(A) **IN GENERAL.**—Any employee who is eligible to make an employee contribution (or, if the employer takes elective contributions into account, elective contributions) or to receive a matching contribution under the plan being tested under paragraph (1) shall be considered an eligible employee for purposes of this subsection.

(B) **CERTAIN NONPARTICIPANTS.**—If an employee contribution is required as a condition of participation in the plan, any employee who would be a participant in the plan if such employee made such a contribution shall be treated as an eligible employee on behalf of whom no employer contributions are made.

(C) **SPECIAL RULE FOR EARLY PARTICIPATION.**—If an employer elects to apply section 410(b)(4)(B) in determining whether a plan meets the requirements of section 410(b), the employer may, in determining whether the plan meets the requirements of paragraph (2), exclude from consideration all eligible employees (other than highly compensated employees) who have not met the minimum age and service requirements of section 410(a)(1)(A).

**(6) PLAN NOT DISQUALIFIED IF EXCESS AGGREGATE CONTRIBUTIONS DISTRIBUTED BEFORE END OF FOLLOWING PLAN YEAR.—**

(A) **IN GENERAL.**—A plan shall not be treated as failing to meet the requirements of paragraph (1) for any plan year if, before the close of the following plan year, the amount of the excess aggregate contributions for such plan year (and any income allocable to such contributions through the end of such year) is distributed (or, if forfeitable, is forfeited). Such contributions (and such income) may be distributed without regard to any other provision of law.

(B) EXCESS AGGREGATE CONTRIBUTIONS.—For purposes of subparagraph (A), the term “excess aggregate contributions” means, with respect to any plan year, the excess of—

(i) the aggregate amount of the matching contributions and employee contributions (and any qualified nonelective contribution or elective contribution taken into account in computing the contribution percentage) actually made on behalf of highly compensated employees for such plan year, over

(ii) the maximum amount of such contributions permitted under the limitations of paragraph (2)(A) (determined by reducing contributions made on behalf of highly compensated employees in order of their contribution percentages beginning with the highest of such percentages).

(C) METHOD OF DISTRIBUTING EXCESS AGGREGATE CONTRIBUTIONS.—Any distribution of the excess aggregate contributions for any plan year shall be made to highly compensated employees on the basis of the amount of contributions on behalf of, or by, each such employee. Forfeitures of excess aggregate contributions may not be allocated to participants whose contributions are reduced under this paragraph.

(D) COORDINATION WITH SUBSECTION (K) AND 402(G).—The determination of the amount of excess aggregate contributions with respect to a plan shall be made after—

(i) first determining the excess deferrals (within the meaning of section 402(g)), and

(ii) then determining the excess contributions under subsection (k).

(7) TREATMENT OF DISTRIBUTIONS.—

(A) ADDITIONAL TAX OF SECTION 72(T) NOT APPLICABLE.—No tax shall be imposed under section 72(t) on any amount required to be distributed under paragraph (6).

(B) EXCLUSION OF EMPLOYEE CONTRIBUTIONS.—Any distribution attributable to employee contributions shall not be included in gross income except to the extent attributable to income on such contributions.

(8) HIGHLY COMPENSATED EMPLOYEE.—For purposes of this subsection, the term “highly compensated employee” has the meaning given to such term by section 414(q).

(9) REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subsection and subsection (k), including regulations permitting appropriate aggregation of plans and contributions.

(10) ALTERNATIVE METHOD OF SATISFYING TESTS.—A defined contribution plan shall be treated as meeting the requirements of paragraph (2) with respect to matching contributions if the plan—

(A) meets the contribution requirements of subparagraph (B) of subsection (k)(11),

(B) meets the exclusive plan requirements of subsection (k)(11)(C), and

(C) meets the vesting requirements of section 408(p)(3).

(11) ADDITIONAL ALTERNATIVE METHOD OF SATISFYING TESTS.—

(A) IN GENERAL.—A defined contribution plan shall be treated as meeting the requirements of paragraph (2) with respect to matching contributions if the plan—

- (i) meets the contribution requirements of subparagraph (B) or (C) of subsection (k)(12),
- (ii) meets the notice requirements of subsection (k)(12)(D), and
- (iii) meets the requirements of subparagraph (B).

(B) LIMITATION ON MATCHING CONTRIBUTIONS.—The requirements of this subparagraph are met if—

- (i) matching contributions on behalf of any employee may not be made with respect to an employee's contributions or elective deferrals in excess of 6 percent of the employee's compensation,
- (ii) the rate of an employer's matching contribution does not increase as the rate of an employee's contributions or elective deferrals increase, and
- (iii) the matching contribution with respect to any highly compensated employee at any rate of an employee contribution or rate of elective deferral is not greater than that with respect to an employee who is not a highly compensated employee.

(12) ALTERNATIVE METHOD FOR AUTOMATIC CONTRIBUTION ARRANGEMENTS.—A defined contribution plan shall be treated as meeting the requirements of paragraph (2) with respect to matching contributions if the plan—

- (A) is a qualified automatic contribution arrangement (as defined in subsection (k)(13)), and
- (B) meets the requirements of paragraph (11)(B).

(13) MATCHING CONTRIBUTIONS FOR QUALIFIED STUDENT LOAN PAYMENTS.—

(A) IN GENERAL.—*For purposes of paragraph (4)(A)(iii), an employer contribution made to a defined contribution plan on account of a qualified student loan payment shall be treated as a matching contribution for purposes of this title if—*

- (i) the plan provides matching contributions on account of elective deferrals at the same rate as contributions on account of qualified student loan payments,*
- (ii) the plan provides matching contributions on account of qualified student loan payments only on behalf of employees otherwise eligible to receive matching contributions on account of elective deferrals,*
- (iii) under the plan, all employees eligible to receive matching contributions on account of elective deferrals are eligible to receive matching contributions on account of qualified student loan payments, and*
- (iv) the plan provides that matching contributions on account of qualified student loan payments vest in the same manner as matching contributions on account of elective deferrals.*

(B) TREATMENT FOR PURPOSES OF NONDISCRIMINATION RULES, ETC.—

(i) *NONDISCRIMINATION RULES.*—For purposes of subparagraph (A)(iii), subsection (a)(4), and section 410(b), matching contributions described in paragraph (4)(A)(iii) shall not fail to be treated as available to an employee solely because such employee does not have debt incurred under a qualified education loan (as defined in section 221(d)(1)).

(ii) *STUDENT LOAN PAYMENTS NOT TREATED AS PLAN CONTRIBUTION.*—Except as provided in clause (iii), a qualified student loan payment shall not be treated as a contribution to a plan under this title.

(iii) *MATCHING CONTRIBUTION RULES.*—Solely for purposes of meeting the requirements of paragraph (11)(B) or (12) of this subsection, or paragraph (11)(B)(i)(II), (12)(B), or (13)(D) of subsection (k), a plan may treat a qualified student loan payment as an elective deferral or an elective contribution, whichever is applicable.

(iv) *ACTUAL DEFERRAL PERCENTAGE TESTING.*—In determining whether a plan meets the requirements of subsection (k)(3)(A)(ii) for a plan year, the plan may apply the requirements of such subsection separately with respect to all employees who receive matching contributions described in paragraph (4)(A)(iii) for the plan year.

(C) *EMPLOYER MAY RELY ON EMPLOYEE CERTIFICATION.*—The employer may rely on an employee certification of payment under paragraph (4)(D)(ii).

[(13)] (14) *CROSS REFERENCE.*—For excise tax on certain excess contributions, see section 4979.

(n) *COORDINATION WITH QUALIFIED DOMESTIC RELATIONS ORDERS.*—The Secretary shall prescribe such rules or regulations as may be necessary to coordinate the requirements of subsection (a)(13)(B) and section 414(p) (and the regulations issued by the Secretary of Labor thereunder) with the other provisions of this chapter.

(o) *SPECIAL RULES FOR APPLYING NONDISCRIMINATION RULES TO PROTECT OLDER, LONGER SERVICE AND GRANDFATHERED PARTICIPANTS.*—

(1) *TESTING OF DEFINED BENEFIT PLANS WITH CLOSED CLASSES OF PARTICIPANTS.*—

(A) *BENEFITS, RIGHTS, OR FEATURES PROVIDED TO CLOSED CLASSES.*—A defined benefit plan which provides benefits, rights, or features to a closed class of participants shall not fail to satisfy the requirements of subsection (a)(4) by reason of the composition of such closed class or the benefits, rights, or features provided to such closed class, if—

(i) for the plan year as of which the class closes and the 2 succeeding plan years, such benefits, rights, and features satisfy the requirements of subsection (a)(4) (without regard to this subparagraph but taking into account the rules of subparagraph (I)),

(ii) after the date as of which the class was closed, any plan amendment which modifies the closed class or the benefits, rights, and features provided to such

closed class does not discriminate significantly in favor of highly compensated employees, and

(iii) the class was closed before April 5, 2017, or the plan is described in subparagraph (C).

(B) AGGREGATE TESTING WITH DEFINED CONTRIBUTION PLANS PERMITTED ON A BENEFITS BASIS.—

(i) IN GENERAL.—For purposes of determining compliance with subsection (a)(4) and section 410(b), a defined benefit plan described in clause (iii) may be aggregated and tested on a benefits basis with 1 or more defined contribution plans, including with the portion of 1 or more defined contribution plans which—

(I) provides matching contributions (as defined in subsection (m)(4)(A)),

(II) provides annuity contracts described in section 403(b) which are purchased with matching contributions or nonelective contributions, or

(III) consists of an employee stock ownership plan (within the meaning of section 4975(e)(7)) or a tax credit employee stock ownership plan (within the meaning of section 409(a)).

(ii) SPECIAL RULES FOR MATCHING CONTRIBUTIONS.—For purposes of clause (i), if a defined benefit plan is aggregated with a portion of a defined contribution plan providing matching contributions—

(I) such defined benefit plan must also be aggregated with any portion of such defined contribution plan which provides elective deferrals described in subparagraph (A) or (C) of section 402(g)(3), and

(II) such matching contributions shall be treated in the same manner as nonelective contributions, including for purposes of applying the rules of subsection (I).

(iii) PLANS DESCRIBED.—A defined benefit plan is described in this clause if—

(I) the plan provides benefits to a closed class of participants,

(II) for the plan year as of which the class closes and the 2 succeeding plan years, the plan satisfies the requirements of section 410(b) and subsection (a)(4) (without regard to this subparagraph but taking into account the rules of subparagraph (I)),

(III) after the date as of which the class was closed, any plan amendment which modifies the closed class or the benefits provided to such closed class does not discriminate significantly in favor of highly compensated employees, and

(IV) the class was closed before April 5, 2017, or the plan is described in subparagraph (C).

(C) PLANS DESCRIBED.—A plan is described in this subparagraph if, taking into account any predecessor plan—

(i) such plan has been in effect for at least 5 years as of the date the class is closed, and

(ii) during the 5-year period preceding the date the class is closed, there has not been a substantial increase in the coverage or value of the benefits, rights, or features described in subparagraph (A) or in the coverage or benefits under the plan described in subparagraph (B)(iii) (whichever is applicable).

(D) DETERMINATION OF SUBSTANTIAL INCREASE FOR BENEFITS, RIGHTS, AND FEATURES.—In applying subparagraph (C)(ii) for purposes of subparagraph (A)(iii), a plan shall be treated as having had a substantial increase in coverage or value of the benefits, rights, or features described in subparagraph (A) during the applicable 5-year period only if, during such period—

(i) the number of participants covered by such benefits, rights, or features on the date such period ends is more than 50 percent greater than the number of such participants on the first day of the plan year in which such period began, or

(ii) such benefits, rights, and features have been modified by 1 or more plan amendments in such a way that, as of the date the class is closed, the value of such benefits, rights, and features to the closed class as a whole is substantially greater than the value as of the first day of such 5-year period, solely as a result of such amendments.

(E) DETERMINATION OF SUBSTANTIAL INCREASE FOR AGGREGATE TESTING ON BENEFITS BASIS.—In applying subparagraph (C)(ii) for purposes of subparagraph (B)(iii)(IV), a plan shall be treated as having had a substantial increase in coverage or benefits during the applicable 5-year period only if, during such period—

(i) the number of participants benefitting under the plan on the date such period ends is more than 50 percent greater than the number of such participants on the first day of the plan year in which such period began, or

(ii) the average benefit provided to such participants on the date such period ends is more than 50 percent greater than the average benefit provided on the first day of the plan year in which such period began.

(F) CERTAIN EMPLOYEES DISREGARDED.—For purposes of subparagraphs (D) and (E), any increase in coverage or value or in coverage or benefits, whichever is applicable, which is attributable to such coverage and value or coverage and benefits provided to employees—

(i) who became participants as a result of a merger, acquisition, or similar event which occurred during the 7-year period preceding the date the class is closed, or

(ii) who became participants by reason of a merger of the plan with another plan which had been in effect for at least 5 years as of the date of the merger, shall be disregarded, except that clause (ii) shall apply for purposes of subparagraph (D) only if, under the merger, the benefits, rights, or features under 1 plan are con-

formed to the benefits, rights, or features of the other plan prospectively.

(G) RULES RELATING TO AVERAGE BENEFIT.—For purposes of subparagraph (E)—

(i) the average benefit provided to participants under the plan will be treated as having remained the same between the 2 dates described in subparagraph (E)(ii) if the benefit formula applicable to such participants has not changed between such dates, and

(ii) if the benefit formula applicable to 1 or more participants under the plan has changed between such 2 dates, then the average benefit under the plan shall be considered to have increased by more than 50 percent only if—

(I) the total amount determined under section 430(b)(1)(A)(i) for all participants benefitting under the plan for the plan year in which the 5-year period described in subparagraph (E) ends, exceeds

(II) the total amount determined under section 430(b)(1)(A)(i) for all such participants for such plan year, by using the benefit formula in effect for each such participant for the first plan year in such 5-year period,

by more than 50 percent. In the case of a CSEC plan (as defined in section 414(y)), the normal cost of the plan (as determined under section 433(j)(1)(B)) shall be used in lieu of the amount determined under section 430(b)(1)(A)(i).

(H) TREATMENT AS SINGLE PLAN.—For purposes of subparagraphs (E) and (G), a plan described in section 413(c) shall be treated as a single plan rather than as separate plans maintained by each employer in the plan.

(I) SPECIAL RULES.—For purposes of subparagraphs (A)(i) and (B)(iii)(II), the following rules shall apply:

(i) In applying section 410(b)(6)(C), the closing of the class of participants shall not be treated as a significant change in coverage under section 410(b)(6)(C)(i)(II).

(ii) 2 or more plans shall not fail to be eligible to be aggregated and treated as a single plan solely by reason of having different plan years.

(iii) Changes in the employee population shall be 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.

(iv) Aggregation and all other testing methodologies otherwise applicable under subsection (a)(4) and section 410(b) may be taken into account.

The rule of clause (ii) shall also apply for purposes of determining whether plans to which subparagraph (B)(i) applies may be aggregated and treated as 1 plan for purposes of determining whether such plans meet the requirements of subsection (a)(4) and section 410(b).



(J) SPUN-OFF PLANS.—For purposes of this paragraph, if a portion of a defined benefit plan described in subparagraph (A) or (B)(iii) is spun off to another employer and the spun-off plan continues to satisfy the requirements of—

(i) subparagraph (A)(i) or (B)(iii)(II), whichever is applicable, if the original plan was still within the 3-year period described in such subparagraph at the time of the spin off, and

(ii) subparagraph (A)(ii) or (B)(iii)(III), whichever is applicable,

the treatment under subparagraph (A) or (B) of the spun-off plan shall continue with respect to such other employer.

(2) TESTING OF DEFINED CONTRIBUTION PLANS.—

(A) TESTING ON A BENEFITS BASIS.—A defined contribution plan shall be permitted to be tested on a benefits basis if—

(i) such defined contribution plan provides make-whole contributions to a closed class of participants whose accruals under a defined benefit plan have been reduced or eliminated,

(ii) for the plan year of the defined contribution plan as of which the class eligible to receive such make-whole contributions closes and the 2 succeeding plan years, such closed class of participants satisfies the requirements of section 410(b)(2)(A)(i) (determined by applying the rules of paragraph (1)(I)),

(iii) after the date as of which the class was closed, any plan amendment to the defined contribution plan which modifies the closed class or the allocations, benefits, rights, and features provided to such closed class does not discriminate significantly in favor of highly compensated employees, and

(iv) the class was closed before April 5, 2017, or the defined benefit plan under clause (i) is described in paragraph (1)(C) (as applied for purposes of paragraph (1)(B)(iii)(IV)).

(B) AGGREGATION WITH PLANS INCLUDING MATCHING CONTRIBUTIONS.—

(i) IN GENERAL.—With respect to 1 or more defined contribution plans described in subparagraph (A), for purposes of determining compliance with subsection (a)(4) and section 410(b), the portion of such plans which provides make-whole contributions or other nonelective contributions may be aggregated and tested on a benefits basis with the portion of 1 or more other defined contribution plans which—

(I) provides matching contributions (as defined in subsection (m)(4)(A)),

(II) provides annuity contracts described in section 403(b) which are purchased with matching contributions or nonelective contributions, or

(III) consists of an employee stock ownership plan (within the meaning of section 4975(e)(7)) or

a tax credit employee stock ownership plan (within the meaning of section 409(a)).

(ii) SPECIAL RULES FOR MATCHING CONTRIBUTIONS.—Rules similar to the rules of paragraph (1)(B)(ii) shall apply for purposes of clause (i).

(C) SPECIAL RULES FOR TESTING DEFINED CONTRIBUTION PLAN FEATURES PROVIDING MATCHING CONTRIBUTIONS TO CERTAIN OLDER, LONGER SERVICE PARTICIPANTS.—In the case of a defined contribution plan which 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 shall not fail to satisfy the requirements of subsection (a)(4) solely by reason of the composition of the closed class or the benefits, rights, or features provided to such closed class if the defined contribution plan and defined benefit plan otherwise meet the requirements of subparagraph (A) but for the fact that the make-whole contributions under the defined contribution plan are made in whole or in part through matching contributions.

(D) SPUN-OFF PLANS.—For purposes of this paragraph, if a portion of a defined contribution plan described in subparagraph (A) or (C) is spun off to another employer, the treatment under subparagraph (A) or (C) of the spun-off plan shall continue with respect to the other employer if such plan continues to comply with the requirements of clauses (ii) (if the original plan was still within the 3-year period described in such clause at the time of the spin off) and (iii) of subparagraph (A), as determined for purposes of subparagraph (A) or (C), whichever is applicable.

(3) DEFINITIONS AND SPECIAL RULE.—For purposes of this subsection—

(A) MAKE-WHOLE CONTRIBUTIONS.—Except as otherwise provided in paragraph (2)(C), the term “make-whole contributions” means nonelective allocations for each employee in the class which are reasonably calculated, in a consistent manner, to replace some or all of the retirement benefits which the employee would have received under the defined benefit plan and any other plan or qualified cash or deferred arrangement under subsection (k)(2) if no change had been made to such defined benefit plan and such other plan or arrangement. For purposes of the preceding sentence, consistency shall not be required with respect to employees who were subject to different benefit formulas under the defined benefit plan.

(B) REFERENCES TO CLOSED CLASS OF PARTICIPANTS.—References to a closed class of participants and similar references to a closed class shall include arrangements under which 1 or more classes of participants are closed, except that 1 or more classes of participants closed on different dates shall not be aggregated for purposes of determining the date any such class was closed.

(C) HIGHLY COMPENSATED EMPLOYEE.—The term “highly compensated employee” has the meaning given such term in section 414(q).

(p) CROSS REFERENCE.—For exemption from tax of a trust qualified under this section, see section 501(a).

**SEC. 402. TAXABILITY OF BENEFICIARY OF EMPLOYEES' TRUST.**

(a) TAXABILITY OF BENEFICIARY OF EXEMPT TRUST.—Except as otherwise provided in this section, any amount actually distributed to any distributee by any employees' trust described in section 401(a) which is exempt from tax under section 501(a) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, under section 72 (relating to annuities).

(b) TAXABILITY OF BENEFICIARY OF NONEXEMPT TRUST.—

(1) CONTRIBUTIONS.—Contributions to an employees' trust made by an employer during a taxable year of the employer which ends with or within a taxable year of the trust for which the trust is not exempt from tax under section 501(a) shall be included in the gross income of the employee in accordance with section 83 (relating to property transferred in connection with performance of services), except that the value of the employee's interest in the trust shall be substituted for the fair market value of the property for purposes of applying such section.

(2) DISTRIBUTIONS.—The amount actually distributed or made available to any distributee by any trust described in paragraph (1) shall be taxable to the distributee, in the taxable year in which so distributed or made available, under section 72 (relating to annuities), except that distributions of income of such trust before the annuity starting date (as defined in section 72(c)(4)) shall be included in the gross income of the employee without regard to section 72(e)(5) (relating to amounts not received as annuities).

(3) GRANTOR TRUSTS.—A beneficiary of any trust described in paragraph (1) shall not be considered the owner of any portion of such trust under subpart E of part I of subchapter J (relating to grantors and others treated as substantial owners).

(4) FAILURE TO MEET REQUIREMENTS OF SECTION 410(B).—

(A) HIGHLY COMPENSATED EMPLOYEES.—If 1 of the reasons a trust is not exempt from tax under section 501(a) is the failure of the plan of which it is a part to meet the requirements of section 401(a)(26) or 410(b), then a highly compensated employee shall, in lieu of the amount determined under paragraph (1) or (2) include in gross income for the taxable year with or within which the taxable year of the trust ends an amount equal to the vested accrued benefit of such employee (other than the employee's investment in the contract) as of the close of such taxable year of the trust.

(B) FAILURE TO MEET COVERAGE TESTS.—If a trust is not exempt from tax under section 501(a) for any taxable year solely because such trust is part of a plan which fails to meet the requirements of section 401(a)(26) or 410(b), paragraphs (1) and (2) shall not apply by reason of such failure to any employee who was not a highly compensated employee during—

- (i) such taxable year, or
- (ii) any preceding period for which service was creditable to such employee under the plan.

- (C) HIGHLY COMPENSATED EMPLOYEE.—For purposes of this paragraph, the term “highly compensated employee” has the meaning given such term by section 414(q).
- (c) RULES APPLICABLE TO ROLLOVERS FROM EXEMPT TRUSTS.—
- (1) EXCLUSION FROM INCOME.—If—
- (A) any portion of the balance to the credit of an employee in a qualified trust is paid to the employee in an eligible rollover distribution,
- (B) the distributee transfers any portion of the property received in such distribution to an eligible retirement plan, and
- (C) in the case of a distribution of property other than money, the amount so transferred consists of the property distributed,
- then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.
- (2) MAXIMUM AMOUNT WHICH MAY BE ROLLED OVER.—In the case of any eligible rollover distribution, the maximum amount transferred to which paragraph (1) applies shall not exceed the portion of such distribution which is includible in gross income (determined without regard to paragraph (1)). The preceding sentence shall not apply to such distribution to the extent—
- (A) such portion is transferred in a direct trustee-to-trustee transfer to a qualified trust or to an annuity contract described in section 403(b) and such trust or contract provides for separate accounting for amounts so transferred (and earnings thereon), including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible, or
- (B) such portion is transferred to an eligible retirement plan described in clause (i) or (ii) of paragraph (8)(B).
- In the case of a transfer described in subparagraph (A) or (B), the amount transferred shall be treated as consisting first of the portion of such distribution that is includible in gross income (determined without regard to paragraph (1)).
- (3) TIME LIMIT ON TRANSFERS.—
- (A) IN GENERAL.—Except as provided in subparagraphs (B) and (C), paragraph (1) shall not apply to any transfer of a distribution made after the 60th day following the day on which the distributee received the property distributed.
- (B) HARDSHIP EXCEPTION.—The Secretary may waive the 60-day requirement under subparagraph (A) where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement.
- (C) ROLLOVER OF CERTAIN PLAN LOAN OFFSET AMOUNTS.—
- (i) IN GENERAL.—In the case of a qualified plan loan offset amount, paragraph (1) shall not apply to any transfer of such amount made after the due date (including extensions) for filing the return of tax for the

taxable year in which such amount is treated as distributed from a qualified employer plan.

(ii) **QUALIFIED PLAN LOAN OFFSET AMOUNT.**—For purposes of this subparagraph, the term “qualified plan loan offset amount” means a plan loan offset amount which is treated as distributed from a qualified employer plan to a participant or beneficiary solely by reason of—

(I) the termination of the qualified employer plan, or

(II) the failure to meet the repayment terms of the loan from such plan because of the severance from employment of the participant.

(iii) **PLAN LOAN OFFSET AMOUNT.**—For purposes of clause (ii), the term “plan loan offset amount” means the amount by which the participant’s accrued benefit under the plan is reduced in order to repay a loan from the plan.

(iv) **LIMITATION.**—This subparagraph shall not apply to any plan loan offset amount unless such plan loan offset amount relates to a loan to which section 72(p)(1) does not apply by reason of section 72(p)(2).

(v) **QUALIFIED EMPLOYER PLAN.**—For purposes of this subsection, the term “qualified employer plan” has the meaning given such term by section 72(p)(4).

(4) **ELIGIBLE ROLLOVER DISTRIBUTION.**—For purposes of this subsection, the term “eligible rollover distribution” means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust; except that such term shall not include—

(A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made—

(i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the employee’s designated beneficiary, or

(ii) for a specified period of 10 years or more,

(B) any distribution to the extent such distribution is required under section 401(a)(9), and

(C) any distribution which is made upon hardship of the employee.

If all or any portion of a distribution during 2020 is treated as an eligible rollover distribution but would not be so treated if the minimum distribution requirements under section 401(a)(9) had applied during 2020, such distribution shall not be treated as an eligible rollover distribution for purposes of section 401(a)(31) or 3405(c) or subsection (f) of this section.

(5) **TRANSFER TREATED AS ROLLOVER CONTRIBUTION UNDER SECTION 408.**—For purposes of this title, a transfer to an eligible retirement plan described in clause (i) or (ii) of paragraph (8)(B) resulting in any portion of a distribution being excluded from gross income under paragraph (1) shall be treated as a rollover contribution described in section 408(d)(3).

(6) **SALES OF DISTRIBUTED PROPERTY.**—For purposes of this subsection—

(A) TRANSFER OF PROCEEDS FROM SALE OF DISTRIBUTED PROPERTY TREATED AS TRANSFER OF DISTRIBUTED PROPERTY.—The transfer of an amount equal to any portion of the proceeds from the sale of property received in the distribution shall be treated as the transfer of property received in the distribution.

(B) PROCEEDS ATTRIBUTABLE TO INCREASE IN VALUE.—The excess of fair market value of property on sale over its fair market value on distribution shall be treated as property received in the distribution.

(C) DESIGNATION WHERE AMOUNT OF DISTRIBUTION EXCEEDS ROLLOVER CONTRIBUTION.—In any case where part or all of the distribution consists of property other than money—

- (i) the portion of the money or other property which is to be treated as attributable to amounts not included in gross income, and
- (ii) the portion of the money or other property which is to be treated as included in the rollover contribution,

shall be determined on a ratable basis unless the taxpayer designates otherwise. Any designation under this subparagraph for a taxable year shall be made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof). Any such designation, once made, shall be irrevocable.

(D) NONRECOGNITION OF GAIN OR LOSS.—No gain or loss shall be recognized on any sale described in subparagraph (A) to the extent that an amount equal to the proceeds is transferred pursuant to paragraph (1).

(7) SPECIAL RULE FOR FROZEN DEPOSITS.—

(A) IN GENERAL.—The 60-day period described in paragraph (3) shall not—

- (i) include any period during which the amount transferred to the employee is a frozen deposit, or
- (ii) end earlier than 10 days after such amount ceases to be a frozen deposit.

(B) FROZEN DEPOSITS.—For purposes of this subparagraph, the term “frozen deposit” means any deposit which may not be withdrawn because of—

- (i) the bankruptcy or insolvency of any financial institution, or
- (ii) any requirement imposed by the State in which such institution is located by reason of the bankruptcy or insolvency (or threat thereof) of 1 or more financial institutions in such State.

A deposit shall not be treated as a frozen deposit unless on at least 1 day during the 60-day period described in paragraph (3) (without regard to this paragraph) such deposit is described in the preceding sentence.

(8) DEFINITIONS.—For purposes of this subsection—

(A) QUALIFIED TRUST.—The term “qualified trust” means an employees’ trust described in section 401(a) which is exempt from tax under section 501(a).

(B) ELIGIBLE RETIREMENT PLAN.—The term “eligible retirement plan” means—

- (i) an individual retirement account described in section 408(a),
- (ii) an individual retirement annuity described in section 408(b) (other than an endowment contract),
- (iii) a qualified trust,
- (iv) an annuity plan described in section 403(a),
- (v) an eligible deferred compensation plan described in section 457(b) which is maintained by an eligible employer described in section 457(e)(1)(A), and
- (vi) an annuity contract described in section 403(b).

If any portion of an eligible rollover distribution is attributable to payments or distributions from a designated Roth account (as defined in section 402A), an eligible retirement plan with respect to such portion shall include only another designated Roth account and a Roth IRA.

(9) ROLLOVER WHERE SPOUSE RECEIVES DISTRIBUTION AFTER DEATH OF EMPLOYEE.—If any distribution attributable to an employee is paid to the spouse of the employee after the employee’s death, the preceding provisions of this subsection shall apply to such distribution in the same manner as if the spouse were the employee.

(10) SEPARATE ACCOUNTING.—Unless a plan described in clause (v) of paragraph (8)(B) agrees to separately account for amounts rolled into such plan from eligible retirement plans not described in such clause, the plan described in such clause may not accept transfers or rollovers from such retirement plans.

(11) DISTRIBUTIONS TO INHERITED INDIVIDUAL RETIREMENT PLAN OF NONSPOUSE BENEFICIARY.—

(A) IN GENERAL.—If, with respect to any portion of a distribution from an eligible retirement plan described in paragraph (8)(B)(iii) of a deceased employee, a direct trustee-to-trustee transfer is made to an individual retirement plan described in clause (i) or (ii) of paragraph (8)(B) established for the purposes of receiving the distribution on behalf of an individual who is a designated beneficiary (as defined by section 401(a)(9)(E)) of the employee and who is not the surviving spouse of the employee—

- (i) the transfer shall be treated as an eligible rollover distribution,
- (ii) the individual retirement plan shall be treated as an inherited individual retirement account or individual retirement annuity (within the meaning of section 408(d)(3)(C)) for purposes of this title, and
- (iii) section 401(a)(9)(B) (other than clause (iv) thereof) shall apply to such plan.

(B) CERTAIN TRUSTS TREATED AS BENEFICIARIES.—For purposes of this paragraph, to the extent provided in rules prescribed by the Secretary, a trust maintained for the benefit of one or more designated beneficiaries shall be treated in the same manner as a designated beneficiary.

(12) *In the case of an inadvertent benefit overpayment from a plan to which section 414(bb)(1) applies which is transferred*

to an eligible retirement plan by or on behalf of a participant or beneficiary—

(A) the portion of such overpayment with respect to which recoupment is not sought on behalf of the plan shall be treated as having been paid in an eligible rollover distribution if the payment would have been an eligible rollover distribution but for being an overpayment, and

(B) the portion of such overpayment with respect to which recoupment is sought on behalf of the plan shall be permitted to be returned to such plan and in such case shall be treated as an eligible rollover distribution transferred to such plan by the participant or beneficiary who received such overpayment (and the plans making and receiving such transfer shall be treated as permitting such transfer).

In any case in which recoupment is sought on behalf of the plan but is disputed by the participant or beneficiary who received such overpayment, such dispute shall be subject to the claims and appeals procedures of the plan that made such overpayment, such plan shall notify the plan receiving the rollover of such dispute, and the plan receiving the rollover shall retain such overpayment on behalf of the participant or beneficiary (and shall be entitled to treat such overpayment as plan assets) pending the outcome of such procedures.

(d) TAXABILITY OF BENEFICIARY OF CERTAIN FOREIGN SITUS TRUSTS.—For purposes of subsections (a), (b), and (c), a stock bonus, pension, or profit-sharing trust which would qualify for exemption from tax under section 501(a) except for the fact that it is a trust created or organized outside the United States shall be treated as if it were a trust exempt from tax under section 501(a).

(e) OTHER RULES APPLICABLE TO EXEMPT TRUSTS.—

(1) ALTERNATE PAYEES.—

(A) ALTERNATE PAYEE TREATED AS DISTRIBUTE.—For purposes of subsection (a) and section 72, an alternate payee who is the spouse or former spouse of the participant shall be treated as the distributee of any distribution or payment made to the alternate payee under a qualified domestic relations order (as defined in section 414(p)).

(B) ROLLOVERS.—If any amount is paid or distributed to an alternate payee who is the spouse or former spouse of the participant by reason of any qualified domestic relations order (within the meaning of section 414(p)), subsection (c) shall apply to such distribution in the same manner as if such alternate payee were the employee.

(2) DISTRIBUTIONS BY UNITED STATES TO NONRESIDENT ALIENS.—The amount includible under subsection (a) in the gross income of a nonresident alien with respect to a distribution made by the United States in respect of services performed by an employee of the United States shall not exceed an amount which bears the same ratio to the amount includible in gross income without regard to this paragraph as—

(A) the aggregate basic pay paid by the United States to such employee for such services, reduced by the amount of such basic pay which was not includible in gross income by reason of being from sources without the United States, bears to



(B) the aggregate basic pay paid by the United States to such employee for such services.

In the case of distributions under the civil service retirement laws, the term "basic pay" shall have the meaning provided in section 8331(3) of title 5, United States Code.

(3) CASH OR DEFERRED ARRANGEMENTS.—For purposes of this title, contributions made by an employer on behalf of an employee to a trust which is a part of a qualified cash or deferred arrangement (as defined in section 401(k)(2)) or which is part of a salary reduction agreement under section 403(b) shall not be treated as distributed or made available to the employee nor as contributions made to the trust by the employee merely because the arrangement includes provisions under which the employee has an election whether the contribution will be made to the trust or received by the employee in cash.

(4) NET UNREALIZED APPRECIATION.—

(A) AMOUNTS ATTRIBUTABLE TO EMPLOYEE CONTRIBUTIONS.—For purposes of subsection (a) and section 72, in the case of a distribution other than a lump sum distribution, the amount actually distributed to any distributee from a trust described in subsection (a) shall not include any net unrealized appreciation in securities of the employer corporation attributable to amounts contributed by the employee (other than deductible employee contributions within the meaning of section 72(o)(5)). This subparagraph shall not apply to a distribution to which subsection (c) applies.

(B) AMOUNTS ATTRIBUTABLE TO EMPLOYER CONTRIBUTIONS.—For purposes of subsection (a) and section 72, in the case of any lump sum distribution which includes securities of the employer corporation, there shall be excluded from gross income the net unrealized appreciation attributable to that part of the distribution which consists of securities of the employer corporation. In accordance with rules prescribed by the Secretary, a taxpayer may elect, on the return of tax on which a lump sum distribution is required to be included, not to have this subparagraph apply to such distribution.

(C) DETERMINATION OF AMOUNTS AND ADJUSTMENTS.—For purposes of subparagraphs (A) and (B), net unrealized appreciation and the resulting adjustments to basis shall be determined in accordance with regulations prescribed by the Secretary.

(D) LUMP-SUM DISTRIBUTION.—For purposes of this paragraph—

(i) IN GENERAL.—The term "lump-sum distribution" means the distribution or payment within one taxable year of the recipient of the balance to the credit of an employee which becomes payable to the recipient—

- (I) on account of the employee's death,
- (II) after the employee attains age 59½,
- (III) on account of the employee's separation from service, or
- (IV) after the employee has become disabled (within the meaning of section 72(m)(7)),

from a trust which forms a part of a plan described in section 401(a) and which is exempt from tax under section 501 or from a plan described in section 403(a). Subclause (III) of this clause shall be applied only with respect to an individual who is an employee without regard to section 401(c)(1), and subclause (IV) shall be applied only with respect to an employee within the meaning of section 401(c)(1). For purposes of this clause, a distribution to two or more trusts shall be treated as a distribution to one recipient. For purposes of this paragraph, the balance to the credit of the employee does not include the accumulated deductible employee contributions under the plan (within the meaning of section 72(o)(5)).

(ii) AGGREGATION OF CERTAIN TRUSTS AND PLANS.—For purposes of determining the balance to the credit of an employee under clause (i)—

(I) all trusts which are part of a plan shall be treated as a single trust, all pension plans maintained by the employer shall be treated as a single plan, all profit-sharing plans maintained by the employer shall be treated as a single plan, and all stock bonus plans maintained by the employer shall be treated as a single plan, and

(II) trusts which are not qualified trusts under section 401(a) and annuity contracts which do not satisfy the requirements of section 404(a)(2) shall not be taken into account.

(iii) COMMUNITY PROPERTY LAWS.—The provisions of this paragraph shall be applied without regard to community property laws.

(iv) AMOUNTS SUBJECT TO PENALTY.—This paragraph shall not apply to amounts described in subparagraph (A) of section 72(m)(5) to the extent that section 72(m)(5) applies to such amounts.

(v) BALANCE TO CREDIT OF EMPLOYEE NOT TO INCLUDE AMOUNTS PAYABLE UNDER QUALIFIED DOMESTIC RELATIONS ORDER.—For purposes of this paragraph, the balance to the credit of an employee shall not include any amount payable to an alternate payee under a qualified domestic relations order (within the meaning of section 414(p)).

(vi) TRANSFERS TO COST-OF-LIVING ARRANGEMENT NOT TREATED AS DISTRIBUTION.—For purposes of this paragraph, the balance to the credit of an employee under a defined contribution plan shall not include any amount transferred from such defined contribution plan to a qualified cost-of-living arrangement (within the meaning of section 415(k)(2)) under a defined benefit plan.

(vii) LUMP-SUM DISTRIBUTIONS OF ALTERNATE PAYEES.—If any distribution or payment of the balance to the credit of an employee would be treated as a lump-sum distribution, then, for purposes of this paragraph, the payment under a qualified domestic relations order (within the meaning of section 414(p)) of the bal-

ance to the credit of an alternate payee who is the spouse or former spouse of the employee shall be treated as a lump-sum distribution. For purposes of this clause, the balance to the credit of the alternate payee shall not include any amount payable to the employee.

(E) DEFINITIONS RELATING TO SECURITIES.—For purposes of this paragraph—

(i) SECURITIES.—The term “securities” means only shares of stock and bonds or debentures issued by a corporation with interest coupons or in registered form.

(ii) SECURITIES OF THE EMPLOYER.—The term “securities of the employer corporation” includes securities of a parent or subsidiary corporation (as defined in subsections (e) and (f) of section 424) of the employer corporation.

(6) DIRECT TRUSTEE-TO-TRUSTEE ~~【TRANSFERS.—】~~ *TRANSFERS.—【Any】*

(A) *IN GENERAL.*—Any amount transferred in a direct trustee-to-trustee transfer in accordance with section 401(a)(31) shall not be includible in gross income for the taxable year of such transfer.

(B) *NOTIFICATION OF TRUSTEE.*—*In the case of a distribution under section 401(a)(31)(B), the plan administrator shall notify the designated trustee or issuer described in clause (i) thereof that the transfer is a mandatory distribution required by such section.*

(f) WRITTEN EXPLANATION TO RECIPIENTS OF DISTRIBUTIONS ELIGIBLE FOR ROLLOVER TREATMENT.—

(1) *IN GENERAL.*—The plan administrator of any plan shall, within a reasonable period of time before making an eligible rollover distribution, provide a written explanation to the recipient—

(A) of the provisions under which the recipient may have the distribution directly transferred to an eligible retirement plan and that the automatic distribution by direct transfer applies to certain distributions in accordance with section 401(a)(31)(B),

(B) of the provision which requires the withholding of tax on the distribution if it is not directly transferred to an eligible retirement plan,

(C) of the provisions under which the distribution will not be subject to tax if transferred to an eligible retirement plan within 60 days after the date on which the recipient received the distribution,

(D) if applicable, of the provisions of subsections (d) and (e) of this section, and

(E) of the provisions under which distributions from the eligible retirement plan receiving the distribution may be subject to restrictions and tax consequences which are different from those applicable to distributions from the plan making such distribution.

(2) DEFINITIONS.—For purposes of this subsection—

(A) **ELIGIBLE ROLLOVER DISTRIBUTION.**—The term “eligible rollover distribution” has the same meaning as when used in subsection (c) of this section, paragraph (4) of section 403(a), subparagraph (A) of section 403(b)(8), or subparagraph (A) of section 457(e)(16). Such term shall include any distribution to a designated beneficiary which would be treated as an eligible rollover distribution by reason of subsection (c)(11), or section 403(a)(4)(B), 403(b)(8)(B), or 457(e)(16)(B), if the requirements of subsection (c)(11) were satisfied.

(B) **ELIGIBLE RETIREMENT PLAN.**—The term “eligible retirement plan” has the meaning given such term by subsection (c)(8)(B).

(g) **LIMITATION ON EXCLUSION FOR ELECTIVE DEFERRALS.**—

(1) **IN GENERAL.**—

(A) **LIMITATION.**—Notwithstanding subsections (e)(3) and (h)(1)(B), the elective deferrals of any individual for any taxable year shall be included in such individual’s gross income to the extent the amount of such deferrals for the taxable year exceeds the applicable dollar amount. The preceding sentence shall not apply to the portion of such excess as does not exceed the designated Roth contributions of the individual for the taxable year.

(B) **APPLICABLE DOLLAR AMOUNT.**—For purposes of subparagraph (A), the applicable dollar amount is \$15,000.

[(C) **CATCH-UP CONTRIBUTIONS.**—In addition to subparagraph (A), in the case of an eligible participant (as defined in section 414(v)), gross income shall not include elective deferrals in excess of the applicable dollar amount under subparagraph (B) to the extent that the amount of such elective deferrals does not exceed the applicable dollar amount under section 414(v)(2)(B)(i) for the taxable year (without regard to the treatment of the elective deferrals by an applicable employer plan under section 414(v)).]

(2) **DISTRIBUTION OF EXCESS DEFERRALS.**—

(A) **IN GENERAL.**—If any amount (hereinafter in this paragraph referred to as “excess deferrals”) is included in the gross income of an individual under paragraph (1) (or would be included but for the last sentence thereof) for any taxable year—

(i) not later than the 1st March 1 following the close of the taxable year, the individual may allocate the amount of such excess deferrals among the plans under which the deferrals were made and may notify each such plan of the portion allocated to it, and

(ii) not later than the 1st April 15 following the close of the taxable year, each such plan may distribute to the individual the amount allocated to it under clause (i) (and any income allocable to such amount through the end of such taxable year).

The distribution described in clause (ii) may be made notwithstanding any other provision of law.

(B) **TREATMENT OF DISTRIBUTION UNDER SECTION 401(K).**—Except to the extent provided under rules prescribed by the Secretary, notwithstanding the distribution

of any portion of an excess deferral from a plan under subparagraph (A)(ii), such portion shall, for purposes of applying section 401(k)(3)(A)(ii), be treated as an employer contribution.

(C) TAXATION OF DISTRIBUTION.—In the case of a distribution to which subparagraph (A) applies—

(i) except as provided in clause (ii), such distribution shall not be included in gross income, and

(ii) any income on the excess deferral shall, for purposes of this chapter, be treated as earned and received in the taxable year in which such income is distributed.

No tax shall be imposed under section 72(t) on any distribution described in the preceding sentence.

(D) PARTIAL DISTRIBUTIONS.—If a plan distributes only a portion of any excess deferral and income allocable thereto, such portion shall be treated as having been distributed ratably from the excess deferral and the income.

(3) ELECTIVE DEFERRALS.—For purposes of this subsection, the term “elective deferrals” means, with respect to any taxable year, the sum of—

(A) any employer contribution under a qualified cash or deferred arrangement (as defined in section 401(k)) to the extent not includible in gross income for the taxable year under subsection (e)(3) (determined without regard to this subsection),

(B) any employer contribution to the extent not includible in gross income for the taxable year under subsection (h)(1)(B) (determined without regard to this subsection),

(C) any employer contribution to purchase an annuity contract under section 403(b) under a salary reduction agreement (within the meaning of section 3121(a)(5)(D)), and

(D) any elective employer contribution under section 408(p)(2)(A)(i).

An employer contribution shall not be treated as an elective deferral described in subparagraph (C) if under the salary reduction agreement such contribution is made pursuant to a one-time irrevocable election made by the employee at the time of initial eligibility to participate in the agreement or is made pursuant to a similar arrangement involving a one-time irrevocable election specified in regulations.

(4) COST-OF-LIVING ADJUSTMENT.—In the case of taxable years beginning after December 31, 2006, the Secretary shall adjust the \$15,000 amount under paragraph (1)(B) at the same time and in the same manner as under section 415(d), except that the base period shall be the calendar quarter beginning July 1, 2005, and any increase under this paragraph which is not a multiple of \$500 shall be rounded to the next lowest multiple of \$500.

(5) DISREGARD OF COMMUNITY PROPERTY LAWS.—This subsection shall be applied without regard to community property laws.

(6) COORDINATION WITH SECTION 72.—For purposes of applying section 72, any amount includible in gross income for any

taxable year under this subsection but which is not distributed from the plan during such taxable year shall not be treated as investment in the contract.

(7) SPECIAL RULE FOR CERTAIN ORGANIZATIONS.—

(A) IN GENERAL.—In the case of a qualified employee of a qualified organization, with respect to employer contributions described in paragraph (3)(C) made by such organization, the limitation of paragraph (1) for any taxable year shall be increased by whichever of the following is the least:

(i) \$3,000,

(ii) \$15,000 reduced by the sum of—

(I) the amounts not included in gross income for prior taxable years by reason of this paragraph, plus

(II) the aggregate amount of designated Roth contributions (as defined in section 402A(c)) permitted for prior taxable years by reason of this paragraph, or

(iii) the excess of \$5,000 multiplied by the number of years of service of the employee with the qualified organization over the employer contributions described in paragraph (3) made by the organization on behalf of such employee for prior taxable years (determined in the manner prescribed by the Secretary).

(B) QUALIFIED ORGANIZATION.—For purposes of this paragraph, the term “qualified organization” means any educational organization, hospital, home health service agency, health and welfare service agency, church, or convention or association of churches. Such term includes any organization described in section 414(e)(3)(B)(ii). Terms used in this subparagraph shall have the same meaning as when used in section 415(c)(4) (as in effect before the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001).

(C) QUALIFIED EMPLOYEE.—For purposes of this paragraph, the term “qualified employee” means any employee who has completed 15 years of service with the qualified organization.

(D) YEARS OF SERVICE.—For purposes of this paragraph, the term “years of service” has the meaning given such term by section 403(b).

(8) MATCHING CONTRIBUTIONS ON BEHALF OF SELF-EMPLOYED INDIVIDUALS NOT TREATED AS ELECTIVE EMPLOYER CONTRIBUTIONS.—Except as provided in section 401(k)(3)(D)(ii), any matching contribution described in section 401(m)(4)(A) which is made on behalf of a self-employed individual (as defined in section 401(c)) shall not be treated as an elective employer contribution under a qualified cash or deferred arrangement (as defined in section 401(k)) for purposes of this title.

(h) SPECIAL RULES FOR SIMPLIFIED EMPLOYEE PENSIONS.—For purposes of this chapter—

(1) IN GENERAL.—Except as provided in paragraph (2), contributions made by an employer on behalf of an employee to an

individual retirement plan pursuant to a simplified employee pension (as defined in section 408(k))—

(A) shall not be treated as distributed or made available to the employee or as contributions made by the employee, **[and]**

(B) if such contributions are made pursuant to an arrangement under section 408(k)(6) under which an employee may elect to have the employer make contributions to the simplified employee pension on behalf of the employee, shall not be treated as distributed or made available or as contributions made by the employee merely because the simplified employee pension includes provisions for such election~~[,] and~~

*(C) in the case of any contributions pursuant to a simplified employer pension which are made to an individual retirement plan designated as a Roth IRA, such contribution shall not be excludable from gross income.*

(2) LIMITATIONS ON EMPLOYER CONTRIBUTIONS.—Contributions made by an employer to a simplified employee pension with respect to an employee for any year shall be treated as distributed or made available to such employee and as contributions made by the employee to the extent such contributions exceed the lesser of—

(A) 25 percent of the compensation (within the meaning of section 414(s)) from such employer includible in the employee's gross income for the year (determined without regard to the employer contributions to the simplified employee pension), or

(B) the limitation in effect under section 415(c)(1)(A), reduced in the case of any highly compensated employee (within the meaning of section 414(q)) by the amount taken into account with respect to such employee under section 408(k)(3)(D).

(3) DISTRIBUTIONS.—Any amount paid or distributed out of an individual retirement plan pursuant to a simplified employee pension shall be included in gross income by the payee or distributee, as the case may be, in accordance with the provisions of section 408(d), *or section 408A(d) in the case of an individual retirement plan designated as a Roth IRA.*

(i) TREATMENT OF SELF-EMPLOYED INDIVIDUALS.—For purposes of this section, except as otherwise provided in subsection (e)(4)(D)(i), the term “employee” includes a self-employed individual (as defined in section 401(c)(1)(B)) and the employer of such individual shall be the person treated as his employer under section 401(c)(4).

(j) EFFECT OF DISPOSITION OF STOCK BY PLAN ON NET UNREALIZED APPRECIATION.—

(1) IN GENERAL.—For purposes of subsection (e)(4), in the case of any transaction to which this subsection applies, the determination of net unrealized appreciation shall be made without regard to such transaction.

(2) TRANSACTION TO WHICH SUBSECTION APPLIES.—This subsection shall apply to any transaction in which—

(A) the plan trustee exchanges the plan's securities of the employer corporation for other such securities, or

(B) the plan trustee disposes of securities of the employer corporation and uses the proceeds of such disposition to acquire securities of the employer corporation within 90 days (or such longer period as the Secretary may prescribe), except that this subparagraph shall not apply to any employee with respect to whom a distribution of money was made during the period after such disposition and before such acquisition.

(k) TREATMENT OF SIMPLE RETIREMENT ACCOUNTS.—Rules similar to the rules of paragraphs (1) and (3) of subsection (h) shall apply to contributions and distributions with respect to a simple retirement account under section 408(p).

(1) DISTRIBUTIONS FROM GOVERNMENTAL PLANS FOR HEALTH AND LONG-TERM CARE INSURANCE.—

(1) IN GENERAL.—In the case of an employee who is an eligible retired public safety officer who makes the election described in paragraph (6) with respect to any taxable year of such employee, gross income of such employee for such taxable year does not include any distribution from an eligible retirement plan maintained by the employer described in paragraph (4)(B) to the extent that the aggregate amount of such distributions does not exceed the amount paid by such employee for qualified health insurance premiums for such taxable year.

(2) LIMITATION.—The amount which may be excluded from gross income for the taxable year by reason of paragraph (1) shall not exceed \$3,000.

(3) DISTRIBUTIONS MUST OTHERWISE BE INCLUDIBLE.—

(A) IN GENERAL.—An amount shall be treated as a distribution for purposes of paragraph (1) only to the extent that such amount would be includible in gross income without regard to paragraph (1).

(B) APPLICATION OF SECTION 72.—Notwithstanding section 72, in determining the extent to which an amount is treated as a distribution for purposes of subparagraph (A), the aggregate amounts distributed from an eligible retirement plan in a taxable year (up to the amount excluded under paragraph (1)) shall be treated as includible in gross income (without regard to subparagraph (A)) to the extent that such amount does not exceed the aggregate amount which would have been so includible if all amounts to the credit of the eligible public safety officer in all eligible retirement plans maintained by the employer described in paragraph (4)(B) were distributed during such taxable year and all such plans were treated as 1 contract for purposes of determining under section 72 the aggregate amount which would have been so includible. Proper adjustments shall be made in applying section 72 to other distributions in such taxable year and subsequent taxable years.

(4) DEFINITIONS.—For purposes of this subsection—

(A) ELIGIBLE RETIREMENT PLAN.—For purposes of paragraph (1), the term “eligible retirement plan” means a governmental plan (within the meaning of section 414(d)) which is described in clause (iii), (iv), (v), or (vi) of subsection (c)(8)(B).



(B) ELIGIBLE RETIRED PUBLIC SAFETY OFFICER.—The term “eligible retired public safety officer” means an individual who, by reason of disability or attainment of normal retirement age, is separated from service as a public safety officer with the employer who maintains the eligible retirement plan from which distributions subject to paragraph (1) are made.

(C) PUBLIC SAFETY OFFICER.—The term “public safety officer” shall have the same meaning given such term by section 1204(9)(A) of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796b(9)(A)), as in effect immediately before the enactment of the National Defense Authorization Act for Fiscal Year 2013.

(D) QUALIFIED HEALTH INSURANCE PREMIUMS.—The term “qualified health insurance premiums” means premiums for coverage for the eligible retired public safety officer, his spouse, and dependents (as defined in section 152), by an accident or health plan or qualified long-term care insurance contract (as defined in section 7702B(b)).

(5) SPECIAL RULES.—For purposes of this subsection—

(A) DIRECT PAYMENT TO INSURER REQUIRED.—Paragraph (1) shall only apply to a distribution if payment of the premiums is made directly to the provider of the accident or health plan or qualified long-term care insurance contract by deduction from a distribution from the eligible retirement plan.

(B) RELATED PLANS TREATED AS 1.—All eligible retirement plans of an employer shall be treated as a single plan.

(6) ELECTION DESCRIBED.—

(A) IN GENERAL.—For purposes of paragraph (1), an election is described in this paragraph if the election is made by an employee after separation from service with respect to amounts not distributed from an eligible retirement plan to have amounts from such plan distributed in order to pay for qualified health insurance premiums.

(B) SPECIAL RULE.—A plan shall not be treated as violating the requirements of section 401, or as engaging in a prohibited transaction for purposes of section 503(b), merely because it provides for an election with respect to amounts that are otherwise distributable under the plan or merely because of a distribution made pursuant to an election described in subparagraph (A).

(7) COORDINATION WITH MEDICAL EXPENSE DEDUCTION.—The amounts excluded from gross income under paragraph (1) shall not be taken into account under section 213.

(8) COORDINATION WITH DEDUCTION FOR HEALTH INSURANCE COSTS OF SELF-EMPLOYED INDIVIDUALS.—The amounts excluded from gross income under paragraph (1) shall not be taken into account under section 162(l).

**SEC. 402A. OPTIONAL TREATMENT OF ELECTIVE DEFERRALS AS ROTH CONTRIBUTIONS.**

(a) GENERAL RULE.—If an applicable retirement plan includes a qualified Roth contribution program—

(1) any designated Roth contribution made by an employee pursuant to the program shall be treated as an elective deferral for purposes of this chapter, except that such contribution shall not be excludable from gross income, **[and]**

(2) *any designated Roth contribution which is made by the employer to the program on the employee's behalf, and on account of the employee's contribution or elective deferral, shall be treated as a matching contribution for purposes of this chapter, except that such contribution shall not be excludable from gross income, and*

**[(2)]** (3) such plan (and any arrangement which is part of such plan) shall not be treated as failing to meet any requirement of this chapter solely by reason of including such program.

(b) **QUALIFIED ROTH CONTRIBUTION PROGRAM.**—For purposes of this section—

(1) **IN GENERAL.**—The term “qualified Roth contribution program” means a program under which an employee may elect to make, *or to have made on the employee's behalf*, designated Roth contributions in lieu of all or a portion of elective deferrals the employee is otherwise eligible to make, *or of matching contributions which may otherwise be made on the employee's behalf*, under the applicable retirement plan.

(2) **SEPARATE ACCOUNTING REQUIRED.**—A program shall not be treated as a qualified Roth contribution program unless the applicable retirement plan—

(A) establishes separate accounts (“designated Roth accounts”) for the designated Roth contributions of each employee and any earnings properly allocable to the contributions, and

(B) maintains separate recordkeeping with respect to each account.

(c) **DEFINITIONS AND RULES RELATING TO DESIGNATED ROTH CONTRIBUTIONS.**—For purposes of this section—

(1) **DESIGNATED ROTH CONTRIBUTION.**—The term “designated Roth contribution” means any elective deferral *or matching contribution* which—

(A) is excludable from gross income of an employee without regard to this section, and

(B) the employee designates (at such time and in such manner as the Secretary may prescribe) as not being so excludable.

(2) **DESIGNATION LIMITS.**—The amount of elective deferrals which an employee may designate under paragraph (1) shall not exceed the excess (if any) of—

(A) the maximum amount of elective deferrals excludable from gross income of the employee for the taxable year (without regard to this section), over

(B) the aggregate amount of elective deferrals of the employee for the taxable year which the employee does not designate under paragraph (1).

(3) **ROLLOVER CONTRIBUTIONS.**—

(A) **IN GENERAL.**—A rollover contribution of any payment or distribution from a designated Roth account which is

otherwise allowable under this chapter may be made only if the contribution is to—

(i) another designated Roth account of the individual from whose account the payment or distribution was made, or

(ii) a Roth IRA of such individual.

(B) COORDINATION WITH LIMIT.—Any rollover contribution to a designated Roth account under subparagraph (A) shall not be taken into account for purposes of paragraph (1).

(4) TAXABLE ROLLOVERS TO DESIGNATED ROTH ACCOUNTS.—

(A) IN GENERAL.—Notwithstanding sections 402(c), 403(b)(8), and 457(e)(16), in the case of any distribution to which this paragraph applies—

(i) there shall be included in gross income any amount which would be includible were it not part of a qualified rollover contribution,

(ii) section 72(t) shall not apply, and

(iii) unless the taxpayer elects not to have this clause apply, any amount required to be included in gross income for any taxable year beginning in 2010 by reason of this paragraph shall be so included ratably over the 2-taxable-year period beginning with the first taxable year beginning in 2011.

Any election under clause (iii) for any distributions during a taxable year may not be changed after the due date for such taxable year.

(B) DISTRIBUTIONS TO WHICH PARAGRAPH APPLIES.—In the case of an applicable retirement plan which includes a qualified Roth contribution program, this paragraph shall apply to a distribution from such plan other than from a designated Roth account which is contributed in a qualified rollover contribution (within the meaning of section 408A(e)) to the designated Roth account maintained under such plan for the benefit of the individual to whom the distribution is made.

(C) COORDINATION WITH LIMIT.—Any distribution to which this paragraph applies shall not be taken into account for purposes of paragraph (1).

(D) OTHER RULES.—The rules of subparagraphs (D), (E), and (F) of section 408A(d)(3) (as in effect for taxable years beginning after 2009) shall apply for purposes of this paragraph.

(E) SPECIAL RULE FOR CERTAIN TRANSFERS.—In the case of an applicable retirement plan which includes a qualified Roth contribution program—

(i) the plan may allow an individual to elect to have the plan transfer any amount not otherwise distributable under the plan to a designated Roth account maintained for the benefit of the individual,

(ii) such transfer shall be treated as a distribution to which this paragraph applies which was contributed in a qualified rollover contribution (within the meaning of section 408A(e)) to such account, and

(iii) the plan shall not be treated as violating the provisions of section 401(k)(2)(B)(i), 403(b)(7)(A)(ii), 403(b)(11), or 457(d)(1)(A), or of section 8433 of title 5, United States Code, solely by reason of such transfer.

(d) DISTRIBUTION RULES.—For purposes of this title—

(1) EXCLUSION.—Any qualified distribution from a designated Roth account shall not be includible in gross income.

(2) QUALIFIED DISTRIBUTION.—For purposes of this subsection—

(A) IN GENERAL.—The term “qualified distribution” has the meaning given such term by section 408A(d)(2)(A) (without regard to clause (iv) thereof).

(B) DISTRIBUTIONS WITHIN NONEXCLUSION PERIOD.—A payment or distribution from a designated Roth account shall not be treated as a qualified distribution if such payment or distribution is made within the 5-taxable-year period beginning with the earlier of—

(i) the first taxable year for which the individual made a designated Roth contribution to any designated Roth account established for such individual under the same applicable retirement plan, or

(ii) if a rollover contribution was made to such designated Roth account from a designated Roth account previously established for such individual under another applicable retirement plan, the first taxable year for which the individual made a designated Roth contribution to such previously established account.

(C) DISTRIBUTIONS OF EXCESS DEFERRALS AND CONTRIBUTIONS AND EARNINGS THEREON.—The term “qualified distribution” shall not include any distribution of any excess deferral under section 402(g)(2) or any excess contribution under section 401(k)(8), and any income on the excess deferral or contribution.

(3) TREATMENT OF DISTRIBUTIONS OF CERTAIN EXCESS DEFERRALS.—Notwithstanding section 72, if any excess deferral under section 402(g)(2) attributable to a designated Roth contribution is not distributed on or before the 1st April 15 following the close of the taxable year in which such excess deferral is made, the amount of such excess deferral shall—

(A) not be treated as investment in the contract, and

(B) be included in gross income for the taxable year in which such excess is distributed.

(4) AGGREGATION RULES.—Section 72 shall be applied separately with respect to distributions and payments from a designated Roth account and other distributions and payments from the plan.

(e) OTHER DEFINITIONS.—For purposes of this section—

(1) APPLICABLE RETIREMENT PLAN.—The term “applicable retirement plan” means—

(A) an employees’ trust described in section 401(a) which is exempt from tax under section 501(a),

(B) a plan under which amounts are contributed by an individual’s employer for an annuity contract described in section 403(b), and

(C) an eligible deferred compensation plan (as defined in section 457(b)) of an eligible employer described in section 457(e)(1)(A).

(2) **ELECTIVE DEFERRAL.**—The term “elective deferral” means—

(A) any elective deferral described in subparagraph (A) or (C) of section 402(g)(3), and

(B) any elective deferral of compensation by an individual under an eligible deferred compensation plan (as defined in section 457(b)) of an eligible employer described in section 457(e)(1)(A).

(3) **MATCHING CONTRIBUTION.**—*The term “matching contribution” means—*

(A) *any matching contribution described in section 401(m)(4)(A), and*

(B) *any contribution to an eligible deferred compensation plan (as defined in section 457(b)) by an eligible employer described in section 457(e)(1)(A) on behalf of an employee and on account of such employee’s elective deferral under such plan.*

#### **SEC. 403. TAXATION OF EMPLOYEE ANNUITIES.**

(a) **TAXABILITY OF BENEFICIARY UNDER A QUALIFIED ANNUITY PLAN.**—

(1) **DISTRIBUTE TAXABLE UNDER SECTION 72.**—If an annuity contract is purchased by an employer for an employee under a plan which meets the requirements of section 404(a)(2) (whether or not the employer deducts the amounts paid for the contract under such section), the amount actually distributed to any distributee under the contract shall be taxable to the distributee (in the year in which so distributed) under section 72 (relating to annuities).

(2) **SPECIAL RULE FOR HEALTH AND LONG-TERM CARE INSURANCE.**—To the extent provided in section 402(l), paragraph (1) shall not apply to the amount distributed under the contract which is otherwise includible in gross income under this subsection.

(3) **SELF-EMPLOYED INDIVIDUALS.**—For purposes of this subsection, the term “employee” includes an individual who is an employee within the meaning of section 401(c)(1), and the employer of such individual is the person treated as his employer under section 401(c)(4).

(4) **ROLLOVER AMOUNTS.**—

(A) **GENERAL RULE.**—If—

(i) any portion of the balance to the credit of an employee in an employee annuity described in paragraph (1) is paid to him in an eligible rollover distribution (within the meaning of section 402(c)(4)),

(ii) the employee transfers any portion of the property he receives in such distribution to an eligible retirement plan, and

(iii) in the case of a distribution of property other than money, the amount so transferred consists of the property distributed,

then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

(B) CERTAIN RULES MADE APPLICABLE.—The rules of paragraphs (2) through (7) and (11) and (9) of section 402(c) and section 402(f) shall apply for purposes of subparagraph (A).

(5) DIRECT TRUSTEE-TO-TRUSTEE TRANSFER.—Any amount transferred in a direct trustee-to-trustee transfer in accordance with section 401(a)(31) shall not be includible in gross income for the taxable year of such transfer.

(b) TAXABILITY OF BENEFICIARY UNDER ANNUITY PURCHASED BY SECTION 501(C)(3) ORGANIZATION OR PUBLIC SCHOOL.—

(1) GENERAL RULE.—If—

(A) an annuity contract is purchased—

(i) for an employee by an employer described in section 501(c)(3) which is exempt from tax under section 501(a),

(ii) for an employee (other than an employee described in clause (i)), who performs services for an educational organization described in section 170(b)(1)(A)(ii), by an employer which is a State, a political subdivision of a State, or an agency or instrumentality of any one or more of the foregoing, or

(iii) for the minister described in section 414(e)(5)(A) by the minister or by an employer,

(B) such annuity contract is not subject to subsection (a),

(C) the employee's rights under the contract are non-forfeitable, except for failure to pay future premiums,

(D) except in the case of a contract purchased by a church, such contract is purchased under a plan which meets the nondiscrimination requirements of paragraph (12), and

(E) in the case of a contract purchased under a salary reduction agreement, the contract meets the requirements of section 401(a)(30),

then contributions and other additions by such employer for such annuity contract shall be excluded from the gross income of the employee for the taxable year to the extent that the aggregate of such contributions and additions (when expressed as an annual addition (within the meaning of section 415(c)(2))) does not exceed the applicable limit under section 415. The amount actually distributed to any distributee under such contract shall be taxable to the distributee (in the year in which so distributed) under section 72 (relating to annuities). For purposes of applying the rules of this subsection to contributions and other additions by an employer for a taxable year, amounts transferred to a contract described in this paragraph by reason of a rollover contribution described in paragraph (8) of this subsection or section 408(d)(3)(A)(ii) shall not be considered contributed by such employer.

(2) SPECIAL RULE FOR HEALTH AND LONG-TERM CARE INSURANCE.—To the extent provided in section 402(l), paragraph (1) shall not apply to the amount distributed under the contract

which is otherwise includible in gross income under this subsection.

(3) **INCLUDIBLE COMPENSATION.**—For purposes of this subsection, the term “includible compensation” means, in the case of any employee, the amount of compensation which is received from the employer described in paragraph (1)(A), and which is includible in gross income (computed without regard to section 911) for the most recent period (ending not later than the close of the taxable year) which under paragraph (4) may be counted as one year of service, and which precedes the taxable year by no more than five years. Such term does not include any amount contributed by the employer for any annuity contract to which this subsection applies. Such term includes—

(A) any elective deferral (as defined in section 402(g)(3)), and

(B) any amount which is contributed or deferred by the employer at the election of the employee and which is not includible in the gross income of the employee by reason of section 125, 132(f)(4), or 457.

(4) **YEARS OF SERVICE.**—In determining the number of years of service for purposes of this subsection, there shall be included—

(A) one year for each full year during which the individual was a full-time employee of the organization purchasing the annuity for him, and

(B) a fraction of a year (determined in accordance with regulations prescribed by the Secretary) for each full year during which such individual was a part-time employee of such organization and for each part of a year during which such individual was a full-time or part-time employee of such organization.

In no case shall the number of years of service be less than one.

(5) **APPLICATION TO MORE THAN ONE ANNUITY CONTRACT.**—If for any taxable year of the employee this subsection applies to 2 or more annuity contracts purchased by the employer, such contracts shall be treated as one contract.

(7) **CUSTODIAL ACCOUNTS [FOR REGULATED INVESTMENT COMPANY STOCK].**—

(A) **AMOUNTS PAID TREATED AS CONTRIBUTIONS.**—For purposes of this title, amounts paid by an employer described in paragraph (1)(A) to a custodial account which satisfies the requirements of section 401(f)(2) shall be treated as amounts contributed by him for an annuity contract for his employee [if the amounts are to be invested in regulated investment company stock to be held in that custodial account] *if the amounts are to be held in that custodial account and invested in regulated investment company stock or a group trust intended to satisfy the requirements of Internal Revenue Service Revenue Ruling 81-100 (or any successor guidance), and under the custodial account—*

(i) no such amounts may be paid or made available to any distributee (unless such amount is a distribution to which section 72(t)(2)(G) applies) before—

(I) the employee dies,  
 (II) the employee attains age 59½,  
 (III) the employee has a severance from employment,

(IV) the employee becomes disabled (within the meaning of section 72(m)(7)),

(V) **■** in the case of contributions made pursuant to a salary reduction agreement (within the meaning of section 3121(a)(5)(D)) **■** *subject to the provisions of paragraph (16)*, the employee encounters financial hardship, or

(VI) except as may be otherwise provided by regulations, with respect to amounts invested in a lifetime income investment (as defined in section 401(a)(38)(B)(ii)), the date that is 90 days prior to the date that such lifetime income investment may no longer be held as an investment option under the contract, and

(ii) in the case of amounts described in clause (i)(VI), such amounts will be distributed only in the form of a qualified distribution (as defined in section 401(a)(38)(B)(i)) or a qualified plan distribution annuity contract (as defined in section 401(a)(38)(B)(iv)).

(B) ACCOUNT TREATED AS PLAN.—For purposes of this title, a custodial account which satisfies the requirements of section 401(f)(2) shall be treated as an organization described in section 401(a) solely for purposes of subchapter F and subtitle F with respect to amounts received by it (and income from investment thereof).

(C) REGULATED INVESTMENT COMPANY.—For purposes of this paragraph, the term “regulated investment company” means a domestic corporation which is a regulated investment company within the meaning of section 851(a).

(D) EMPLOYEE CERTIFICATION.—*In determining whether a distribution is upon the financial hardship of an employee, the administrator of the plan may rely on a certification by the employee that the distribution is on account of a financial need of a type that is deemed in regulations prescribed by the Secretary to be an immediate and heavy financial need and that such distribution is not in excess of the amount required to satisfy such financial need.*

(8) ROLLOVER AMOUNTS.—

(A) GENERAL RULE.—If—

(i) any portion of the balance to the credit of an employee in an annuity contract described in paragraph (1) is paid to him in an eligible rollover distribution (within the meaning of section 402(c)(4)),

(ii) the employee transfers any portion of the property he receives in such distribution to an eligible retirement plan described in section 402(c)(8)(B), and

(iii) in the case of a distribution of property other than money, the property so transferred consists of the property distributed,



then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

(B) CERTAIN RULES MADE APPLICABLE.—The rules of paragraphs (2) through (7), (9), and (11) of section 402(c) and section 402(f) shall apply for purposes of subparagraph (A), except that section 402(f) shall be applied to the payor in lieu of the plan administrator.

(9) RETIREMENT INCOME ACCOUNTS PROVIDED BY CHURCHES, ETC.—

(A) AMOUNTS PAID TREATED AS CONTRIBUTIONS.—For purposes of this title—

(i) a retirement income account shall be treated as an annuity contract described in this subsection, and

(ii) amounts paid by an employer described in paragraph (1)(A) to a retirement income account shall be treated as amounts contributed by the employer for an annuity contract for the employee on whose behalf such account is maintained.

(B) RETIREMENT INCOME ACCOUNT.—For purposes of this paragraph, the term “retirement income account” means a defined contribution program established or maintained by a church, or a convention or association of churches, including an organization described in section 414(e)(3)(A), to provide benefits under section 403(b) for an employee described in paragraph (1) (including an employee described in section 414(e)(3)(B)) or his beneficiaries.

(10) DISTRIBUTION REQUIREMENTS.—Under regulations prescribed by the Secretary, this subsection shall not apply to any annuity contract (or to any custodial account described in paragraph (7) or retirement income account described in paragraph (9)) unless requirements similar to the requirements of sections 401(a)(9) and 401(a)(31) are met (and requirements similar to the incidental death benefit requirements of section 401(a) are met) with respect to such annuity contract (or custodial account or retirement income account). Any amount transferred in a direct trustee-to-trustee transfer in accordance with section 401(a)(31) shall not be includible in gross income for the taxable year of the transfer.

(11) REQUIREMENT THAT DISTRIBUTIONS NOT BEGIN BEFORE AGE 59½, SEVERANCE FROM EMPLOYMENT, DEATH, OR DISABILITY.—This subsection shall not apply to any annuity contract unless under such contract distributions attributable to contributions made pursuant to a salary reduction agreement (within the meaning of section 402(g)(3)(C)) may be paid only—

(A) when the employee attains age 59½, has a severance from employment, dies, or becomes disabled (within the meaning of section 72(m)(7)),

(B) *[in] subject to the provisions of paragraph (16), in the case of hardship,*

(C) for distributions to which section 72(t)(2)(G) applies, or

(D) except as may be otherwise provided by regulations, with respect to amounts invested in a lifetime income investment (as defined in section 401(a)(38)(B)(ii))—

(i) on or after the date that is 90 days prior to the date that such lifetime income investment may no longer be held as an investment option under the contract, and

(ii) in the form of a qualified distribution (as defined in section 401(a)(38)(B)(i)) or a qualified plan distribution annuity contract (as defined in section 401(a)(38)(B)(iv)).

【Such contract may not provide for the distribution of any income attributable to such contributions in the case of hardship.】 *In determining whether a distribution is upon hardship of an employee, the administrator of the plan may rely on a certification by the employee that the distribution is on account of a financial need of a type that is deemed in regulations prescribed by the Secretary to be an immediate and heavy financial need and that such distribution is not in excess of the amount required to satisfy such financial need.*

(12) NONDISCRIMINATION REQUIREMENTS.—

(A) IN GENERAL.—For purposes of paragraph (1)(D), a plan meets the nondiscrimination requirements of this paragraph if—

(i) with respect to contributions not made pursuant to a salary reduction agreement, such plan meets the requirements of paragraphs (4), (5), (17), and (26) of section 401(a), section 401(m), and section 410(b) in the same manner as if such plan were described in section 401(a), and

(ii) all employees of the organization may elect to have the employer make contributions of more than \$200 pursuant to a salary reduction agreement if any employee of the organization may elect to have the organization make contributions for such contracts pursuant to such agreement.

For purposes of clause (i), a contribution shall be treated as not made pursuant to a salary reduction agreement if under the agreement it is made pursuant to a 1-time irrevocable election made by the employee at the time of initial eligibility to participate in the agreement or is made pursuant to a similar arrangement involving a one-time irrevocable election specified in regulations. For purposes of clause (ii), there may be excluded any employee who is a participant in an eligible deferred compensation plan (within the meaning of section 457) or a qualified cash or deferred arrangement of the organization or another annuity contract described in this subsection. Any nonresident alien described in section 410(b)(3)(C) may also be excluded. Subject to the conditions applicable under section 410(b)(4), there may be excluded for purposes of this subparagraph employees who are students performing services described in section 3121(b)(10) and employees who normally work less than 20 hours per week. *The fact that the employer offers matching contributions on account of qualified student loan payments as described in section 401(m)(13) shall not be taken into account in determining whether the arrangement satisfies the requirements of*

*clause (ii) (and any regulation thereunder). A plan shall not fail to satisfy clause (ii) solely by reason of offering a de minimis financial incentive to employees to elect to have the employer make contributions pursuant to a salary reduction agreement.*

(B) CHURCH.—For purposes of paragraph (1)(D), the term “church” has the meaning given to such term by section 3121(w)(3)(A). Such term shall include any qualified church-controlled organization (as defined in section 3121(w)(3)(B)).

(C) STATE AND LOCAL GOVERNMENTAL PLANS.—For purposes of paragraph (1)(D), the requirements of subparagraph (A)(i) (other than those relating to section 401(a)(17)) shall not apply to a governmental plan (within the meaning of section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof).

(13) TRUSTEE-TO-TRUSTEE TRANSFERS TO PURCHASE PERMISSIVE SERVICE CREDIT.—No amount shall be includible in gross income by reason of a direct trustee-to-trustee transfer to a defined benefit governmental plan (as defined in section 414(d)) if such transfer is—

(A) for the purchase of permissive service credit (as defined in section 415(n)(3)(A)) under such plan, or

(B) a repayment to which section 415 does not apply by reason of subsection (k)(3) thereof.

(14) DEATH BENEFITS UNDER USERRA-QUALIFIED ACTIVE MILITARY SERVICE.—This subsection shall not apply to an annuity contract unless such contract meets the requirements of section 401(a)(37).

(15) MULTIPLE EMPLOYER PLANS.—

(A) IN GENERAL.—*Except in the case of a church plan, this subsection shall not be treated as failing to apply to an annuity contract solely by reason of such contract being purchased under a plan maintained by more than 1 employer.*

(B) TREATMENT OF EMPLOYERS FAILING TO MEET REQUIREMENTS OF PLAN.—

(i) IN GENERAL.—*In the case of a plan maintained by more than 1 employer, this subsection shall not be treated as failing to apply to an annuity contract held under such plan merely because of one or more employers failing to meet the requirements of this subsection if such plan satisfies rules similar to the rules of section 413(e)(2) with respect to any such employer failure.*

(ii) ADDITIONAL REQUIREMENTS IN CASE OF NON-GOVERNMENTAL PLANS.—*A plan shall not be treated as meeting the requirements of this subparagraph unless the plan meets the requirements of subparagraph (A) or (B) of section 413(e)(1), except in the case of a multiple employer plan maintained solely by any of the following: A State, a political subdivision of a State, or an agency or instrumentality of any one or more of the foregoing.*

(16) *SPECIAL RULES RELATING TO HARDSHIP WITHDRAWALS.—For purposes of paragraphs (7) and (11)—*

(A) *AMOUNTS WHICH MAY BE WITHDRAWN.—The following amounts may be distributed upon hardship of the employee:*

(i) *Contributions made pursuant to a salary reduction agreement (within the meaning of section 3121(a)(5)(D)).*

(ii) *Qualified nonelective contributions (as defined in section 401(m)(4)(C)).*

(iii) *Qualified matching contributions described in section 401(k)(3)(D)(ii)(I).*

(iv) *Earnings on any contributions described in clause (i), (ii), or (iii).*

(B) *NO REQUIREMENT TO TAKE AVAILABLE LOAN.—A distribution shall not be treated as failing to be made upon the hardship of an employee solely because the employee does not take any available loan under the plan.*

(c) *TAXABILITY OF BENEFICIARY UNDER NONQUALIFIED ANNUITIES OR UNDER ANNUITIES PURCHASED BY EXEMPT ORGANIZATIONS.—*Premiums paid by an employer for an annuity contract which is not subject to subsection (a) shall be included in the gross income of the employee in accordance with section 83 (relating to property transferred in connection with performance of services), except that the value of such contract shall be substituted for the fair market value of the property for purposes of applying such section. The preceding sentence shall not apply to that portion of the premiums paid which is excluded from gross income under subsection (b). In the case of any portion of any contract which is attributable to premiums to which this subsection applies, the amount actually paid or made available under such contract to any beneficiary which is attributable to such premiums shall be taxable to the beneficiary (in the year in which so paid or made available) under section 72 (relating to annuities).

\* \* \* \* \*

#### **SEC. 408. INDIVIDUAL RETIREMENT ACCOUNTS.**

(a) *INDIVIDUAL RETIREMENT ACCOUNT.—*For purposes of this section, the term “individual retirement account” means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:

(1) Except in the case of a rollover contribution described in subsection (d)(3) or in section 402(c), 403(a)(4), 403(b)(8), or 457(e)(16), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year under section 219(b)(1)(A).

(2) The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.

(3) No part of the trust funds will be invested in life insurance contracts.

(4) The interest of an individual in the balance in his account is nonforfeitable.

(5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

(b) **INDIVIDUAL RETIREMENT ANNUITY.**—For purposes of this section, the term “individual retirement annuity” means an annuity contract, or an endowment contract (as determined under regulations prescribed by the Secretary), issued by an insurance company which meets the following requirements:

(1) The contract is not transferable by the owner.

(2) Under the contract—

(A) the premiums are not fixed,

(B) the annual premium on behalf of any individual will not exceed the dollar amount in effect under section 219(b)(1)(A), and

(C) any refund of premiums will be applied before the close of the calendar year following the year of the refund toward the payment of future premiums or the purchase of additional benefits.

(3) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of the owner.

(4) The entire interest of the owner is nonforfeitable.

Such term does not include such an annuity contract for any taxable year of the owner in which it is disqualified on the application of subsection (e) or for any subsequent taxable year. For purposes of this subsection, no contract shall be treated as an endowment contract if it matures later than the taxable year in which the individual in whose name such contract is purchased attains **[age 72]** *the applicable age (determined under section 401(a)(9)(C)(v) for the calendar year in which such taxable year begins)*; if it is not for the exclusive benefit of the individual in whose name it is purchased or his beneficiaries; or if the aggregate annual premiums under all such contracts purchased in the name of such individual for any taxable year exceed the dollar amount in effect under section 219(b)(1)(A).

(c) **ACCOUNTS ESTABLISHED BY EMPLOYERS AND CERTAIN ASSOCIATIONS OF EMPLOYEES.**—A trust created or organized in the United States by an employer for the exclusive benefit of his employees or their beneficiaries, or by an association of employees (which may include employees within the meaning of section 401(c)(1)) for the exclusive benefit of its members or their beneficiaries, shall be treated as an individual retirement account (described in subsection (a)), but only if the written governing instrument creating the trust meets the following requirements:

(1) The trust satisfies the requirements of paragraphs (1) through (6) of subsection (a).

(2) There is a separate accounting for the interest of each employee or member (or spouse of an employee or member).

(3) There is a separate accounting for any interest of an employee or member (or spouse of an employee or member) in a Roth IRA.

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.

(d) TAX TREATMENT OF DISTRIBUTIONS.—

(1) IN GENERAL.—Except as otherwise provided in this subsection, any amount paid or distributed out of an individual retirement plan shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72.

(2) SPECIAL RULES FOR APPLYING SECTION 72.—For purposes of applying section 72 to any amount described in paragraph (1)—

(A) all individual retirement plans shall be treated as 1 contract,

(B) all distributions during any taxable year shall be treated as 1 distribution, and

(C) the value of the contract, income on the contract, and investment in the contract shall be computed as of the close of the calendar year in which the taxable year begins. For purposes of subparagraph (C), the value of the contract shall be increased by the amount of any distributions during the calendar year.

(3) ROLLOVER CONTRIBUTION.—An amount is described in this paragraph as a rollover contribution if it meets the requirements of subparagraphs (A) and (B).

(A) IN GENERAL.—Paragraph (1) does not apply to any amount paid or distributed out of an individual retirement account or individual retirement annuity to the individual for whose benefit the account or annuity is maintained if—

(i) the entire amount received (including money and any other property) is paid into an individual retirement account or individual retirement annuity (other than an endowment contract) for the benefit of such individual not later than the 60th day after the day on which he receives the payment or distribution; or

(ii) the entire amount received (including money and any other property) is paid into an eligible retirement plan for the benefit of such individual not later than the 60th day after the date on which the payment or distribution is received, except that the maximum amount which may be paid into such plan may not exceed the portion of the amount received which is includible in gross income (determined without regard to this paragraph).

For purposes of clause (ii), the term “eligible retirement plan” means an eligible retirement plan described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B).

(B) LIMITATION.—This paragraph does not apply to any amount described in subparagraph (A)(i) received by an individual from an individual retirement account or individual retirement annuity if at any time during the 1-year

period ending on the day of such receipt such individual received any other amount described in that subparagraph from an individual retirement account or an individual retirement annuity which was not includible in his gross income because of the application of this paragraph.

(C) DENIAL OF ROLLOVER TREATMENT FOR INHERITED ACCOUNTS, ETC.—

(i) IN GENERAL.—In the case of an inherited individual retirement account or individual retirement annuity—

(I) this paragraph shall not apply to any amount received by an individual from such an account or annuity (and no amount transferred from such account or annuity to another individual retirement account or annuity shall be excluded from gross income by reason of such transfer), and

(II) such inherited account or annuity shall not be treated as an individual retirement account or annuity for purposes of determining whether any other amount is a rollover contribution.

(ii) INHERITED INDIVIDUAL RETIREMENT ACCOUNT OR ANNUITY.—An individual retirement account or individual retirement annuity shall be treated as inherited if—

(I) the individual for whose benefit the account or annuity is maintained acquired such account by reason of the death of another individual, and

(II) such individual was not the surviving spouse of such other individual.

(D) PARTIAL ROLLOVERS PERMITTED.—

(i) IN GENERAL.—If any amount paid or distributed out of an individual retirement account or individual retirement annuity would meet the requirements of subparagraph (A) but for the fact that the entire amount was not paid into an eligible plan as required by clause (i) or (ii) of subparagraph (A), such amount shall be treated as meeting the requirements of subparagraph (A) to the extent it is paid into an eligible plan referred to in such clause not later than the 60th day referred to in such clause.

(ii) ELIGIBLE PLAN.—For purposes of clause (i), the term “eligible plan” means any account, annuity, contract, or plan referred to in subparagraph (A).

(E) DENIAL OF ROLLOVER TREATMENT FOR REQUIRED DISTRIBUTIONS.—This paragraph shall not apply to any amount to the extent such amount is required to be distributed under subsection (a)(6) or (b)(3).

(F) FROZEN DEPOSITS.—For purposes of this paragraph, rules similar to the rules of section 402(c)(7) (relating to frozen deposits) shall apply.

(G) SIMPLE RETIREMENT ACCOUNTS.—In the case of any payment or distribution out of a simple retirement account (as defined in subsection (p)) to which section 72(t)(6) applies, this paragraph shall not apply unless such payment

or distribution is paid into another simple retirement account.

(H) APPLICATION OF SECTION 72.—

(i) IN GENERAL.—If—

(I) a distribution is made from an individual retirement plan, and

(II) a rollover contribution is made to an eligible retirement plan described in section 402(c)(8)(B)(iii), (iv), (v), or (vi) with respect to all or part of such distribution,

then, notwithstanding paragraph (2), the rules of clause (ii) shall apply for purposes of applying section 72.

(ii) APPLICABLE RULES.—In the case of a distribution described in clause (i)—

(I) section 72 shall be applied separately to such distribution,

(II) notwithstanding the pro rata allocation of income on, and investment in, the contract to distributions under section 72, the portion of such distribution rolled over to an eligible retirement plan described in clause (i) shall be treated as from income on the contract (to the extent of the aggregate income on the contract from all individual retirement plans of the distributee), and

(III) appropriate adjustments shall be made in applying section 72 to other distributions in such taxable year and subsequent taxable years.

(I) WAIVER OF 60-DAY REQUIREMENT.—The Secretary may waive the 60-day requirement under subparagraphs (A) and (D) where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement.

(4) CONTRIBUTIONS RETURNED BEFORE DUE DATE OF RETURN.—Paragraph (1) does not apply to the distribution of any contribution paid during a taxable year to an individual retirement account or for an individual retirement annuity if—

(A) such distribution is received on or before the day prescribed by law (including extensions of time) for filing such individual's return for such taxable year,

(B) no deduction is allowed under section 219 with respect to such contribution, and

(C) such distribution is accompanied by the amount of net income attributable to such contribution.

In the case of such a distribution, for purposes of section 61, any net income described in subparagraph (C) shall be deemed to have been earned and receivable in the taxable year in which such contribution is made.

(5) DISTRIBUTIONS OF EXCESS CONTRIBUTIONS AFTER DUE DATE FOR TAXABLE YEAR AND CERTAIN EXCESS ROLLOVER CONTRIBUTIONS.—

(A) IN GENERAL.—In the case of any individual, if the aggregate contributions (other than rollover contributions) paid for any taxable year to an individual retirement account or for an individual retirement annuity do not ex-



ceed the dollar amount in effect under section 219(b)(1)(A), paragraph (1) shall not apply to the distribution of any such contribution to the extent that such contribution exceeds the amount allowable as a deduction under section 219 for the taxable year for which the contribution was paid—

(i) if such distribution is received after the date described in paragraph (4),

(ii) but only to the extent that no deduction has been allowed under section 219 with respect to such excess contribution.

If employer contributions on behalf of the individual are paid for the taxable year to a simplified employee pension, the dollar limitation of the preceding sentence shall be increased by the lesser of the amount of such contributions or the dollar limitation in effect under section 415(c)(1)(A) for such taxable year.

(B) EXCESS ROLLOVER CONTRIBUTIONS ATTRIBUTABLE TO ERRONEOUS INFORMATION.—If—

(i) the taxpayer reasonably relies on information supplied pursuant to subtitle F for determining the amount of a rollover contribution, but

(ii) the information was erroneous,

subparagraph (A) shall be applied by increasing the dollar limit set forth therein by that portion of the excess contribution which was attributable to such information.

For purposes of this paragraph, the amount allowable as a deduction under section 219 shall be computed without regard to section 219(g).

(6) TRANSFER OF ACCOUNT INCIDENT TO DIVORCE.—The transfer of an individual's interest in an individual retirement account or an individual retirement annuity to his spouse or former spouse under a divorce or separation instrument described in clause (i) of section 121(d)(3)(C) is not to be considered a taxable transfer made by such individual notwithstanding any other provision of this subtitle, and such interest at the time of the transfer is to be treated as an individual retirement account of such spouse, and not of such individual. Thereafter such account or annuity for purposes of this subtitle is to be treated as maintained for the benefit of such spouse.

(7) SPECIAL RULES FOR SIMPLIFIED EMPLOYEE PENSIONS OR SIMPLE RETIREMENT ACCOUNTS.—

(A) TRANSFER OR ROLLOVER OF CONTRIBUTIONS PROHIBITED UNTIL DEFERRAL TEST MET.—Notwithstanding any other provision of this subsection or section 72(t), paragraph (1) and section 72(t)(1) shall apply to the transfer or distribution from a simplified employee pension of any contribution under a salary reduction arrangement described in subsection (k)(6) (or any income allocable thereto) before a determination as to whether the requirements of subsection (k)(6)(A)(iii) are met with respect to such contribution.

(B) CERTAIN EXCLUSIONS TREATED AS DEDUCTIONS.—For purposes of paragraphs (4) and (5) and section 4973, any amount excludable or excluded from gross income under

section 402(h) or 402(k) shall be treated as an amount allowable or allowed as a deduction under section 219.

(8) DISTRIBUTIONS FOR CHARITABLE PURPOSES.—

(A) IN GENERAL.—So much of the aggregate amount of qualified charitable distributions with respect to a taxpayer made during any taxable year which does not exceed \$100,000 shall not be includible in gross income of such taxpayer for such taxable year. The amount of distributions not includible in gross income by reason of the preceding sentence for a taxable year (determined without regard to this sentence) shall be reduced (but not below zero) by an amount equal to the excess of—

(i) the aggregate amount of deductions allowed to the taxpayer under section 219 for all taxable years ending on or after the date the taxpayer attains age 70½, over

(ii) the aggregate amount of reductions under this sentence for all taxable years preceding the current taxable year.

(B) QUALIFIED CHARITABLE DISTRIBUTION.—For purposes of this paragraph, the term “qualified charitable distribution” means any distribution from an individual retirement plan (other than a plan described in subsection (k) or (p))—

(i) which is made directly by the trustee to an organization described in section 170(b)(1)(A) (other than any organization described in section 509(a)(3) or any fund or account described in section 4966(d)(2)), and

(ii) which is made on or after the date that the individual for whose benefit the plan is maintained has attained age 70½.

A distribution shall be treated as a qualified charitable distribution only to the extent that the distribution would be includible in gross income without regard to subparagraph (A).

(C) CONTRIBUTIONS MUST BE OTHERWISE DEDUCTIBLE.—For purposes of this paragraph, a distribution to an organization described in subparagraph (B)(i) shall be treated as a qualified charitable distribution only if a deduction for the entire distribution would be allowable under section 170 (determined without regard to subsection (b) thereof and this paragraph).

(D) APPLICATION OF SECTION 72.—Notwithstanding section 72, in determining the extent to which a distribution is a qualified charitable distribution, the entire amount of the distribution shall be treated as includible in gross income without regard to subparagraph (A) to the extent that such amount does not exceed the aggregate amount which would have been so includible if all amounts in all individual retirement plans of the individual were distributed during such taxable year and all such plans were treated as 1 contract for purposes of determining under section 72 the aggregate amount which would have been so includible. Proper adjustments shall be made in apply-

ing section 72 to other distributions in such taxable year and subsequent taxable years.

(E) DENIAL OF DEDUCTION.—Qualified charitable distributions which are not includible in gross income pursuant to subparagraph (A) shall not be taken into account in determining the deduction under section 170.

(F) ONE-TIME ELECTION FOR QUALIFIED CHARITABLE DISTRIBUTION TO SPLIT-INTEREST ENTITY.—

(i) IN GENERAL.—A taxpayer may for a taxable year elect under this subparagraph to treat as meeting the requirement of subparagraph (B)(i) any distribution from an individual retirement account which is made directly by the trustee to a split-interest entity, but only if—

(I) an election is not in effect under this subparagraph for a preceding taxable year,

(II) the aggregate amount of distributions of the taxpayer with respect to which an election under this subparagraph is made does not exceed \$50,000, and

(III) such distribution meets the requirements of clauses (iii) and (iv).

(ii) SPLIT-INTEREST ENTITY.—For purposes of this subparagraph, the term “split-interest entity” means—

(I) a charitable remainder annuity trust (as defined in section 664(d)(1)), but only if such trust is funded exclusively by qualified charitable distributions,

(II) a charitable remainder unitrust (as defined in section 664(d)(2)), but only if such unitrust is funded exclusively by qualified charitable distributions, or

(III) a charitable gift annuity (as defined in section 501(m)(5)), but only if such annuity is funded exclusively by qualified charitable distributions and commences fixed payments of 5 percent or greater not later than 1 year from the date of funding.

(iii) CONTRIBUTIONS MUST BE OTHERWISE DEDUCTIBLE.—A distribution meets the requirement of this clause only if—

(I) in the case of a distribution to a charitable remainder annuity trust or a charitable remainder unitrust, a deduction for the entire value of the remainder interest in the distribution for the benefit of a specified charitable organization would be allowable under section 170 (determined without regard to subsection (b) thereof and this paragraph), and

(II) in the case of a charitable gift annuity, a deduction in an amount equal to the amount of the distribution reduced by the value of the annuity described in section 501(m)(5)(B) would be allowable under section 170 (determined without regard to subsection (b) thereof and this paragraph).

(iv) *LIMITATION ON INCOME INTERESTS.*—A distribution meets the requirements of this clause only if—

(I) no person holds an income interest in the split-interest entity other than the individual for whose benefit such account is maintained, the spouse of such individual, or both, and

(II) the income interest in the split-interest entity is nonassignable.

(v) *SPECIAL RULES.*—

(I) *CHARITABLE REMAINDER TRUSTS.*—Notwithstanding section 664(b), distributions made from a trust described in subclause (I) or (II) of clause (ii) shall be treated as ordinary income in the hands of the beneficiary to whom the annuity described in section 664(d)(1)(A) or the payment described in section 664(d)(2)(A) is paid.

(II) *CHARITABLE GIFT ANNUITIES.*—Qualified charitable distributions made to fund a charitable gift annuity shall not be treated as an investment in the contract for purposes of section 72(c).

(G) *INFLATION ADJUSTMENT.*—

(i) *IN GENERAL.*—In the case of any taxable year beginning after 2021, each of the dollar amounts in subparagraphs (A) and (F) shall be increased by an amount equal to—

(I) such dollar amount, multiplied by

(II) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting “calendar year 2020” for “calendar year 2016” in subparagraph (A)(ii) thereof.

(ii) *ROUNDING.*—If any dollar amount increased under clause (i) is not a multiple of \$1,000, such dollar amount shall be rounded to the nearest multiple of \$1,000.

(9) *DISTRIBUTION FOR HEALTH SAVINGS ACCOUNT FUNDING.*—

(A) *IN GENERAL.*—In the case of an individual who is an eligible individual (as defined in section 223(c)) and who elects the application of this paragraph for a taxable year, gross income of the individual for the taxable year does not include a qualified HSA funding distribution to the extent such distribution is otherwise includible in gross income.

(B) *QUALIFIED HSA FUNDING DISTRIBUTION.*—For purposes of this paragraph, the term “qualified HSA funding distribution” means a distribution from an individual retirement plan (other than a plan described in subsection (k) or (p)) of the employee to the extent that such distribution is contributed to the health savings account of the individual in a direct trustee-to-trustee transfer.

(C) *LIMITATIONS.*—

(i) *MAXIMUM DOLLAR LIMITATION.*—The amount excluded from gross income by subparagraph (A) shall not exceed the excess of—

(I) the annual limitation under section 223(b) computed on the basis of the type of coverage

under the high deductible health plan covering the individual at the time of the qualified HSA funding distribution, over

(II) in the case of a distribution described in clause (ii)(II), the amount of the earlier qualified HSA funding distribution.

(ii) ONE-TIME TRANSFER.—

(I) IN GENERAL.—Except as provided in subclause (II), an individual may make an election under subparagraph (A) only for one qualified HSA funding distribution during the lifetime of the individual. Such an election, once made, shall be irrevocable.

(II) CONVERSION FROM SELF-ONLY TO FAMILY COVERAGE.—If a qualified HSA funding distribution is made during a month in a taxable year during which an individual has self-only coverage under a high deductible health plan as of the first day of the month, the individual may elect to make an additional qualified HSA funding distribution during a subsequent month in such taxable year during which the individual has family coverage under a high deductible health plan as of the first day of the subsequent month.

(D) FAILURE TO MAINTAIN HIGH DEDUCTIBLE HEALTH PLAN COVERAGE.—

(i) IN GENERAL.—If, at any time during the testing period, the individual is not an eligible individual, then the aggregate amount of all contributions to the health savings account of the individual made under subparagraph (A)—

(I) shall be includible in the gross income of the individual for the taxable year in which occurs the first month in the testing period for which such individual is not an eligible individual, and

(II) the tax imposed by this chapter for any taxable year on the individual shall be increased by 10 percent of the amount which is so includible.

(ii) EXCEPTION FOR DISABILITY OR DEATH.—Subclauses (I) and (II) of clause (i) shall not apply if the individual ceased to be an eligible individual by reason of the death of the individual or the individual becoming disabled (within the meaning of section 72(m)(7)).

(iii) TESTING PERIOD.—The term “testing period” means the period beginning with the month in which the qualified HSA funding distribution is contributed to a health savings account and ending on the last day of the 12th month following such month.

(E) APPLICATION OF SECTION 72.—Notwithstanding section 72, in determining the extent to which an amount is treated as otherwise includible in gross income for purposes of subparagraph (A), the aggregate amount distributed from an individual retirement plan shall be treated as includible in gross income to the extent that such amount does not exceed the aggregate amount which

would have been so includible if all amounts from all individual retirement plans were distributed. Proper adjustments shall be made in applying section 72 to other distributions in such taxable year and subsequent taxable years.

(e) TAX TREATMENT OF ACCOUNTS AND ANNUITIES.—

(1) EXEMPTION FROM TAX.—Any individual retirement account is exempt from taxation under this subtitle unless such account has ceased to be an individual retirement account by reason of paragraph (2) or (3). Notwithstanding the preceding sentence, any such account is subject to the taxes imposed by section 511 (relating to imposition of tax on unrelated business income of charitable, etc. organizations).

(2) LOSS OF EXEMPTION OF ACCOUNT WHERE EMPLOYEE ENGAGES IN PROHIBITED TRANSACTION.—

(A) IN GENERAL.—If, during any taxable year of the individual for whose benefit any individual retirement account is established, that individual or his beneficiary engages in any transaction prohibited by section 4975 with respect to such account, **[such account ceases to be an individual retirement account]** *the portion of such account which is used in such transaction shall be treated as distributed to the individual as of the first day of such taxable year.* For purposes of this paragraph—

(i) the individual for whose benefit any account was established is treated as the creator of such account, and

(ii) the separate account for any individual within an individual retirement account maintained by an employer or association of employees is treated as a separate individual retirement account.

(B) ACCOUNT TREATED AS DISTRIBUTING **[ALL ITS ASSETS]** *PORTION OF ASSETS USED IN PROHIBITED TRANSACTION.*—

**[In any case in which any account ceases to be an individual retirement account by reason of subparagraph (A)]** *In any case in which a portion of an individual retirement account is treated as distributed under subparagraph (A) as of the first day of any taxable year, paragraph (1) of subsection (d) applies as if there were a distribution on such first day in an amount equal to the fair market value (on such first day) of [all assets in the account] such portion (on such first day).*

(3) EFFECT OF BORROWING ON ANNUITY CONTRACT.—If during any taxable year the owner of an individual retirement annuity borrows any money under or by use of such contract, the contract ceases to be an individual retirement annuity as of the first day of such taxable year. Such owner shall include in gross income for such year an amount equal to the fair market value of such contract as of such first day.

(4) EFFECT OF PLEDGING ACCOUNT AS SECURITY.—If, during any taxable year of the individual for whose benefit an individual retirement account is established, that individual uses the account or any portion thereof as security for a loan, the portion so used is treated as distributed to that individual.

(5) PURCHASE OF ENDOWMENT CONTRACT BY INDIVIDUAL RETIREMENT ACCOUNT.—If the assets of an individual retirement account or any part of such assets are used to purchase an endowment contract for the benefit of the individual for whose benefit the account is established—

(A) to the extent that the amount of the assets involved in the purchase are not attributable to the purchase of life insurance, the purchase is treated as a rollover contribution described in subsection (d)(3), and

(B) to the extent that the amount of the assets involved in the purchase are attributable to the purchase of life, health, accident, or other insurance, such amounts are treated as distributed to that individual (but the provisions of subsection (f) do not apply).

(6) COMMINGLING INDIVIDUAL RETIREMENT ACCOUNT AMOUNTS IN CERTAIN COMMON TRUST FUNDS AND COMMON INVESTMENT FUNDS.—Any common trust fund or common investment fund of individual retirement account assets which is exempt from taxation under this subtitle does not cease to be exempt on account of the participation or inclusion of assets of a trust exempt from taxation under section 501(a) which is described in section 401(a).

(g) COMMUNITY PROPERTY LAWS.—This section shall be applied without regard to any community property laws.

(h) CUSTODIAL ACCOUNTS.—For purposes of this section, a custodial account shall be treated as a trust if the assets of such account are held by a bank (as defined in subsection (n)) or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which he will administer the account will be consistent with the requirements of this section, and if the custodial account would, except for the fact that it is not a trust, constitute an individual retirement account described in subsection (a). For purposes of this title, in the case of a custodial account treated as a trust by reason of the preceding sentence, the custodian of such account shall be treated as the trustee thereof.

(i) **[REPORTS.—]** **[The trustee of]** *REPORTS*.—

(1) *IN GENERAL*.—*The trustee of an individual retirement account and the issuer of an endowment contract described in subsection (b) or an individual retirement annuity shall make such reports regarding such account, contract, or annuity to the Secretary and to the individuals for whom the account, contract, or annuity is, or is to be, maintained with respect to contributions (and the years to which they relate), distributions aggregating \$10 or more in any calendar year, and such other matters as the Secretary may require. The reports required by this subsection—*

**[(1)]** (A) shall be filed at such time and in such manner as the Secretary prescribes, and

**[(2)]** (B) shall be furnished to individuals—

**[(A)]** (i) not later than January 31 of the calendar year following the calendar year to which such reports relate, and

**[(B)]** (ii) in such manner **[as the Secretary prescribes.]** *as the Secretary prescribes.*

(2) *MANDATORY DISTRIBUTIONS.*—*In the case of an account, contract, or annuity to which a transfer under section 401(a)(31)(B) is made (including a transfer from the individual retirement plan to which the original transfer under such section was made to another individual retirement plan), the report required by this subsection for the year of the transfer and any year in which the information previously reported in subparagraph (B) changes shall—*

*(A) identify such transfer as a mandatory distribution required by such section,*

*(B) include the name, address, and taxpayer identifying number of the trustee or issuer of the individual retirement plan to which the amount is transferred, and*

*(C) be filed with the Pension Benefit Guaranty Corporation as well as with the Secretary.*

**[In the case of a simple retirement account]**

(3) *SIMPLE RETIREMENT ACCOUNTS.*—*In the case of a simple retirement account under subsection (p), only one report under this subsection shall be required to be submitted each calendar year to the Secretary (at the time provided [under paragraph (2)] under paragraph (1)(B)) but, in addition to the report under this subsection, there shall be furnished, within 31 days after each calendar year, to the individual on whose behalf the account is maintained a statement with respect to the account balance as of the close of, and the account activity during, such calendar year.*

(j) *INCREASE IN MAXIMUM LIMITATIONS FOR SIMPLIFIED EMPLOYEE PENSIONS.*—*In the case of any simplified employee pension, subsections (a)(1) and (b)(2) of this section shall be applied by increasing the amounts contained therein by the amount of the limitation in effect under section 415(c)(1)(A).*

(k) *SIMPLIFIED EMPLOYEE PENSION DEFINED.*—

(1) *IN GENERAL.*—*For purposes of this title, the term “simplified employee pension” means an individual retirement account or individual retirement annuity—*

*(A) with respect to which the requirements of paragraphs (2), (3), (4), and (5) of this subsection are met, and*

*(B) if such account or annuity is part of a top-heavy plan (as defined in section 416), with respect to which the requirements of section 416(c)(2) are met.*

(2) *PARTICIPATION REQUIREMENTS.*—*This paragraph is satisfied with respect to a simplified employee pension for a year only if for such year the employer contributes to the simplified employee pension of each employee who—*

*(A) has attained age 21,*

*(B) has performed service for the employer during at least 3 of the immediately preceding 5 years, and*

*(C) received at least \$450 in compensation (within the meaning of section 414(q)(4)) from the employer for the year.*

For purposes of this paragraph, there shall be excluded from consideration employees described in subparagraph (A) or (C) of section 410(b)(3). For purposes of any arrangement described in subsection (k)(6), any employee who is eligible to have employer contributions made on the employee's behalf under such



arrangement shall be treated as if such a contribution was made.

(3) CONTRIBUTIONS MAY NOT DISCRIMINATE IN FAVOR OF THE HIGHLY COMPENSATED, ETC.—

(A) IN GENERAL.—The requirements of this paragraph are met with respect to a simplified employee pension for a year if for such year the contributions made by the employer to simplified employee pensions for his employees do not discriminate in favor of any highly compensated employee (within the meaning of section 414(q)).

(B) SPECIAL RULES.—For purposes of subparagraph (A), there shall be excluded from consideration employees described in subparagraph (A) or (C) of section 410(b)(3).

(C) CONTRIBUTIONS MUST BEAR UNIFORM RELATIONSHIP TO TOTAL COMPENSATION.—For purposes of subparagraph (A), and except as provided in subparagraph (D), employer contributions to simplified employee pensions (other than contributions under an arrangement described in paragraph (6)) shall be considered discriminatory unless contributions thereto bear a uniform relationship to the compensation (not in excess of the first \$200,000) of each employee maintaining a simplified employee pension.

(D) PERMITTED DISPARITY.—For purposes of subparagraph (C), the rules of section 401(l)(2) shall apply to contributions to simplified employee pensions (other than contributions under an arrangement described in paragraph (6)).

(4) WITHDRAWALS MUST BE PERMITTED.—A simplified employee pension meets the requirements of this paragraph only if—

(A) employer contributions thereto are not conditioned on the retention in such pension of any portion of the amount contributed, and

(B) there is no prohibition imposed by the employer on withdrawals from the simplified employee pension.

(5) CONTRIBUTIONS MUST BE MADE UNDER WRITTEN ALLOCATION FORMULA.—The requirements of this paragraph are met with respect to a simplified employee pension only if employer contributions to such pension are determined under a definite written allocation formula which specifies—

(A) the requirements which an employee must satisfy to share in an allocation, and

(B) the manner in which the amount allocated is computed.

(6) EMPLOYEE MAY ELECT SALARY REDUCTION ARRANGEMENT.—

(A) ARRANGEMENTS WHICH QUALIFY.—

(i) IN GENERAL.—A simplified employee pension shall not fail to meet the requirements of this subsection for a year merely because, under the terms of the pension, an employee may elect to have the employer make payments—

(I) as elective employer contributions to the simplified employee pension on behalf of the employee, or

(II) to the employee directly in cash.

(ii) 50 PERCENT OF ELIGIBLE EMPLOYEES MUST ELECT.—Clause (i) shall not apply to a simplified employee pension unless an election described in clause (i)(I) is made or is in effect with respect to not less than 50 percent of the employees of the employer eligible to participate.

(iii) REQUIREMENTS RELATING TO DEFERRAL PERCENTAGE.—Clause (i) shall not apply to a simplified employee pension for any year unless the deferral percentage for such year of each highly compensated employee eligible to participate is not more than the product of—

(I) the average of the deferral percentages for such year of all employees (other than highly compensated employees) eligible to participate, multiplied by

(II) 1.25.

(iv) LIMITATIONS ON ELECTIVE DEFERRALS.—Clause (i) shall not apply to a simplified employee pension unless the requirements of section 401(a)(30) are met.

(B) EXCEPTION WHERE MORE THAN 25 EMPLOYEES.—This paragraph shall not apply with respect to any year in the case of a simplified employee pension maintained by an employer with more than 25 employees who were eligible to participate (or would have been required to be eligible to participate if a pension was maintained) at any time during the preceding year.

(C) DISTRIBUTIONS OF EXCESS CONTRIBUTIONS.—

(i) IN GENERAL.—Rules similar to the rules of section 401(k)(8) shall apply to any excess contribution under this paragraph. Any excess contribution under a simplified employee pension shall be treated as an excess contribution for purposes of section 4979.

(ii) EXCESS CONTRIBUTION.—For purposes of clause (i), the term “excess contribution” means, with respect to a highly compensated employee, the excess of elective employer contributions under this paragraph over the maximum amount of such contributions allowable under subparagraph (A)(iii).

(D) DEFERRAL PERCENTAGE.—For purposes of this paragraph, the deferral percentage for an employee for a year shall be the ratio of—

(i) the amount of elective employer contributions actually paid over to the simplified employee pension on behalf of the employee for the year, to

(ii) the employee’s compensation (not in excess of the first \$200,000) for the year.

(E) EXCEPTION FOR STATE AND LOCAL AND TAX-EXEMPT PENSIONS.—This paragraph shall not apply to a simplified employee pension maintained by—

(i) a State or local government or political subdivision thereof, or any agency or instrumentality thereof, or

(ii) an organization exempt from tax under this title.

(F) EXCEPTION WHERE PENSION DOES NOT MEET REQUIREMENTS NECESSARY TO INSURE DISTRIBUTION OF EXCESS CONTRIBUTIONS.—This paragraph shall not apply with respect to any year for which the simplified employee pension does not meet such requirements as the Secretary may prescribe as are necessary to insure that excess contributions are distributed in accordance with subparagraph (C), including—

- (i) reporting requirements, and
- (ii) requirements which, notwithstanding paragraph (4), provide that contributions (and any income allocable thereto) may not be withdrawn from a simplified employee pension until a determination has been made that the requirements of subparagraph (A)(iii) have been met with respect to such contributions.

(G) HIGHLY COMPENSATED EMPLOYEE.—For purposes of this paragraph, the term “highly compensated employee” has the meaning given such term by section 414(q).

(H) TERMINATION.—This paragraph shall not apply to years beginning after December 31, 1996. The preceding sentence shall not apply to a simplified employee pension of an employer if the terms of simplified employee pensions of such employer, as in effect on December 31, 1996, provide that an employee may make the election described in subparagraph (A).

(7) ROTH CONTRIBUTION ELECTION.—*An individual retirement plan which is designated as a Roth IRA shall not be treated as a simplified employee pension under this subsection unless the employee elects for such plan to be so treated (at such time and in such manner as the Secretary may provide).*

[(7)] (8) DEFINITIONS.—For purposes of this subsection and subsection (I)—

(A) EMPLOYEE, EMPLOYER, OR OWNER-EMPLOYEE.—The terms “employee”, “employer”, and “owner-employee” shall have the respective meanings given such terms by section 401(c).

(B) COMPENSATION.—Except as provided in paragraph (2)(C), the term “compensation” has the meaning given such term by section 414(s).

(C) YEAR.—The term “year” means—

- (i) the calendar year, or
- (ii) if the employer elects, subject to such terms and conditions as the Secretary may prescribe, to maintain the simplified employee pension on the basis of the employer’s taxable year.

[(8)] (9) COST-OF-LIVING ADJUSTMENT.—The Secretary shall adjust the \$450 amount in paragraph (2)(C) at the same time and in the same manner as under section 415(d) and shall adjust the \$200,000 amount in paragraphs (3)(C) and (6)(D)(ii) at the same time, and by the same amount, as any adjustment under section 401(a)(17)(B); except that any increase in the \$450 amount which is not a multiple of \$50 shall be rounded to the next lowest multiple of \$50.

[(9)] (10) CROSS REFERENCE.—For excise tax on certain excess contributions, see section 4979.

## (l) SIMPLIFIED EMPLOYER REPORTS.—

(1) IN GENERAL.—An employer who makes a contribution on behalf of an employee to a simplified employee pension shall provide such simplified reports with respect to such contributions as the Secretary may require by regulations. The reports required by this subsection shall be filed at such time and in such manner, and information with respect to such contributions shall be furnished to the employee at such time and in such manner, as may be required by regulations.

## (2) SIMPLE RETIREMENT ACCOUNTS.—

(A) NO EMPLOYER REPORTS.—Except as provided in this paragraph, no report shall be required under this section by an employer maintaining a qualified salary reduction arrangement under subsection (p).

(B) SUMMARY DESCRIPTION.—The trustee of any simple retirement account established pursuant to a qualified salary reduction arrangement under subsection (p) and the issuer of an annuity established under such an arrangement shall provide to the employer maintaining the arrangement, each year a description containing the following information:

- (i) The name and address of the employer and the trustee or issuer.
- (ii) The requirements for eligibility for participation.
- (iii) The benefits provided with respect to the arrangement.
- (iv) The time and method of making elections with respect to the arrangement.
- (v) The procedures for, and effects of, withdrawals (including rollovers) from the arrangement.

(C) EMPLOYEE NOTIFICATION.—The employer shall notify each employee immediately before the period for which an election described in subsection (p)(5)(C) may be made of the employee's opportunity to make such election. Such notice shall include a copy of the description described in subparagraph (B).

## (m) INVESTMENT IN COLLECTIBLES TREATED AS DISTRIBUTIONS.—

(1) IN GENERAL.—The acquisition by an individual retirement account or by an individually-directed account under a plan described in section 401(a) of any collectible shall be treated (for purposes of this section and section 402) as a distribution from such account in an amount equal to the cost to such account of such collectible.

(2) COLLECTIBLE DEFINED.—For purposes of this subsection, the term “collectible” means—

- (A) any work of art,
- (B) any rug or antique,
- (C) any metal or gem,
- (D) any stamp or coin,
- (E) any alcoholic beverage, or
- (F) any other tangible personal property specified by the Secretary for purposes of this subsection.

(3) EXCEPTION FOR CERTAIN COINS AND BULLION.—For purposes of this subsection, the term “collectible” shall not include—

(A) any coin which is—

- (i) a gold coin described in paragraph (7), (8), (9), or (10) of section 5112(a) of title 31, United States Code,
- (ii) a silver coin described in section 5112(e) of title 31, United States Code,
- (iii) a platinum coin described in section 5112(k) of title 31, United States Code, or
- (iv) a coin issued under the laws of any State, or

(B) any gold, silver, platinum, or palladium bullion of a fineness equal to or exceeding the minimum fineness that a contract market (as described in section 5 of the Commodity Exchange Act, 7 U.S.C. 7) requires for metals which may be delivered in satisfaction of a regulated futures contract,

if such bullion is in the physical possession of a trustee described under subsection (a) of this section.

(n) BANK.—For purposes of subsection (a)(2), the term “bank” means—

- (1) any bank (as defined in section 581),
- (2) an insured credit union (within the meaning of paragraph (6) or (7) of section 101 of the Federal Credit Union Act), and
- (3) a corporation which, under the laws of the State of its incorporation, is subject to supervision and examination by the Commissioner of Banking or other officer of such State in charge of the administration of the banking laws of such State.

(o) DEFINITIONS AND RULES RELATING TO NONDEDUCTIBLE CONTRIBUTIONS TO INDIVIDUAL RETIREMENT PLANS.—

(1) IN GENERAL.—Subject to the provisions of this subsection, designated nondeductible contributions may be made on behalf of an individual to an individual retirement plan.

(2) LIMITS ON AMOUNTS WHICH MAY BE CONTRIBUTED.—

(A) IN GENERAL.—The amount of the designated nondeductible contributions made on behalf of any individual for any taxable year shall not exceed the nondeductible limit for such taxable year.

(B) NONDEDUCTIBLE LIMIT.—For purposes of this paragraph—

(i) IN GENERAL.—The term “nondeductible limit” means the excess of—

(I) the amount allowable as a deduction under section 219 (determined without regard to section 219(g)), over

(II) the amount allowable as a deduction under section 219 (determined with regard to section 219(g)).

(ii) TAXPAYER MAY ELECT TO TREAT DEDUCTIBLE CONTRIBUTIONS AS NONDEDUCTIBLE.—If a taxpayer elects not to deduct an amount which (without regard to this clause) is allowable as a deduction under section 219 for any taxable year, the nondeductible limit for such taxable year shall be increased by such amount.

(C) DESIGNATED NONDEDUCTIBLE CONTRIBUTIONS.—

(i) IN GENERAL.—For purposes of this paragraph, the term “designated nondeductible contribution” means any contribution to an individual retirement plan for

the taxable year which is designated (in such manner as the Secretary may prescribe) as a contribution for which a deduction is not allowable under section 219.

(ii) DESIGNATION.—Any designation under clause (i) shall be made on the return of tax imposed by chapter 1 for the taxable year.

(3) TIME WHEN CONTRIBUTIONS MADE.—In determining for which taxable year a designated nondeductible contribution is made, the rule of section 219(f)(3) shall apply.

(4) INDIVIDUAL REQUIRED TO REPORT AMOUNT OF DESIGNATED NONDEDUCTIBLE CONTRIBUTIONS.—

(A) IN GENERAL.—Any individual who—

(i) makes a designated nondeductible contribution to any individual retirement plan for any taxable year, or

(ii) receives any amount from any individual retirement plan for any taxable year,

shall include on his return of the tax imposed by chapter 1 for such taxable year and any succeeding taxable year (or on such other form as the Secretary may prescribe for any such taxable year) information described in subparagraph (B).

(B) INFORMATION REQUIRED TO BE SUPPLIED.—The following information is described in this subparagraph:

(i) The amount of designated nondeductible contributions for the taxable year.

(ii) The amount of distributions from individual retirement plans for the taxable year.

(iii) The excess (if any) of—

(I) the aggregate amount of designated nondeductible contributions for all preceding taxable years, over

(II) the aggregate amount of distributions from individual retirement plans which was excludable from gross income for such taxable years.

(iv) The aggregate balance of all individual retirement plans of the individual as of the close of the calendar year in which the taxable year begins.

(v) Such other information as the Secretary may prescribe.

(C) PENALTY FOR REPORTING CONTRIBUTIONS NOT MADE.—For penalty where individual reports designated nondeductible contributions not made, see section 6693(b).

(5) SPECIAL RULE FOR DIFFICULTY OF CARE PAYMENTS EXCLUDED FROM GROSS INCOME.—In the case of an individual who for a taxable year excludes from gross income under section 131 a qualified foster care payment which is a difficulty of care payment, if—

(A) the deductible amount in effect for the taxable year under subsection (b), exceeds

(B) the amount of compensation includible in the individual's gross income for the taxable year, the individual may elect to increase the nondeductible limit under paragraph (2) for the taxable year by an amount equal to the lesser of such excess or the amount so excluded.

(p) SIMPLE RETIREMENT ACCOUNTS.—

(1) IN GENERAL.—For purposes of this title, the term “simple retirement account” means an individual retirement plan (as defined in section 7701(a)(37))—

(A) with respect to which the requirements of paragraphs (3), (4), and (5) are met; and

(B) except in the case of a rollover contribution described in subsection (d)(3)(G) or a rollover contribution otherwise described in subsection (d)(3) or in section 402(c), 403(a)(4), 403(b)(8), or 457(e)(16), which is made after the 2-year period described in section 72(t)(6), with respect to which the only contributions allowed are contributions under a qualified salary reduction arrangement.

(2) QUALIFIED SALARY REDUCTION ARRANGEMENT.—

(A) IN GENERAL.—For purposes of this subsection, the term “qualified salary reduction arrangement” means a written arrangement of an eligible employer under which—

(i) an employee eligible to participate in the arrangement may elect to have the employer make payments—

(I) as elective employer contributions to a simple retirement account on behalf of the employee, or

(II) to the employee directly in cash,

(ii) the amount which an employee may elect under clause (i) for any year is required to be expressed as a percentage of compensation and may not exceed a total of the applicable dollar amount for any year,

(iii) the employer is required to make a matching contribution to the simple retirement account for any year in an amount equal to so much of the amount the employee elects under clause (i)(I) as does not exceed the applicable percentage of compensation for the year, and

(iv) no contributions may be made other than contributions described in clause (i) or (iii).

(B) EMPLOYER MAY ELECT 2-PERCENT NONELECTIVE CONTRIBUTION.—

(i) IN GENERAL.—An employer shall be treated as meeting the requirements of subparagraph (A)(iii) for any year if, in lieu of the contributions described in such clause, the employer elects to make nonelective contributions of 2 percent of compensation for each employee who is eligible to participate in the arrangement and who has at least \$5,000 of compensation from the employer for the year. If an employer makes an election under this subparagraph for any year, the employer shall notify employees of such election within a reasonable period of time before the 60-day period for such year under paragraph (5)(C).

(ii) COMPENSATION LIMITATION.—The compensation taken into account under clause (i) for any year shall not exceed the limitation in effect for such year under section 401(a)(17).

(C) DEFINITIONS.—For purposes of this subsection—

## (i) ELIGIBLE EMPLOYER.—

(I) IN GENERAL.—The term “eligible employer” means, with respect to any year, an employer which had no more than 100 employees who received at least \$5,000 of compensation from the employer for the preceding year.

(II) 2-YEAR GRACE PERIOD.—An eligible employer who establishes and maintains a plan under this subsection for 1 or more years and who fails to be an eligible employer for any subsequent year shall be treated as an eligible employer for the 2 years following the last year the employer was an eligible employer. If such failure is due to any acquisition, disposition, or similar transaction involving an eligible employer, the preceding sentence shall not apply.

## (ii) APPLICABLE PERCENTAGE.—

(I) IN GENERAL.—The term “applicable percentage” means 3 percent.

(II) ELECTION OF LOWER PERCENTAGE.—An employer may elect to apply a lower percentage (not less than 1 percent) for any year for all employees eligible to participate in the plan for such year if the employer notifies the employees of such lower percentage within a reasonable period of time before the 60-day election period for such year under paragraph (5)(C). An employer may not elect a lower percentage under this subclause for any year if that election would result in the applicable percentage being lower than 3 percent in more than 2 of the years in the 5-year period ending with such year.

(III) SPECIAL RULE FOR YEARS ARRANGEMENT NOT IN EFFECT.—If any year in the 5-year period described in subclause (II) is a year prior to the first year for which any qualified salary reduction arrangement is in effect with respect to the employer (or any predecessor), the employer shall be treated as if the level of the employer matching contribution was at 3 percent of compensation for such prior year.

## (D) ARRANGEMENT MAY BE ONLY PLAN OF EMPLOYER.—

(i) IN GENERAL.—An arrangement shall not be treated as a qualified salary reduction arrangement for any year if the employer (or any predecessor employer) maintained a qualified plan with respect to which contributions were made, or benefits were accrued, for service in any year in the period beginning with the year such arrangement became effective and ending with the year for which the determination is being made. If only individuals other than employees described in subparagraph (A) of section 410(b)(3) are eligible to participate in such arrangement, then the preceding sentence shall be applied without regard to



any qualified plan in which only employees so described are eligible to participate.

(ii) **QUALIFIED PLAN.**—For purposes of this subparagraph, the term “qualified plan” means a plan, contract, pension, or trust described in subparagraph (A) or (B) of section 219(g)(5).

(E) **APPLICABLE DOLLAR AMOUNT; COST-OF-LIVING ADJUSTMENT.**—

(i) **IN GENERAL.**—For purposes of subparagraph (A)(ii), the applicable amount is \$10,000.

(ii) **COST-OF-LIVING ADJUSTMENT.**—In the case of a year beginning after December 31, 2005, the Secretary shall adjust the \$10,000 amount under clause (i) at the same time and in the same manner as under section 415(d), except that the base period taken into account shall be the calendar quarter beginning July 1, 2004, and any increase under this subparagraph which is not a multiple of \$500 shall be rounded to the next lower multiple of \$500.

(F) **MATCHING CONTRIBUTIONS FOR QUALIFIED STUDENT LOAN PAYMENTS.**—

(i) **IN GENERAL.**—*Subject to the rules of clause (iii), an arrangement shall not fail to be treated as meeting the requirements of subparagraph (A)(iii) solely because under the arrangement, solely for purposes of such subparagraph, qualified student loan payments are treated as amounts elected by the employee under subparagraph (A)(i)(I) to the extent such payments do not exceed—*

*(I) the applicable dollar amount under subparagraph (E) (after application of section 414(v)) for the year (or, if lesser, the employee’s compensation (as defined in section 415(c)(3)) for the year), reduced by*

*(II) any other amounts elected by the employee under subparagraph (A)(i)(I) for the year.*

(ii) **QUALIFIED STUDENT LOAN PAYMENT.**—*For purposes of this subparagraph—*

*(I) IN GENERAL.*—*The term “qualified student loan payment” means a payment made by an employee in repayment of a qualified education loan (as defined in section 221(d)(1)) incurred by the employee to pay qualified higher education expenses, but only if the employee certifies to the employer making the matching contribution that such payment has been made on such a loan.*

*(II) QUALIFIED HIGHER EDUCATION EXPENSES.*—*The term “qualified higher education expenses” has the same meaning as when used in section 401(m)(4)(D).*

(iii) **APPLICABLE RULES.**—*Clause (i) shall apply to an arrangement only if, under the arrangement—*

*(I) matching contributions on account of qualified student loan payments are provided only on*

*behalf of employees otherwise eligible to elect contributions under subparagraph (A)(i)(I), and*

*(II) all employees otherwise eligible to participate in the arrangement are eligible to receive matching contributions on account of qualified student loan payments.*

(3) VESTING REQUIREMENTS.—The requirements of this paragraph are met with respect to a simple retirement account if the employee's rights to any contribution to the simple retirement account are nonforfeitable. For purposes of this paragraph, rules similar to the rules of subsection (k)(4) shall apply.

(4) PARTICIPATION REQUIREMENTS.—

(A) IN GENERAL.—The requirements of this paragraph are met with respect to any simple retirement account for a year only if, under the qualified salary reduction arrangement, all employees of the employer who—

(i) received at least \$5,000 in compensation from the employer during any 2 preceding years, and

(ii) are reasonably expected to receive at least \$5,000 in compensation during the year, are eligible to make the election under paragraph (2)(A)(i) or receive the nonelective contribution described in paragraph (2)(B).

(B) EXCLUDABLE EMPLOYEES.—An employer may elect to exclude from the requirement under subparagraph (A) employees described in section 410(b)(3).

(5) ADMINISTRATIVE REQUIREMENTS.—The requirements of this paragraph are met with respect to any simple retirement account if, under the qualified salary reduction arrangement—

(A) an employer must—

(i) make the elective employer contributions under paragraph (2)(A)(i) not later than the close of the 30-day period following the last day of the month with respect to which the contributions are to be made, and

(ii) make the matching contributions under paragraph (2)(A)(iii) or the nonelective contributions under paragraph (2)(B) not later than the date described in section 404(m)(2)(B),

(B) an employee may elect to terminate participation in such arrangement at any time during the year, except that if an employee so terminates, the arrangement may provide that the employee may not elect to resume participation until the beginning of the next year, and

(C) each employee eligible to participate may elect, during the 60-day period before the beginning of any year (and the 60-day period before the first day such employee is eligible to participate), to participate in the arrangement, or to modify the amounts subject to such arrangement, for such year.

(6) DEFINITIONS.—For purposes of this subsection—

(A) COMPENSATION.—

(i) IN GENERAL.—The term “compensation” means amounts described in paragraphs (3) and (8) of section 6051(a). For purposes of the preceding sentence,

amounts described in section 6051(a)(3) shall be determined without regard to section 3401(a)(3).

(ii) SELF-EMPLOYED.—In the case of an employee described in subparagraph (B), the term “compensation” means net earnings from self-employment determined under section 1402(a) without regard to any contribution under this subsection. The preceding sentence shall be applied as if the term “trade or business” for purposes of section 1402 included service described in section 1402(c)(6).

(B) EMPLOYEE.—The term “employee” includes an employee as defined in section 401(c)(1).

(C) YEAR.—The term “year” means the calendar year.

(7) USE OF DESIGNATED FINANCIAL INSTITUTION.—A plan shall not be treated as failing to satisfy the requirements of this subsection or any other provision of this title merely because the employer makes all contributions to the individual retirement accounts or annuities of a designated trustee or issuer. The preceding sentence shall not apply unless each plan participant is notified in writing (either separately or as part of the notice under subsection (l)(2)(C)) that the participant’s balance may be transferred without cost or penalty to another individual account or annuity in accordance with subsection (d)(3)(G).

(8) COORDINATION WITH MAXIMUM LIMITATION UNDER SUBSECTION (A).—In the case of any simple retirement account, subsections (a)(1) and (b)(2) shall be applied by substituting “the sum of the dollar amount in effect under paragraph (2)(A)(ii) of this subsection and the employer contribution required under subparagraph (A)(iii) or (B)(i) of paragraph (2) of this subsection, whichever is applicable” for “the dollar amount in effect under section 219(b)(1)(A)”.

(9) MATCHING CONTRIBUTIONS ON BEHALF OF SELF-EMPLOYED INDIVIDUALS NOT TREATED AS ELECTIVE EMPLOYER CONTRIBUTIONS.—Any matching contribution described in paragraph (2)(A)(iii) which is made on behalf of a self-employed individual (as defined in section 401(c)) shall not be treated as an elective employer contribution to a simple retirement account for purposes of this title.

(10) SPECIAL RULES FOR ACQUISITIONS, DISPOSITIONS, AND SIMILAR TRANSACTIONS.—

(A) IN GENERAL.—An employer which fails to meet any applicable requirement by reason of an acquisition, disposition, or similar transaction shall not be treated as failing to meet such requirement during the transition period if—

(i) the employer satisfies requirements similar to the requirements of section 410(b)(6)(C)(i)(II); and

(ii) the qualified salary reduction arrangement maintained by the employer would satisfy the requirements of this subsection after the transaction if the employer which maintained the arrangement before the transaction had remained a separate employer.

(B) APPLICABLE REQUIREMENT.—For purposes of this paragraph, the term “applicable requirement” means—

- (i) the requirement under paragraph (2)(A)(i) that an employer be an eligible employer;
- (ii) the requirement under paragraph (2)(D) that an arrangement be the only plan of an employer; and
- (iii) the participation requirements under paragraph (4).

(C) TRANSITION PERIOD.—For purposes of this paragraph, the term “transition period” means the period beginning on the date of any transaction described in subparagraph (A) and ending on the last day of the second calendar year following the calendar year in which such transaction occurs.

(11) ROTH CONTRIBUTION ELECTION.—*An individual retirement plan which is designated as a Roth IRA shall not be treated as a simple retirement account under this subsection unless the employee elects for such plan to be so treated (at such time and in such manner as the Secretary may provide).*

(q) DEEMED IRAS UNDER QUALIFIED EMPLOYER PLANS.—

(1) GENERAL RULE.—If—

(A) a qualified employer plan elects to allow employees to make voluntary employee contributions to a separate account or annuity established under the plan, and

(B) under the terms of the qualified employer plan, such account or annuity meets the applicable requirements of this section or section 408A for an individual retirement account or annuity,

then such account or annuity shall be treated for purposes of this title in the same manner as an individual retirement plan and not as a qualified employer plan (and contributions to such account or annuity as contributions to an individual retirement plan and not to the qualified employer plan). For purposes of subparagraph (B), the requirements of subsection (a)(5) shall not apply.

(2) SPECIAL RULES FOR QUALIFIED EMPLOYER PLANS.—For purposes of this title, a qualified employer plan shall not fail to meet any requirement of this title solely by reason of establishing and maintaining a program described in paragraph (1).

(3) DEFINITIONS.—For purposes of this subsection—

(A) QUALIFIED EMPLOYER PLAN.—The term “qualified employer plan” has the meaning given such term by section 72(p)(4)(A)(i); except that such term shall also include an eligible deferred compensation plan (as defined in section 457(b)) of an eligible employer described in section 457(e)(1)(A).

(B) VOLUNTARY EMPLOYEE CONTRIBUTION.—The term “voluntary employee contribution” means any contribution (other than a mandatory contribution within the meaning of section 411(c)(2)(C))—

- (i) which is made by an individual as an employee under a qualified employer plan which allows employees to elect to make contributions described in paragraph (1), and

- (ii) with respect to which the individual has designated the contribution as a contribution to which this subsection applies.

## (r) CROSS REFERENCES.—

(1) For tax on excess contributions in individual retirement accounts or annuities, see section 4973.

(2) For tax on certain accumulations in individual retirement accounts or annuities, see section 4974.

**SEC. 408A. ROTH IRAS.**

(a) GENERAL RULE.—Except as provided in this section, a Roth IRA shall be treated for purposes of this title in the same manner as an individual retirement plan.

(b) ROTH IRA.—For purposes of this title, the term “Roth IRA” means an individual retirement plan (as defined in section 7701(a)(37)) which is designated (in such manner as the Secretary may prescribe) at the time of establishment of the plan as a Roth IRA. Such designation shall be made in such manner as the Secretary may prescribe.

## (c) TREATMENT OF CONTRIBUTIONS.—

(1) NO DEDUCTION ALLOWED.—No deduction shall be allowed under section 219 for a contribution to a Roth IRA.

(2) CONTRIBUTION LIMIT.—The aggregate amount of contributions for any taxable year to all Roth IRAs maintained for the benefit of an individual shall not exceed the excess (if any) of—

(A) the maximum amount allowable as a deduction under section 219 with respect to such individual for such taxable year (computed without regard to subsection (d)(1) or (g) of such section), over

(B) the aggregate amount of contributions for such taxable year to all other individual retirement plans (other than Roth IRAs) maintained for the benefit of the individual.

## (3) LIMITS BASED ON MODIFIED ADJUSTED GROSS INCOME.—

(A) DOLLAR LIMIT.—The amount determined under paragraph (2) for any taxable year shall not exceed an amount equal to the amount determined under paragraph (2)(A) for such taxable year, reduced (but not below zero) by the amount which bears the same ratio to such amount as—

(i) the excess of—

(I) the taxpayer’s adjusted gross income for such taxable year, over

(II) the applicable dollar amount, bears to

(ii) \$15,000 (\$10,000 in the case of a joint return or a married individual filing a separate return).

The rules of subparagraphs (B) and (C) of section 219(g)(2) shall apply to any reduction under this subparagraph.

## (B) DEFINITIONS.—For purposes of this paragraph—

(i) adjusted gross income shall be determined in the same manner as under section 219(g)(3), except that any amount included in gross income under subsection (d)(3) shall not be taken into account, and

(ii) the applicable dollar amount is—

(I) in the case of a taxpayer filing a joint return, \$150,000,

(II) in the case of any other taxpayer (other than a married individual filing a separate return), \$95,000, and

(III) in the case of a married individual filing a separate return, zero.

(C) MARITAL STATUS.—Section 219(g)(4) shall apply for purposes of this paragraph.

(D) INFLATION ADJUSTMENT.—In the case of any taxable year beginning in a calendar year after 2006, the dollar amounts in subclauses (I) and (II) of subparagraph (B)(ii) shall each be increased by an amount equal to—

- (i) such dollar amount, multiplied by
- (ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting “calendar year 2005” for “calendar year 2016” in subparagraph (A)(ii) thereof.

Any increase determined under the preceding sentence shall be rounded to the nearest multiple of \$1,000.

(4) MANDATORY DISTRIBUTION RULES NOT TO APPLY BEFORE DEATH.—Notwithstanding subsections (a)(6) and (b)(3) of section 408 (relating to required distributions), the following provisions shall not apply to any Roth IRA:

(A) Section 401(a)(9)(A).

(B) The incidental death benefit requirements of section 401(a).

(5) ROLLOVER CONTRIBUTIONS.—

(A) IN GENERAL.—No rollover contribution may be made to a Roth IRA unless it is a qualified rollover contribution.

(B) COORDINATION WITH LIMIT.—A qualified rollover contribution shall not be taken into account for purposes of paragraph (2).

(6) TIME WHEN CONTRIBUTIONS MADE.—For purposes of this section, the rule of section 219(f)(3) shall apply.

(7) COORDINATION WITH LIMITATION FOR SIMPLE RETIREMENT PLANS AND SEPS.—*In the case of an individual on whose behalf contributions are made to a simple retirement account or a simplified employee pension, the amount described in paragraph (2)(A) shall be increased by an amount equal to the contributions made on the individual’s behalf to such account or pension for the taxable year, but only to the extent such contributions—*

(A) *in the case of a simplified retirement account—*

*(i) do not exceed the sum of the dollar amount in effect for the taxable year under section 408(p)(2)(A)(ii) and the employer contribution required under subparagraph (A)(iii) or (B)(i), as the case may be, of section 408(p)(2), and*

*(ii) do not cause the elective deferrals (as defined in section 402(g)(3)) on behalf of such individual to exceed the limitation under section 402(g)(1) (taking into account any additional elective deferrals permitted under section 414(v)), or*

*(B) in the case of a simplified employee pension, do not exceed the limitation in effect under section 408(j).*

(d) DISTRIBUTION RULES.—For purposes of this title—

(1) EXCLUSION.—Any qualified distribution from a Roth IRA shall not be includible in gross income.

(2) QUALIFIED DISTRIBUTION.—For purposes of this subsection—

(A) IN GENERAL.—The term “qualified distribution” means any payment or distribution—

- (i) made on or after the date on which the individual attains age 59½,
- (ii) made to a beneficiary (or to the estate of the individual) on or after the death of the individual,
- (iii) attributable to the individual’s being disabled (within the meaning of section 72(m)(7)), or
- (iv) which is a qualified special purpose distribution.

(B) DISTRIBUTIONS WITHIN NONEXCLUSION PERIOD.—A payment or distribution from a Roth IRA shall not be treated as a qualified distribution under subparagraph (A) if such payment or distribution is made within the 5-taxable year period beginning with the first taxable year for which the individual made a contribution to a Roth IRA (or such individual’s spouse, *or employer in the case of a simple retirement account (as defined in section 408(p)) or simplified employee pension (as defined in section 408(k))*, made a contribution to a Roth IRA) established for such individual.

(C) DISTRIBUTIONS OF EXCESS CONTRIBUTIONS AND EARNINGS.—The term “qualified distribution” shall not include any distribution of any contribution described in section 408(d)(4) and any net income allocable to the contribution.

(3) ROLLOVERS FROM AN ELIGIBLE RETIREMENT PLAN OTHER THAN A ROTH IRA.—

(A) IN GENERAL.—Notwithstanding sections 402(c), 403(b)(8), 408(d)(3), and 457(e)(16), in the case of any distribution to which this paragraph applies—

- (i) there shall be included in gross income any amount which would be includible were it not part of a qualified rollover contribution,
- (ii) section 72(t) shall not apply, and
- (iii) unless the taxpayer elects not to have this clause apply, any amount required to be included in gross income for any taxable year beginning in 2010 by reason of this paragraph shall be so included ratably over the 2-taxable-year period beginning with the first taxable year beginning in 2011.

Any election under clause (iii) for any distributions during a taxable year may not be changed after the due date for such taxable year.

(B) DISTRIBUTIONS TO WHICH PARAGRAPH APPLIES.—This paragraph shall apply to a distribution from an eligible retirement plan (as defined by section 402(c)(8)(B)) maintained for the benefit of an individual which is contributed to a Roth IRA maintained for the benefit of such individual in a qualified rollover contribution. This paragraph shall not apply to a distribution which is a qualified rollover contribution from a Roth IRA or a qualified rollover contribution from a designated Roth account which is a rollover contribution described in section 402A(c)(3)(A).

(C) CONVERSIONS.—The conversion of an individual retirement plan (other than a Roth IRA) to a Roth IRA shall be treated for purposes of this paragraph as a distribution to which this paragraph applies.

(D) ADDITIONAL REPORTING REQUIREMENTS.—Trustees of Roth IRAs, trustees of individual retirement plans, persons subject to section 6047(d)(1), or all of the foregoing persons, whichever is appropriate, shall include such additional information in reports required under section 408(i) or 6047 as the Secretary may require to ensure that amounts required to be included in gross income under subparagraph (A) are so included.

(E) SPECIAL RULES FOR CONTRIBUTIONS TO WHICH 2-YEAR AVERAGING APPLIES.—In the case of a qualified rollover contribution to a Roth IRA of a distribution to which subparagraph (A)(iii) applied, the following rules shall apply:

(i) ACCELERATION OF INCLUSION.—

(I) IN GENERAL.—The amount otherwise required to be included in gross income for any taxable year beginning in 2010 or the first taxable year in the 2-year period under subparagraph (A)(iii) shall be increased by the aggregate distributions from Roth IRAs for such taxable year which are allocable under paragraph (4) to the portion of such qualified rollover contribution required to be included in gross income under subparagraph (A)(i).

(II) LIMITATION ON AGGREGATE AMOUNT INCLUDED.—The amount required to be included in gross income for any taxable year under subparagraph (A)(iii) shall not exceed the aggregate amount required to be included in gross income under subparagraph (A)(iii) for all taxable years in the 2-year period (without regard to subclause (I)) reduced by amounts included for all preceding taxable years.

(ii) DEATH OF DISTRIBUTE.—

(I) IN GENERAL.—If the individual required to include amounts in gross income under such subparagraph dies before all of such amounts are included, all remaining amounts shall be included in gross income for the taxable year which includes the date of death.

(II) SPECIAL RULE FOR SURVIVING SPOUSE.—If the spouse of the individual described in subclause (I) acquires the individual's entire interest in any Roth IRA to which such qualified rollover contribution is properly allocable, the spouse may elect to treat the remaining amounts described in subclause (I) as includible in the spouse's gross income in the taxable years of the spouse ending with or within the taxable years of such individual in which such amounts would otherwise have been includible. Any such election may not be made or



changed after the due date for the spouse's taxable year which includes the date of death.

(F) SPECIAL RULE FOR APPLYING SECTION 72.—

(i) IN GENERAL.—If—

(I) any portion of a distribution from a Roth IRA is properly allocable to a qualified rollover contribution described in this paragraph; and

(II) such distribution is made within the 5-taxable year period beginning with the taxable year in which such contribution was made,

then section 72(t) shall be applied as if such portion were includible in gross income.

(ii) LIMITATION.—Clause (i) shall apply only to the extent of the amount of the qualified rollover contribution includible in gross income under subparagraph (A)(i).

(4) AGGREGATION AND ORDERING RULES.—

(A) AGGREGATION RULES.—Section 408(d)(2) shall be applied separately with respect to Roth IRAs and other individual retirement plans.

(B) ORDERING RULES.—For purposes of applying this section and section 72 to any distribution from a Roth IRA, such distribution shall be treated as made—

(i) from contributions to the extent that the amount of such distribution, when added to all previous distributions from the Roth IRA, does not exceed the aggregate contributions to the Roth IRA; and

(ii) from such contributions in the following order:

(I) Contributions other than qualified rollover contributions to which paragraph (3) applies.

(II) Qualified rollover contributions to which paragraph (3) applies on a first-in, first-out basis.

Any distribution allocated to a qualified rollover contribution under clause (ii)(II) shall be allocated first to the portion of such contribution required to be included in gross income.

(5) QUALIFIED SPECIAL PURPOSE DISTRIBUTION.—For purposes of this section, the term “qualified special purpose distribution” means any distribution to which subparagraph (F) of section 72(t)(2) applies.

(6) TAXPAYER MAY MAKE ADJUSTMENTS BEFORE DUE DATE.—

(A) IN GENERAL.—Except as provided by the Secretary, if, on or before the due date for any taxable year, a taxpayer transfers in a trustee-to-trustee transfer any contribution to an individual retirement plan made during such taxable year from such plan to any other individual retirement plan, then, for purposes of this chapter, such contribution shall be treated as having been made to the transferee plan (and not the transferor plan).

(B) SPECIAL RULES.—

(i) TRANSFER OF EARNINGS.—Subparagraph (A) shall not apply to the transfer of any contribution unless such transfer is accompanied by any net income allocable to such contribution.

(ii) NO DEDUCTION.—Subparagraph (A) shall apply to the transfer of any contribution only to the extent no deduction was allowed with respect to the contribution to the transferor plan.

(iii) CONVERSIONS.—Subparagraph (A) shall not apply in the case of a qualified rollover contribution to which subsection (d)(3) applies (including by reason of subparagraph (C) thereof).

(7) DUE DATE.—For purposes of this subsection, the due date for any taxable year is the date prescribed by law (including extensions of time) for filing the taxpayer's return for such taxable year.

(e) QUALIFIED ROLLOVER CONTRIBUTION.—For purposes of this section—

(1) IN GENERAL.—The term “qualified rollover contribution” means a rollover contribution—

(A) to a Roth IRA from another such account,

(B) from an eligible retirement plan, but only if—

(i) in the case of an individual retirement plan, such rollover contribution meets the requirements of section 408(d)(3), and

(ii) in the case of any eligible retirement plan (as defined in section 402(c)(8)(B) other than clauses (i) and (ii) thereof), such rollover contribution meets the requirements of section 402(c), 403(b)(8), or 457(e)(16), as applicable.

For purposes of section 408(d)(3)(B), there shall be disregarded any qualified rollover contribution from an individual retirement plan (other than a Roth IRA) to a Roth IRA.

(2) MILITARY DEATH GRATUITY.—

(A) IN GENERAL.—The term “qualified rollover contribution” includes a contribution to a Roth IRA maintained for the benefit of an individual made before the end of the 1-year period beginning on the date on which such individual receives an amount under section 1477 of title 10, United States Code, or section 1967 of title 38 of such Code, with respect to a person, to the extent that such contribution does not exceed—

(i) the sum of the amounts received during such period by such individual under such sections with respect to such person, reduced by

(ii) the amounts so received which were contributed to a Coverdell education savings account under section 530(d)(9).

(B) ANNUAL LIMIT ON NUMBER OF ROLLOVERS NOT TO APPLY.—Section 408(d)(3)(B) shall not apply with respect to amounts treated as a rollover by subparagraph (A).

(C) APPLICATION OF SECTION 72.—For purposes of applying section 72 in the case of a distribution which is not a qualified distribution, the amount treated as a rollover by reason of subparagraph (A) shall be treated as investment in the contract.

(3) SIMPLE RETIREMENT ACCOUNTS.—*In the case of any payment or distribution out of a simple retirement account (as de-*

*defined in section 408(p)) with respect to which an election has been made under section 408(p)(11) and to which 72(t)(6) applies, the term “qualified rollover contribution” shall not include any payment or distribution paid into an account other than another simple retirement account (as so defined).*

[(f) INDIVIDUAL RETIREMENT PLAN.—For purposes of this section—

[(1) a simplified employee pension or a simple retirement account may not be designated as a Roth IRA; and

[(2) contributions to any such pension or account shall not be taken into account for purposes of subsection (c)(2)(B).]

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### Subpart B—SPECIAL RULES

\* \* \* \* \*

Sec. 414A. *Requirements related to automatic enrollment.*

\* \* \* \* \*

### SEC. 414. DEFINITIONS AND SPECIAL RULES.

(a) SERVICE FOR PREDECESSOR EMPLOYER.—For purposes of this part—

(1) in any case in which the employer maintains a plan of a predecessor employer, service for such predecessor shall be treated as service for the employer, and

(2) in any case in which the employer maintains a plan which is not the plan maintained by a predecessor employer, service for such predecessor shall, to the extent provided in regulations prescribed by the Secretary, be treated as service for the employer.

(b) EMPLOYEES OF CONTROLLED GROUP OF CORPORATIONS.—[For purposes of]

(1) *IN GENERAL.*—For purposes of sections 401, 408(k), 408(p), 410, 411, 415, and 416, all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C)) shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the applicable limitations provided by section 404(a) shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations prescribed by the Secretary.

(2) *SPECIAL RULES FOR APPLYING FAMILY ATTRIBUTION.*—For purposes of applying the attribution rules under section 1563 with respect to paragraph (1), the following rules apply:

(A) *Community property laws shall be disregarded for purposes of determining ownership.*

(B) *Except as provided by the Secretary, stock of an individual not attributed under section 1563(e)(5) to such individual’s spouse shall not be attributed to such spouse by reason of section 1563(e)(6)(A).*

(C) *Except as provided by the Secretary, in the case of stock in different corporations that is attributed to a child under section 1563(e)(6)(A) from each parent, and is not attributed to such parents as spouses under section*

*1563(e)(5), such attribution to the child shall not by itself result in such corporations being members of the same controlled group.*

*(3) PLAN SHALL NOT FAIL TO BE TREATED AS SATISFYING THIS SECTION.—If application of paragraph (2) causes two or more entities to be a controlled group, or an affiliated service group, or to no longer be in a controlled group or an affiliated service group, such change shall be treated as a transaction to which section 410(b)(6)(C) applies.*

(c) EMPLOYEES OF PARTNERSHIPS, PROPRIETORSHIPS, ETC., WHICH ARE UNDER COMMON CONTROL.—

(1) IN GENERAL.—Except as provided in paragraph (2), for purposes of sections 401, 408(k), 408(p), 410, 411, 415, and 416, under regulations prescribed by the Secretary, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b).

(2) SPECIAL RULES RELATING TO CHURCH PLANS.—

(A) GENERAL RULE.—Except as provided in subparagraphs (B) and (C), for purposes of this subsection and subsection (m), an organization that is otherwise eligible to participate in a church plan shall not be aggregated with another such organization and treated as a single employer with such other organization for a plan year beginning in a taxable year unless—

(i) one such organization provides (directly or indirectly) at least 80 percent of the operating funds for the other organization during the preceding taxable year of the recipient organization, and

(ii) there is a degree of common management or supervision between the organizations such that the organization providing the operating funds is directly involved in the day-to-day operations of the other organization.

(B) NONQUALIFIED CHURCH-CONTROLLED ORGANIZATIONS.—Notwithstanding subparagraph (A), for purposes of this subsection and subsection (m), an organization that is a nonqualified church-controlled organization shall be aggregated with 1 or more other nonqualified church-controlled organizations, or with an organization that is not exempt from tax under section 501, and treated as a single employer with such other organization, if at least 80 percent of the directors or trustees of such other organization are either representatives of, or directly or indirectly controlled by, such nonqualified church-controlled organization. For purposes of this subparagraph, the term “nonqualified church-controlled organization” means a church-controlled tax-exempt organization described in section 501(c)(3) that is not a qualified church-controlled organization (as defined in section 3121(w)(3)(B)).

(C) PERMISSIVE AGGREGATION AMONG CHURCH-RELATED ORGANIZATIONS.—The church or convention or association of churches with which an organization described in sub-

paragraph (A) is associated (within the meaning of subsection (e)(3)(D)), or an organization designated by such church or convention or association of churches, may elect to treat such organizations as a single employer for a plan year. Such election, once made, shall apply to all succeeding plan years unless revoked with notice provided to the Secretary in such manner as the Secretary shall prescribe.

(D) PERMISSIVE DISAGGREGATION OF CHURCH-RELATED ORGANIZATIONS.—For purposes of subparagraph (A), in the case of a church plan, an employer may elect to treat churches (as defined in section 403(b)(12)(B)) separately from entities that are not churches (as so defined), without regard to whether such entities maintain separate church plans. Such election, once made, shall apply to all succeeding plan years unless revoked with notice provided to the Secretary in such manner as the Secretary shall prescribe.

(d) GOVERNMENTAL PLAN.—For purposes of this part, the term “governmental plan” means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term “governmental plan” also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act (59 Stat. 669). The term “governmental plan” includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function).

(e) CHURCH PLAN.—

(1) IN GENERAL.—For purposes of this part, the term “church plan” means a plan established and maintained (to the extent required in paragraph (2)(B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501.

(2) CERTAIN PLANS EXCLUDED.—The term “church plan” does not include a plan—

(A) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513); or

(B) if less than substantially all of the individuals included in the plan are individuals described in paragraph (1) or (3)(B) (or their beneficiaries).

(3) DEFINITIONS AND OTHER PROVISIONS.—For purposes of this subsection—

(A) TREATMENT AS CHURCH PLAN.—A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, 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, if such organization is controlled by or associated with a church or a convention or association of churches.

(B) EMPLOYEE DEFINED.—The term employee of a church or a convention or association of churches shall include—

- (i) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;
- (ii) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 and which is controlled by or associated with a church or a convention or association of churches; and
- (iii) an individual described in subparagraph (E).

(C) CHURCH TREATED AS EMPLOYER.—A church or a convention or association of churches which is exempt from tax under section 501 shall be deemed the employer of any individual included as an employee under subparagraph (B).

(D) ASSOCIATION WITH CHURCH.—An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(E) SPECIAL RULE IN CASE OF SEPARATION FROM PLAN.—If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization described in clause (ii) of paragraph (3)(B), the church plan shall not fail to meet the requirements of this subsection merely because the plan—

- (i) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or
- (ii) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7)) at the time of such separation from service.

(4) CORRECTION OF FAILURE TO MEET CHURCH PLAN REQUIREMENTS.—

(A) IN GENERAL.—If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 fails to meet one or more of the

requirements of this subsection and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this subsection for the year in which the correction was made and for all prior years.

(B) FAILURE TO CORRECT.—If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this subsection beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(C) CORRECTION PERIOD DEFINED.—The term “correction period” means—

(i) the period, ending 270 days after the date of mailing by the Secretary of a notice of default with respect to the plan’s failure to meet one or more of the requirements of this subsection;

(ii) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(iii) any additional period which the Secretary determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

(5) SPECIAL RULES FOR CHAPLAINS AND SELF-EMPLOYED MINISTERS.—

(A) CERTAIN MINISTERS MAY PARTICIPATE.—For purposes of this part—

(i) IN GENERAL.—A duly ordained, commissioned, or licensed minister of a church is described in paragraph (3)(B) if, in connection with the exercise of their ministry, the minister—

(I) is a self-employed individual (within the meaning of section 401(c)(1)(B)), or

(II) is employed by an organization other than an organization which is described in section 501(c)(3) and with respect to which the minister shares common religious bonds.

(ii) TREATMENT AS EMPLOYER AND EMPLOYEE.—For purposes of sections 403(b)(1)(A) and 404(a)(10), a minister described in clause (i)(I) shall be treated as employed by the minister’s own employer which is an organization described in section 501(c)(3) and exempt from tax under section 501(a).

(B) SPECIAL RULES FOR APPLYING SECTION 403(B) TO SELF-EMPLOYED MINISTERS.—In the case of a minister described in subparagraph (A)(i)(I)—

(i) the minister’s includible compensation under section 403(b)(3) shall be determined by reference to the minister’s earned income (within the meaning of section 401(c)(2)) from such ministry rather than the

amount of compensation which is received from an employer, and

(ii) the years (and portions of years) in which such minister was a self-employed individual (within the meaning of section 401(c)(1)(B)) with respect to such ministry shall be included for purposes of section 403(b)(4).

(C) EFFECT ON NON-DENOMINATIONAL PLANS.—If a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry participates in a church plan (within the meaning of this section) and in the exercise of such ministry is employed by an employer not otherwise participating in such church plan, then such employer may exclude such minister from being treated as an employee of such employer for purposes of applying sections 401(a)(3), 401(a)(4), and 401(a)(5), as in effect on September 1, 1974, and sections 401(a)(4), 401(a)(5), 401(a)(26), 401(k)(3), 401(m), 403(b)(1)(D) (including section 403(b)(12)), and 410 to any stock bonus, pension, profit-sharing, or annuity plan (including an annuity described in section 403(b) or a retirement income account described in section 403(b)(9)). The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purpose of, and prevent the abuse of, this subparagraph.

(D) COMPENSATION TAKEN INTO ACCOUNT ONLY ONCE.—If any compensation is taken into account in determining the amount of any contributions made to, or benefits to be provided under, any church plan, such compensation shall not also be taken into account in determining the amount of any contributions made to, or benefits to be provided under, any other stock bonus, pension, profit-sharing, or annuity plan which is not a church plan.

(E) EXCLUSION.—In the case of a contribution to a church plan made on behalf of a minister described in subparagraph (A)(i)(II), such contribution shall not be included in the gross income of the minister to the extent that such contribution would not be so included if the minister was an employee of a church.

(f) MULTIEMPLOYER PLAN.—

(1) DEFINITION.—For purposes of this part, the term “multiemployer plan” means a plan—

(A) to which more than one employer is required to contribute,

(B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation.

(2) CASES OF COMMON CONTROL.—For purposes of this subsection, all trades or businesses (whether or not incorporated) which are under common control within the meaning of subsection (c) are considered a single employer.

(3) CONTINUATION OF STATUS AFTER TERMINATION.—Notwithstanding paragraph (1), a plan is a multiemployer plan on and



after its termination date under title IV of the Employee Retirement Income Security Act of 1974 if the plan was a multiemployer plan under this subsection for the plan year preceding its termination date.

(4) TRANSITIONAL RULE.—For any plan year which began before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, the term “multiemployer plan” means a plan described in this subsection as in effect immediately before that date.

(5) SPECIAL ELECTION.—Within one year after the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, a multiemployer plan may irrevocably elect, pursuant to procedures established by the Pension Benefit Guaranty Corporation and subject to the provisions of section 4403(b) and (c) of the Employee Retirement Income Security Act of 1974, that the plan shall not be treated as a multiemployer plan for any purpose under such Act or this title, if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980—

(A) the plan was not a multiemployer plan because the plan was not a plan described in section 3(37)(A)(iii) of the Employee Retirement Income Security Act of 1974 and section 414(f)(1)(C) (as such provisions were in effect on the day before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980); and

(B) the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the Pension Benefit Guaranty Corporation, the Secretary of Labor and the Secretary.

(6) ELECTION WITH REGARD TO MULTIEMPLOYER STATUS.—(A) Within 1 year after the enactment of the Pension Protection Act of 2006—

(i) An election under paragraph (5) may be revoked, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, if, for each of the 3 plan years prior to the date of the enactment of that Act, the plan would have been a multiemployer plan but for the election under paragraph (5), and

(ii) a plan that meets the criteria in subparagraph (A) and (B) of paragraph (1) of this subsection or that is described in subparagraph (E) may, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, elect to be a multiemployer plan, if—

(I) for each of the 3 plan years immediately preceding the first plan year for which the election under this paragraph is effective with respect to the plan, the plan has met those criteria or is so described,

(II) substantially all of the plan’s employer contributions for each of those plan years were made or required to be made by organizations that were exempt from tax under section 501, and

(III) the plan was established prior to September 2, 1974.

(B) An election under this paragraph shall be effective for all purposes under this Act and under the Employee Retirement

Income Security Act of 1974, starting with any plan year beginning on or after January 1, 1999, and ending before January 1, 2008, as designated by the plan in the election made under subparagraph (A)(ii).

(C) Once made, an election under this paragraph shall be irrevocable, except that a plan described in subparagraph (A)(ii) shall cease to be a multiemployer plan as of the plan year beginning immediately after the first plan year for which the majority of its employer contributions were made or required to be made by organizations that were not exempt from tax under section 501.

(D) The fact that a plan makes an election under subparagraph (A)(ii) does not imply that the plan was not a multiemployer plan prior to the date of the election or would not be a multiemployer plan without regard to the election.

(E) A plan is described in this subparagraph if it is a plan sponsored by an organization which is described in section 501(c)(5) and exempt from tax under section 501(a) and which was established in Chicago, Illinois, on August 12, 1881.

(F) MAINTENANCE UNDER COLLECTIVE BARGAINING AGREEMENT.—For purposes of this title and the Employee Retirement Income Security Act of 1974, a plan making an election under this paragraph shall be treated as maintained pursuant to a collective bargaining agreement if a collective bargaining agreement, expressly or otherwise, provides for or permits employer contributions to the plan by one or more employers that are signatory to such agreement, or participation in the plan by one or more employees of an employer that is signatory to such agreement, regardless of whether the plan was created, established, or maintained for such employees by virtue of another document that is not a collective bargaining agreement.

(g) PLAN ADMINISTRATOR.—For purposes of this part, the term “plan administrator” means—

(1) the person specifically so designated by the terms of the instrument under which the plan is operated;

(2) in the absence of a designation referred to in paragraph (1)—

(A) in the case of a plan maintained by a single employer, such employer,

(B) 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 who maintained the plan, or

(C) in any case to which subparagraph (A) or (B) does not apply, such other person as the Secretary may by regulation, prescribe.

(h) TAX TREATMENT OF CERTAIN CONTRIBUTIONS.—

(1) IN GENERAL.—Effective with respect to taxable years beginning after December 31, 1973, for purposes of this title, any amount contributed—

(A) to an employees’ trust described in section 401(a), or

(B) under a plan described in section 403(a), shall not be treated as having been made by the employer if it is designated as an employee contribution.

(2) DESIGNATION BY UNITS OF GOVERNMENT.—For purposes of paragraph (1), in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, or a governmental plan described in the last sentence of section 414(d) (relating to plans of Indian tribal governments), where the contributions of employing units are designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions.

(i) DEFINED CONTRIBUTION PLAN.—For purposes of this part, the term “defined contribution plan” means a plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant’s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant’s account.

(j) DEFINED BENEFIT PLAN.—For purposes of this part, the term “defined benefit plan” means any plan which is not a defined contribution plan.

(k) CERTAIN PLANS.—A defined benefit plan which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant shall—

(1) for purposes of section 410 (relating to minimum participation standards), be treated as a defined contribution plan,

(2) for purposes of sections 72(d) (relating to treatment of employee contributions as separate contract), 411(a)(7)(A) (relating to minimum vesting standards), 415 (relating to limitations on benefits and contributions under qualified plans), and 401(m) (relating to nondiscrimination tests for matching requirements and employee contributions), be treated as consisting of a defined contribution plan to the extent benefits are based on the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan, and

(3) for purposes of section 4975 (relating to tax on prohibited transactions), be treated as a defined benefit plan.

(l) MERGER AND CONSOLIDATIONS OF PLANS OR TRANSFERS OF PLAN ASSETS.—

(1) IN GENERAL.—A trust which forms a part of a plan shall not constitute a qualified trust under section 401 and a plan shall be treated as not described in section 403(a) unless in the case of any merger or consolidation of the plan with, or in the case of any transfer of assets or liabilities of such plan to, any other trust plan after September 2, 1974, each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence does not apply to any multiemployer plan with respect to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which Title IV of the Employee Retirement Income Security Act of 1974 applies.

## (2) ALLOCATION OF ASSETS IN PLAN SPIN-OFFS, ETC.—

(A) IN GENERAL.—In the case of a plan spin-off of a defined benefit plan, a trust which forms part of—

- (i) the original plan, or
- (ii) any plan spun off from such plan,

shall not constitute a qualified trust under this section unless the applicable percentage of excess assets are allocated to each of such plans.

(B) APPLICABLE PERCENTAGE.—For purposes of subparagraph (A), the term “applicable percentage” means, with respect to each of the plans described in clauses (i) and (ii) of subparagraph (A), the percentage determined by dividing—

- (i) the excess (if any) of—
  - (I) the sum of the funding target and target normal cost determined under section 430, over
  - (II) the amount of the assets required to be allocated to the plan after the spin-off (without regard to this paragraph), by
- (ii) the sum of the excess amounts determined separately under clause (i) for all such plans.

(C) EXCESS ASSETS.—For purposes of subparagraph (A), the term “excess assets” means an amount equal to the excess (if any) of—

- (i) the fair market value of the assets of the original plan immediately before the spin-off, over
- (ii) the amount of assets required to be allocated after the spin-off to all plans (determined without regard to this paragraph).

(D) CERTAIN SPUN-OFF PLANS NOT TAKEN INTO ACCOUNT.—

(i) IN GENERAL.—A plan involved in a spin-off which is described in clause (ii), (iii), or (iv) shall not be taken into account for purposes of this paragraph, except that the amount determined under subparagraph (C)(ii) shall be increased by the amount of assets allocated to such plan.

(ii) PLANS TRANSFERRED OUT OF CONTROLLED GROUPS.—A plan is described in this clause if, after such spin-off, such plan is maintained by an employer who is not a member of the same controlled group as the employer maintaining the original plan.

(iii) PLANS TRANSFERRED OUT OF MULTIPLE EMPLOYER PLANS.—A plan as described in this clause if, after the spin-off, any employer maintaining such plan (and any member of the same controlled group as such employer) does not maintain any other plan remaining after the spin-off which is also maintained by another employer (or member of the same controlled group as such other employer) which maintained the plan in existence before the spin-off.

(iv) TERMINATED PLANS.—A plan is described in this clause if, pursuant to the transaction involving the spin-off, the plan is terminated.

(v) CONTROLLED GROUP.—For purposes of this subparagraph, the term “controlled group” means any group treated as a single employer under subsection (b), (c), (m), or (o).

(E) PARAGRAPH NOT TO APPLY TO MULTIEMPLOYER PLANS.—This paragraph does not apply to any multiemployer plan with respect to any spin-off to the extent that participants either before or after the spin-off are covered under a multiemployer plan to which title IV of the Employee Retirement Income Security Act of 1974 applies.

(F) APPLICATION TO SIMILAR TRANSACTION.—Except as provided by the Secretary, rules similar to the rules of this paragraph shall apply to transactions similar to spin-offs.

(G) SPECIAL RULES FOR BRIDGE DEPOSITORY INSTITUTIONS.—For purposes of this paragraph, in the case of a bridge depository institution established under section 11(i) of the Federal Deposit Insurance Act (12 U.S.C. 1821(i))—

(i) such bank shall be treated as a member of any controlled group which includes any insured bank (as defined in section 3(h) of such Act (12 U.S.C. 1813(h)))—

- (I) which maintains a defined benefit plan,
- (II) which is closed by the appropriate bank regulatory authorities, and
- (III) any asset and liabilities of which are received by the bridge depository institution, and

(ii) the requirements of this paragraph shall not be treated as met with respect to such plan unless during the 180-day period beginning on the date such insured bank is closed—

(I) the bridge depository institution has the right to require the plan to transfer (subject to the provisions of this paragraph) not more than 50 percent of the excess assets (as defined in subparagraph (C)) to a defined benefit plan maintained by the bridge depository institution with respect to participants or former participants (including retirees and beneficiaries) in the original plan employed by the bridge depository institution or formerly employed by the closed bank, and

(II) no other merger, spin-off, termination, or similar transaction involving the portion of the excess assets described in subclause (I) may occur without the prior written consent of the bridge depository institution.

(m) EMPLOYEES OF AN AFFILIATED SERVICE GROUP.—

(1) IN GENERAL.—For purposes of the employee benefit requirements listed in paragraph (4), except to the extent otherwise provided in regulations, all employees of the members of an affiliated service group shall be treated as employed by a single employer.

(2) AFFILIATED SERVICE GROUP.—For purposes of this subsection, the term “affiliated service group” means a group consisting of a service organization (hereinafter in this paragraph

referred to as the “first organization”) and one or more of the following:

- (A) any service organization which—
  - (i) is a shareholder or partner in the first organization, and
  - (ii) regularly performs services for the first organization or is regularly associated with the first organization in performing services for third persons, and
- (B) any other organization if—
  - (i) a significant portion of the business of such organization is the performance of services (for the first organization, for organizations described in subparagraph (A), or for both) of a type historically performed in such service field by employees, and
  - (ii) 10 percent or more of the interests in such organization is held by persons who are highly compensated employees (within the meaning of section 414(q)) of the first organization or an organization described in subparagraph (A).

(3) SERVICE ORGANIZATIONS.—For purposes of this subsection, the term “service organization” means an organization the principal business of which is the performance of services.

(4) EMPLOYEE BENEFIT REQUIREMENTS.—For purposes of this subsection, the employee benefit requirements listed in this paragraph are—

- (A) paragraphs (3), (4), (7), (16), (17), and (26) of section 401(a), and
- (B) sections 408(k), 408(p), 410, 411, 415, and 416.

(5) CERTAIN ORGANIZATIONS PERFORMING MANAGEMENT FUNCTIONS.—For purposes of this subsection, the term “affiliated service group” also includes a group consisting of—

- (A) an organization the principal business of which is performing, on a regular and continuing basis, management functions for 1 organization (or for 1 organization and other organizations related to such 1 organization), and
- (B) the organization (and related organizations) for which such functions are so performed by the organization described in subparagraph (A).

For purposes of this paragraph, the term “related organizations” has the same meaning as the term “related persons” when used in section 144(a)(3).

(6) OTHER DEFINITIONS.—For purposes of this subsection—

- (A) ORGANIZATION DEFINED.—The term “organization” means a corporation, partnership, or other organization.
- (B) OWNERSHIP.—In determining ownership, the principles of section 318(a) shall **[apply]** *apply, except that community property laws shall be disregarded for purposes of determining ownership.*

(n) EMPLOYEE LEASING.—

(1) IN GENERAL.—For purposes of the requirements listed in paragraph (3), with respect to any person (hereinafter in this subsection referred to as the “recipient”) for whom a leased employee performs services—

- (A) the leased employee shall be treated as an employee of the recipient, but
- (B) contributions or benefits provided by the leasing organization which are attributable to services performed for the recipient shall be treated as provided by the recipient.
- (2) LEASED EMPLOYEE.—For purposes of paragraph (1), the term “leased employee” means any person who is not an employee of the recipient and who provides services to the recipient if—
  - (A) such services are provided pursuant to an agreement between the recipient and any other person (in this subsection referred to as the “leasing organization”),
  - (B) such person has performed such services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year, and
  - (C) such services are performed under primary direction or control by the recipient.
- (3) REQUIREMENTS.—For purposes of this subsection, the requirements listed in this paragraph are—
  - (A) paragraphs (3), (4), (7), (16), (17), and (26) of section 401(a),
  - (B) sections 408(k), 408(p), 410, 411, 415, and 416, and
  - (C) sections 79, 106, 117(d), 125, 127, 129, 132, 137, 274(j), 505, and 4980B.
- (4) TIME WHEN FIRST CONSIDERED AS EMPLOYEE.—
  - (A) IN GENERAL.—In the case of any leased employee, paragraph (1) shall apply only for purposes of determining whether the requirements listed in paragraph (3) are met for periods after the close of the period referred to in paragraph (2)(B).
  - (B) YEARS OF SERVICE.—In the case of a person who is an employee of the recipient (whether by reason of this subsection or otherwise), for purposes of the requirements listed in paragraph (3), years of service for the recipient shall be determined by taking into account any period for which such employee would have been a leased employee but for the requirements of paragraph (2)(B).
- (5) SAFE HARBOR.—
  - (A) IN GENERAL.—In the case of requirements described in subparagraphs (A) and (B) of paragraph (3), this subsection shall not apply to any leased employee with respect to services performed for a recipient if—
    - (i) such employee is covered by a plan which is maintained by the leasing organization and meets the requirements of subparagraph (B), and
    - (ii) leased employees (determined without regard to this paragraph) do not constitute more than 20 percent of the recipient’s nonhighly compensated work force.
  - (B) PLAN REQUIREMENTS.—A plan meets the requirements of this subparagraph if—
    - (i) such plan is a money purchase pension plan with a nonintegrated employer contribution rate for each participant of at least 10 percent of compensation,

(ii) such plan provides for full and immediate vesting, and

(iii) each employee of the leasing organization (other than employees who perform substantially all of their services for the leasing organization) immediately participates in such plan.

Clause (iii) shall not apply to any individual whose compensation from the leasing organization in each plan year during the 4-year period ending with the plan year is less than \$1,000.

(C) DEFINITIONS.—For purposes of this paragraph—

(i) HIGHLY COMPENSATED EMPLOYEE.—The term “highly compensated employee” has the meaning given such term by section 414(q).

(ii) NONHIGHLY COMPENSATED WORK FORCE.—The term “nonhighly compensated work force” means the aggregate number of individuals (other than highly compensated employees)—

(I) who are employees of the recipient (without regard to this subsection) and have performed services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year, or

(II) who are leased employees with respect to the recipient (determined without regard to this paragraph).

(iii) COMPENSATION.—The term “compensation” has the same meaning as when used in section 415; except that such term shall include—

(I) any employer contribution under a qualified cash or deferred arrangement to the extent not included in gross income under section 402(e)(3) or 402(h)(1)(B),

(II) any amount which the employee would have received in cash but for an election under a cafeteria plan (within the meaning of section 125), and

(III) any amount contributed to an annuity contract described in section 403(b) pursuant to a salary reduction agreement (within the meaning of section 3121(a)(5)(D)).

(6) OTHER RULES.—For purposes of this subsection—

(A) RELATED PERSONS.—The term “related persons” has the same meaning as when used in section 144(a)(3).

(B) EMPLOYEES OF ENTITIES UNDER COMMON CONTROL.—

The rules of subsections (b), (c), (m), and (o) shall apply.

(o) REGULATIONS.—The Secretary shall prescribe such regulations (which may provide rules in addition to the rules contained in subsections (m) and (n)) as may be necessary to prevent the avoidance of any employee benefit requirement listed in subsection (m)(4) or (n)(3) or any requirement under section 457 through the use of—

- (1) separate organizations,
- (2) employee leasing, or
- (3) other arrangements.



The regulations prescribed under subsection (n) shall include provisions to minimize the recordkeeping requirements of subsection (n) in the case of an employer which has no top-heavy plans (within the meaning of section 416(g)) and which uses the services of persons (other than employees) for an insignificant percentage of the employer's total workload.

(p) **QUALIFIED DOMESTIC RELATIONS ORDER DEFINED.**—For purposes of this subsection and section 401(a)(13)—

(1) **IN GENERAL.**—

(A) **QUALIFIED DOMESTIC RELATIONS ORDER.**—The term “qualified domestic relations order” means a domestic relations order—

(i) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(ii) with respect to which the requirements of paragraphs (2) and (3) are met.

(B) **DOMESTIC RELATIONS ORDER.**—The term “domestic relations order” means any judgment, decree, or order (including approval of a property settlement agreement) which—

(i) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(ii) is made pursuant to a State domestic relations law (including a community property law).

(2) **ORDER MUST CLEARLY SPECIFY CERTAIN FACTS.**—A domestic relations order meets the requirements of this paragraph only if such order clearly specifies—

(A) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(B) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(C) the number of payments or period to which such order applies, and

(D) each plan to which such order applies.

(3) **ORDER MAY NOT ALTER AMOUNT, FORM, ETC., OF BENEFITS.**—A domestic relations order meets the requirements of this paragraph only if such order—

(A) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(B) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(C) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(4) EXCEPTION FOR CERTAIN PAYMENTS MADE AFTER EARLIEST RETIREMENT AGE.—

(A) IN GENERAL.—A domestic relations order shall not be treated as failing to meet the requirements of subparagraph (A) of paragraph (3) solely because such order requires that payment of benefits be made to an alternate payee—

(i) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(ii) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of the benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(iii) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of clause (ii), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(B) EARLIEST RETIREMENT AGE.—For purposes of this paragraph, the term “earliest retirement age” means the earlier of—

(i) the date on which the participant is entitled to a distribution under the plan, or

(ii) the later of—

(I) the date the participant attains age 50, or

(II) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(5) TREATMENT OF FORMER SPOUSE AS SURVIVING SPOUSE FOR PURPOSES OF DETERMINING SURVIVOR BENEFITS.—To the extent provided in any qualified domestic relations order—

(A) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of sections 401(a)(11) and 417 (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(B) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 417(d).

(6) PLAN PROCEDURES WITH RESPECT TO ORDERS.—

(A) NOTICE AND DETERMINATION BY ADMINISTRATOR.—In the case of any domestic relations order received by a plan—

(i) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan’s procedures for determining the qualified status of domestic relations orders, and

(ii) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(B) PLAN TO ESTABLISH REASONABLE PROCEDURES.—Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders.

(7) PROCEDURES FOR PERIOD DURING WHICH DETERMINATION IS BEING MADE.—

(A) IN GENERAL.—During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this paragraph referred to as the “segregated amounts”) which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(B) PAYMENT TO ALTERNATE PAYEE IF ORDER DETERMINED TO BE QUALIFIED DOMESTIC RELATIONS ORDER.—If within the 18-month period described in subparagraph (E) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(C) PAYMENT TO PLAN PARTICIPANT IN CERTAIN CASES.—If within the 18-month period described in subparagraph (E)—

(i) it is determined that the order is not a qualified domestic relations order, or

(ii) the issue as to whether such order is a qualified domestic relations order is not resolved, then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(D) SUBSEQUENT DETERMINATION OR ORDER TO BE APPLIED PROSPECTIVELY ONLY.—Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in subparagraph (E) shall be applied prospectively only.

(E) DETERMINATION OF 18-MONTH PERIOD.—For purposes of this paragraph, the 18-month period described in this subparagraph is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(8) ALTERNATE PAYEE DEFINED.—The term “alternate payee” means any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(9) SUBSECTION NOT TO APPLY TO PLANS TO WHICH SECTION 401(A)(13) DOES NOT APPLY.—This subsection shall not apply to

any plan to which section 401(a)(13) does not apply. For purposes of this title, except as provided in regulations, any distribution from an annuity contract under section 403(b) pursuant to a qualified domestic relations order shall be treated in the same manner as a distribution from a plan to which section 401(a)(13) applies.

(10) WAIVER OF CERTAIN DISTRIBUTION REQUIREMENTS.—With respect to the requirements of subsections (a) and (k) of section 401, section 403(b), section 409(d), and section 457(d), a plan shall not be treated as failing to meet such requirements solely by reason of payments to an alternative payee pursuant to a qualified domestic relations order.

(11) APPLICATION OF RULES TO CERTAIN OTHER PLANS.—For purposes of this title, a distribution or payment from a governmental plan (as defined in subsection (d)) or a church plan (as described in subsection (e)) or an eligible deferred compensation plan (within the meaning of section 457(b)) shall be treated as made pursuant to a qualified domestic relations order if it is made pursuant to a domestic relations order which meets the requirement of clause (i) of paragraph (1)(A).

(12) TAX TREATMENT OF PAYMENTS FROM A SECTION 457 PLAN.—If a distribution or payment from an eligible deferred compensation plan described in section 457(b) is made pursuant to a qualified domestic relations order, rules similar to the rules of section 402(e)(1)(A) shall apply to such distribution or payment.

(13) CONSULTATION WITH THE SECRETARY.—In prescribing regulations under this subsection and section 401(a)(13), the Secretary of Labor shall consult with the Secretary.

(q) HIGHLY COMPENSATED EMPLOYEE.—

(1) IN GENERAL.—The term “highly compensated employee” means any employee who—

(A) was a 5-percent owner at any time during the year or the preceding year, or

(B) for the preceding year—

(i) had compensation from the employer in excess of \$80,000, and

(ii) if the employer elects the application of this clause for such preceding year, was in the top-paid group of employees for such preceding year.

The Secretary shall adjust the \$80,000 amount under subparagraph (B) at the same time and in the same manner as under section 415(d), except that the base period shall be the calendar quarter ending September 30, 1996.

(2) 5-PERCENT OWNER.—An employee shall be treated as a 5-percent owner for any year if at any time during such year such employee was a 5-percent owner (as defined in section 416(i)(1)) of the employer.

(3) TOP-PAID GROUP.—An employee is in the top-paid group of employees for any year if such employee is in the group consisting of the top 20 percent of the employees when ranked on the basis of compensation paid during such year.

(4) COMPENSATION.—For purposes of this subsection, the term “compensation” has the meaning given such term by section 415(c)(3).

(5) EXCLUDED EMPLOYEES.—For purposes of subsection (r) and for purposes of determining the number of employees in the top-paid group, the following employees shall be excluded—

(A) employees who have not completed 6 months of service,

(B) employees who normally work less than 171/2 hours per week,

(C) employees who normally work during not more than 6 months during any year,

(D) employees who have not attained age 21, and

(E) except to the extent provided in regulations, employees who are included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and the employer.

Except as provided by the Secretary, the employer may elect to apply subparagraph (A), (B), (C), or (D) by substituting a shorter period of service, smaller number of hours or months, or lower age for the period of service, number of hours or months, or age (as the case may be) than that specified in such subparagraph.

(6) FORMER EMPLOYEES.—A former employee shall be treated as a highly compensated employee if—

(A) such employee was a highly compensated employee when such employee separated from service, or

(B) such employee was a highly compensated employee at any time after attaining age 55.

(7) COORDINATION WITH OTHER PROVISIONS.—Subsections (b), (c), (m), (n), and (o) shall be applied before the application of this subsection.

(8) SPECIAL RULE FOR NONRESIDENT ALIENS.—For purposes of this subsection and subsection (r), employees who are nonresident aliens and who receive no earned income (within the meaning of section 911(d)(2)) from the employer which constitutes income from sources within the United States (within the meaning of section 861(a)(3)) shall not be treated as employees.

(9) CERTAIN EMPLOYEES NOT CONSIDERED HIGHLY COMPENSATED AND EXCLUDED EMPLOYEES UNDER PRE-ERISA RULES FOR CHURCH PLANS.—In the case of a church plan (as defined in subsection (e)), no employee shall be considered an officer, a person whose principal duties consist of supervising the work of other employees, or a highly compensated employee for any year unless such employee is a highly compensated employee under paragraph (1) for such year.

(r) SPECIAL RULES FOR SEPARATE LINE OF BUSINESS.—

(1) IN GENERAL.—For purposes of sections 129(d)(8) and 410(b), an employer shall be treated as operating separate lines of business during any year if the employer for bona fide business reasons operates separate lines of business.

(2) LINE OF BUSINESS MUST HAVE 50 EMPLOYEES, ETC.—A line of business shall not be treated as separate under paragraph (1) unless—

(A) such line of business has at least 50 employees who are not excluded under subsection (q)(5),

(B) the employer notifies the Secretary that such line of business is being treated as separate for purposes of paragraph (1), and

(C) such line of business meets guidelines prescribed by the Secretary or the employer receives a determination from the Secretary that such line of business may be treated as separate for purposes of paragraph (1).

(3) SAFE HARBOR RULE.—

(A) IN GENERAL.—The requirements of subparagraph (C) of paragraph (2) shall not apply to any line of business if the highly compensated employee percentage with respect to such line of business is—

- (i) not less than one-half, and
- (ii) not more than twice,

the percentage which highly compensated employees are of all employees of the employer. An employer shall be treated as meeting the requirements of clause (i) if at least 10 percent of all highly compensated employees of the employer perform services solely for such line of business.

(B) DETERMINATION MAY BE BASED ON PRECEDING YEAR.—The requirements of subparagraph (A) shall be treated as met with respect to any line of business if such requirements were met with respect to such line of business for the preceding year and if—

- (i) no more than a de minimis number of employees were shifted to or from the line of business after the close of the preceding year, or
- (ii) the employees shifted to or from the line of business after the close of the preceding year contained a substantially proportional number of highly compensated employees.

(4) HIGHLY COMPENSATED EMPLOYEE PERCENTAGE DEFINED.—For purposes of this subsection, the term “highly compensated employee percentage” means the percentage which highly compensated employees performing services for the line of business are of all employees performing services for the line of business.

(5) ALLOCATION OF BENEFITS TO LINE OF BUSINESS.—For purposes of this subsection, benefits which are attributable to services provided to a line of business shall be treated as provided by such line of business.

(6) HEADQUARTERS PERSONNEL, ETC.—The Secretary shall prescribe rules providing for—

(A) the allocation of headquarters personnel among the lines of business of the employer, and

(B) the treatment of other employees providing services for more than 1 line of business of the employer or not in lines of business meeting the requirements of paragraph (2).

(7) SEPARATE OPERATING UNITS.—For purposes of this subsection, the term “separate line of business” includes an operating unit in a separate geographic area separately operated for a bona fide business reason.

(8) **AFFILIATED SERVICE GROUPS.**—This subsection shall not apply in the case of any affiliated service group (within the meaning of section 414(m)).

(s) **COMPENSATION.**—For purposes of any applicable provision—

(1) **IN GENERAL.**—Except as provided in this subsection, the term “compensation” has the meaning given such term by section 415(c)(3).

(2) **EMPLOYER MAY ELECT NOT TO TREAT CERTAIN DEFERRALS AS COMPENSATION.**—An employer may elect not to include as compensation any amount which is contributed by the employer pursuant to a salary reduction agreement and which is not includible in the gross income of an employee under section 125, 132(f)(4), 402(e)(3), 402(h), or 403(b).

(3) **ALTERNATIVE DETERMINATION OF COMPENSATION.**—The Secretary shall by regulation provide for alternative methods of determining compensation which may be used by an employer, except that such regulations shall provide that an employer may not use an alternative method if the use of such method discriminates in favor of highly compensated employees (within the meaning of subsection (q)).

(4) **APPLICABLE PROVISION.**—For purposes of this subsection, the term “applicable provision” means any provision which specifically refers to this subsection.

(t) **APPLICATION OF CONTROLLED GROUP RULES TO CERTAIN EMPLOYEE BENEFITS.**—

(1) **IN GENERAL.**—All employees who are treated as employed by a single employer under subsection (b), (c), or (m) shall be treated as employed by a single employer for purposes of an applicable section. The provisions of subsection (o) shall apply with respect to the requirements of an applicable section.

(2) **APPLICABLE SECTION.**—For purposes of this subsection, the term “applicable section” means section 79, 106, 117(d), 125, 127, 129, 132, 137, 274(j), 505, or 4980B.

(u) **SPECIAL RULES RELATING TO VETERANS’ REEMPLOYMENT RIGHTS UNDER USERRA AND TO DIFFERENTIAL WAGE PAYMENTS TO MEMBERS ON ACTIVE DUTY.**—

(1) **TREATMENT OF CERTAIN CONTRIBUTIONS MADE PURSUANT TO VETERANS’ REEMPLOYMENT RIGHTS.**—If any contribution is made by an employer or an employee under an individual account plan with respect to an employee, or by an employee to a defined benefit plan that provides for employee contributions, and such contribution is required by reason of such employee’s rights under chapter 43 of title 38, United States Code, resulting from qualified military service, then—

(A) such contribution shall not be subject to any otherwise applicable limitation contained in section 402(g), 402(h), 403(b), 404(a), 404(h), 408, 415, or 457, and shall not be taken into account in applying such limitations to other contributions or benefits under such plan or any other plan, with respect to the year in which the contribution is made,

(B) such contribution shall be subject to the limitations referred to in subparagraph (A) with respect to the year to which the contribution relates (in accordance with rules prescribed by the Secretary), and

(C) such plan shall not be treated as failing to meet the requirements of section 401(a)(4), 401(a)(26), 401(k)(3), 401(k)(11), 401(k)(12), 401(m), 403(b)(12), 408(k)(3), 408(k)(6), 408(p), 410(b), or 416 by reason of the making of (or the right to make) such contribution.

For purposes of the preceding sentence, any elective deferral or employee contribution made under paragraph (2) shall be treated as required by reason of the employee's rights under such chapter 43.

(2) REEMPLOYMENT RIGHTS UNDER USERRA WITH RESPECT TO ELECTIVE DEFERRALS.—

(A) IN GENERAL.—For purposes of this subchapter and section 457, if an employee is entitled to the benefits of chapter 43 of title 38, United States Code, with respect to any plan which provides for elective deferrals, the employer sponsoring the plan shall be treated as meeting the requirements of such chapter 43 with respect to such elective deferrals only if such employer—

(i) permits such employee to make additional elective deferrals under such plan (in the amount determined under subparagraph (B) or such lesser amount as is elected by the employee) during the period which begins on the date of the reemployment of such employee with such employer and has the same length as the lesser of—

(I) the product of 3 and the period of qualified military service which resulted in such rights, and

(II) 5 years, and

(ii) makes a matching contribution with respect to any additional elective deferral made pursuant to clause (i) which would have been required had such deferral actually been made during the period of such qualified military service.

(B) AMOUNT OF MAKEUP REQUIRED.—The amount determined under this subparagraph with respect to any plan is the maximum amount of the elective deferrals that the individual would have been permitted to make under the plan in accordance with the limitations referred to in paragraph (1)(A) during the period of qualified military service if the individual had continued to be employed by the employer during such period and received compensation as determined under paragraph (7). Proper adjustment shall be made to the amount determined under the preceding sentence for any elective deferrals actually made during the period of such qualified military service.

(C) ELECTIVE DEFERRAL.—For purposes of this paragraph, the term “elective deferral” has the meaning given such term by section 402(g)(3); except that such term shall include any deferral of compensation under an eligible deferred compensation plan (as defined in section 457(b)).

(D) AFTER-TAX EMPLOYEE CONTRIBUTIONS.—References in subparagraphs (A) and (B) to elective deferrals shall be treated as including references to employee contributions.

(3) CERTAIN RETROACTIVE ADJUSTMENTS NOT REQUIRED.—For purposes of this subchapter and subchapter E, no provision of



chapter 43 of title 38, United States Code, shall be construed as requiring—

(A) any crediting of earnings to an employee with respect to any contribution before such contribution is actually made, or

(B) any allocation of any forfeiture with respect to the period of qualified military service.

(4) LOAN REPAYMENT SUSPENSIONS PERMITTED.—If any plan suspends the obligation to repay any loan made to an employee from such plan for any part of any period during which such employee is performing service in the uniformed services (as defined in chapter 43 of title 38, United States Code), whether or not qualified military service, such suspension shall not be taken into account for purposes of section 72(p), 401(a), or 4975(d)(1).

(5) QUALIFIED MILITARY SERVICE.—For purposes of this subsection, the term “qualified military service” means any service in the uniformed services (as defined in chapter 43 of title 38, United States Code) by any individual if such individual is entitled to reemployment rights under such chapter with respect to such service.

(6) INDIVIDUAL ACCOUNT PLAN.—For purposes of this subsection, the term “individual account plan” means any defined contribution plan (including any tax-sheltered annuity plan under section 403(b), any simplified employee pension under section 408(k), any qualified salary reduction arrangement under section 408(p), and any eligible deferred compensation plan (as defined in section 457(b))).

(7) COMPENSATION.—For purposes of sections 403(b)(3), 415(c)(3), and 457(e)(5), an employee who is in qualified military service shall be treated as receiving compensation from the employer during such period of qualified military service equal to—

(A) the compensation the employee would have received during such period if the employee were not in qualified military service, determined based on the rate of pay the employee would have received from the employer but for absence during the period of qualified military service, or

(B) if the compensation the employee would have received during such period was not reasonably certain, the employee’s average compensation from the employer during the 12-month period immediately preceding the qualified military service (or, if shorter, the period of employment immediately preceding the qualified military service).

(8) USERRA REQUIREMENTS FOR QUALIFIED RETIREMENT PLANS.—For purposes of this subchapter and section 457, an employer sponsoring a retirement plan shall be treated as meeting the requirements of chapter 43 of title 38, United States Code, only if each of the following requirements is met:

(A) An individual reemployed under such chapter is treated with respect to such plan as not having incurred a break in service with the employer maintaining the plan by reason of such individual’s period of qualified military service.

(B) Each period of qualified military service served by an individual is, upon reemployment under such chapter, deemed with respect to such plan to constitute service with the employer maintaining the plan for the purpose of determining the nonforfeitability of the individual's accrued benefits under such plan and for the purpose of determining the accrual of benefits under such plan.

(C) An individual reemployed under such chapter is entitled to accrued benefits that are contingent on the making of, or derived from, employee contributions or elective deferrals only to the extent the individual makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the individual would have been permitted or required to contribute had the individual remained continuously employed by the employer throughout the period of qualified military service. Any payment to such plan shall be made during the period beginning with the date of reemployment and whose duration is 3 times the period of the qualified military service (but not greater than 5 years).

(9) TREATMENT IN THE CASE OF DEATH OR DISABILITY RESULTING FROM ACTIVE MILITARY SERVICE.—

(A) IN GENERAL.—For benefit accrual purposes, an employer sponsoring a retirement plan may treat an individual who dies or becomes disabled (as defined under the terms of the plan) while performing qualified military service with respect to the employer maintaining the plan as if the individual has resumed employment in accordance with the individual's reemployment rights under chapter 43 of title 38, United States Code, on the day preceding death or disability (as the case may be) and terminated employment on the actual date of death or disability. In the case of any such treatment, and subject to subparagraphs (B) and (C), any full or partial compliance by such plan with respect to the benefit accrual requirements of paragraph (8) with respect to such individual shall be treated for purposes of paragraph (1) as if such compliance were required under such chapter 43.

(B) NONDISCRIMINATION REQUIREMENT.—Subparagraph (A) shall apply only if all individuals performing qualified military service with respect to the employer maintaining the plan (as determined under subsections (b), (c), (m), and (o)) who die or became disabled as a result of performing qualified military service prior to reemployment by the employer are credited with service and benefits on reasonably equivalent terms.

(C) DETERMINATION OF BENEFITS.—The amount of employee contributions and the amount of elective deferrals of an individual treated as reemployed under subparagraph (A) for purposes of applying paragraph (8)(C) shall be determined on the basis of the individual's average actual employee contributions or elective deferrals for the lesser of—

- (i) the 12-month period of service with the employer immediately prior to qualified military service, or

(ii) if service with the employer is less than such 12-month period, the actual length of continuous service with the employer.

(10) PLANS NOT SUBJECT TO TITLE 38.—This subsection shall not apply to any retirement plan to which chapter 43 of title 38, United States Code, does not apply.

(11) REFERENCES.—For purposes of this section, any reference to chapter 43 of title 38, United States Code, shall be treated as a reference to such chapter as in effect on December 12, 1994 (without regard to any subsequent amendment).

(12) TREATMENT OF DIFFERENTIAL WAGE PAYMENTS.—

(A) IN GENERAL.—Except as provided in this paragraph, for purposes of applying this title to a retirement plan to which this subsection applies—

(i) an individual receiving a differential wage payment shall be treated as an employee of the employer making the payment,

(ii) the differential wage payment shall be treated as compensation, and

(iii) the plan shall not be treated as failing to meet the requirements of any provision described in paragraph (1)(C) by reason of any contribution or benefit which is based on the differential wage payment.

(B) SPECIAL RULE FOR DISTRIBUTIONS.—

(i) IN GENERAL.—Notwithstanding subparagraph (A)(i), for purposes of section 401(k)(2)(B)(i)(I), 403(b)(7)(A)(ii), 403(b)(11)(A), or 457(d)(1)(A)(ii), an individual shall be treated as having been severed from employment during any period the individual is performing service in the uniformed services described in section 3401(h)(2)(A).

(ii) LIMITATION.—If an individual elects to receive a distribution by reason of clause (i), the plan shall provide that the individual may not make an elective deferral or employee contribution during the 6-month period beginning on the date of the distribution.

(C) NONDISCRIMINATION REQUIREMENT.—Subparagraph (A)(iii) shall apply only if all employees of an employer (as determined under subsections (b), (c), (m), and (o)) performing service in the uniformed services described in section 3401(h)(2)(A) are entitled to receive differential wage payments on reasonably equivalent terms and, if eligible to participate in a retirement plan maintained by the employer, to make contributions based on the payments on reasonably equivalent terms. For purposes of applying this subparagraph, the provisions of paragraphs (3), (4), and (5) of section 410(b) shall apply.

(D) DIFFERENTIAL WAGE PAYMENT.—For purposes of this paragraph, the term “differential wage payment” has the meaning given such term by section 3401(h)(2).

(v) CATCH-UP CONTRIBUTIONS FOR INDIVIDUALS AGE 50 OR OVER.—

(1) IN GENERAL.—An applicable employer plan shall not be treated as failing to meet any requirement of this title solely because the plan permits an eligible participant to make additional elective deferrals in any plan year. *Except in the case of*

*an applicable employer plan described in paragraph (6)(iv), the preceding sentence shall only apply if contributions are designated Roth contributions (as defined in section 402A(c)(1)).*

(2) LIMITATION ON AMOUNT OF ADDITIONAL DEFERRALS.—

(A) IN GENERAL.—A plan shall not permit additional elective deferrals under paragraph (1) for any year in an amount greater than the lesser of—

(i) the applicable dollar amount, or

(ii) the excess (if any) of—

(I) the participant's compensation (as defined in section 415(c)(3)) for the year, over

(II) any other elective deferrals of the participant for such year which are made without regard to this subsection.

(B) APPLICABLE DOLLAR AMOUNT.—For purposes of this paragraph—

(i) In the case of an applicable employer plan other than a plan described in section 401(k)(11) or 408(p), the applicable dollar amount is \$5,000 (*\$10,000, in the case of an eligible participant who has attained age 62, but not age 65, before the close of the taxable year*).

(ii) In the case of an applicable employer plan described in section 401(k)(11) or 408(p), the applicable dollar amount is \$2,500 (*\$5,000, in the case of an eligible participant who has attained age 62, but not age 65, before the close of the taxable year*).

(C) COST-OF-LIVING ADJUSTMENT.—In the case of a year beginning after December 31, 2006, the Secretary shall adjust annually the \$5,000 amount in subparagraph (B)(i) and the \$2,500 amount in subparagraph (B)(ii) for increases in the cost-of-living at the same time and in the same manner as adjustments under section 415(d); except that the base period taken into account shall be the calendar quarter beginning July 1, 2005, and any increase under this subparagraph which is not a multiple of \$500 shall be rounded to the next lower multiple of \$500. *In the case of a year beginning after December 31, 2022, the Secretary shall adjust annually the \$10,000 amount in subparagraph (B)(i) and the \$5,000 amount in subparagraph (B)(ii) for increases in the cost-of-living at the same time and in the same manner as adjustments under the preceding sentence; except that the period at the end of the base sentence taken into account shall be the calendar quarter beginning July 1, 2021.*

(D) AGGREGATION OF PLANS.—For purposes of this paragraph, plans described in clauses (i), (ii), and (iv) of paragraph (6)(A) that are maintained by the same employer (as determined under subsection (b), (c), (m) or (o)) shall be treated as a single plan, and plans described in clause (iii) of paragraph (6)(A) that are maintained by the same employer shall be treated as a single plan.

(3) TREATMENT OF CONTRIBUTIONS.—In the case of any contribution to a plan under paragraph (1)—

(A) such contribution shall not, with respect to the year in which the contribution is made—

(i) be subject to any otherwise applicable limitation contained in sections 401(a)(30), 402(h), 403(b), 408, 415(c), and 457(b)(2) (determined without regard to section 457(b)(3)), or

(ii) be taken into account in applying such limitations to other contributions or benefits under such plan or any other such plan, and

(B) except as provided in paragraph (4), such plan shall not be treated as failing to meet the requirements of section 401(a)(4), 401(k)(3), 401(k)(11), 403(b)(12), 408(k), 410(b), or 416 by reason of the making of (or the right to make) such contribution.

(4) APPLICATION OF NONDISCRIMINATION RULES.—

(A) IN GENERAL.—An applicable employer plan shall be treated as failing to meet the nondiscrimination requirements under section 401(a)(4) with respect to benefits, rights, and features unless the plan allows all eligible participants to make the same election with respect to the additional elective deferrals under this subsection.

(B) AGGREGATION.—For purposes of subparagraph (A), all plans maintained by employers who are treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as 1 plan, except that a plan described in clause (i) of section 410(b)(6)(C) shall not be treated as a plan of the employer until the expiration of the transition period with respect to such plan (as determined under clause (ii) of such section).

(5) ELIGIBLE PARTICIPANT.—For purposes of this subsection, the term “eligible participant” means a participant in a plan—

(A) who would attain age 50 by the end of the taxable year,

(B) with respect to whom no other elective deferrals may (without regard to this subsection) be made to the plan for the plan (or other applicable) year by reason of the application of any limitation or other restriction described in paragraph (3) or comparable limitation or restriction contained in the terms of the plan.

(6) OTHER DEFINITIONS AND RULES.—For purposes of this subsection—

(A) APPLICABLE EMPLOYER PLAN.—The term “applicable employer plan” means—

(i) an employees’ trust described in section 401(a) which is exempt from tax under section 501(a),

(ii) a plan under which amounts are contributed by an individual’s employer for an annuity contract described in section 403(b),

(iii) an eligible deferred compensation plan under section 457 of an eligible employer described in section 457(e)(1)(A), and

(iv) an arrangement meeting the requirements of section 408(k) or (p).

(B) ELECTIVE DEFERRAL.—The term “elective deferral” has the meaning given such term by subsection (u)(2)(C).

(C) EXCEPTION FOR SECTION 457 PLANS.—This subsection shall not apply to a participant for any year for which a

higher limitation applies to the participant under section 457(b)(3).

(w) SPECIAL RULES FOR CERTAIN WITHDRAWALS FROM ELIGIBLE AUTOMATIC CONTRIBUTION ARRANGEMENTS.—

(1) IN GENERAL.—If an eligible automatic contribution arrangement allows an employee to elect to make permissible withdrawals—

(A) the amount of any such withdrawal shall be includible in the gross income of the employee for the taxable year of the employee in which the distribution is made,

(B) no tax shall be imposed under section 72(t) with respect to the distribution, and

(C) the arrangement shall not be treated as violating any restriction on distributions under this title solely by reason of allowing the withdrawal.

In the case of any distribution to an employee by reason of an election under this paragraph, employer matching contributions shall be forfeited or subject to such other treatment as the Secretary may prescribe.

(2) PERMISSIBLE WITHDRAWAL.—For purposes of this subsection—

(A) IN GENERAL.—The term “permissible withdrawal” means any withdrawal from an eligible automatic contribution arrangement meeting the requirements of this paragraph which—

(i) is made pursuant to an election by an employee, and

(ii) consists of elective contributions described in paragraph (3)(B) (and earnings attributable thereto).

(B) TIME FOR MAKING ELECTION.—Subparagraph (A) shall not apply to an election by an employee unless the election is made no later than the date which is 90 days after the date of the first elective contribution with respect to the employee under the arrangement.

(C) AMOUNT OF DISTRIBUTION.—Subparagraph (A) shall not apply to any election by an employee unless the amount of any distribution by reason of the election is equal to the amount of elective contributions made with respect to the first payroll period to which the eligible automatic contribution arrangement applies to the employee and any succeeding payroll period beginning before the effective date of the election (and earnings attributable thereto).

(3) ELIGIBLE AUTOMATIC CONTRIBUTION ARRANGEMENT.—For purposes of this subsection, the term “eligible automatic contribution arrangement” means an arrangement under an applicable employer plan—

(A) under which a participant may elect to have the employer make payments as contributions under the plan on behalf of the participant, or to the participant directly in cash,

(B) under which the participant is treated as having elected to have the employer make such contributions in an amount equal to a uniform percentage of compensation provided under the plan until the participant specifically

elects not to have such contributions made (or specifically elects to have such contributions made at a different percentage), and

(C) which meets the requirements of paragraph (4).

(4) NOTICE REQUIREMENTS.—

(A) IN GENERAL.—The administrator of a plan containing an arrangement described in paragraph (3) shall, within a reasonable period before each plan year, give to each employee to whom an arrangement described in paragraph (3) applies for such plan year notice of the employee's rights and obligations under the arrangement which—

(i) is sufficiently accurate and comprehensive to apprise the employee of such rights and obligations, and

(ii) is written in a manner calculated to be understood by the average employee to whom the arrangement applies.

(B) TIME AND FORM OF NOTICE.—A notice shall not be treated as meeting the requirements of subparagraph (A) with respect to an employee unless—

(i) the notice includes an explanation of the employee's right under the arrangement to elect not to have elective contributions made on the employee's behalf (or to elect to have such contributions made at a different percentage),

(ii) the employee has a reasonable period of time after receipt of the notice described in clause (i) and before the first elective contribution is made to make such election, and

(iii) the notice explains how contributions made under the arrangement will be invested in the absence of any investment election by the employee.

(5) APPLICABLE EMPLOYER PLAN.—For purposes of this subsection, the term “applicable employer plan” means—

(A) an employees' trust described in section 401(a) which is exempt from tax under section 501(a),

(B) a plan under which amounts are contributed by an individual's employer for an annuity contract described in section 403(b),

(C) an eligible deferred compensation plan described in section 457(b) which is maintained by an eligible employer described in section 457(e)(1)(A),

(D) a simplified employee pension the terms of which provide for a salary reduction arrangement described in section 408(k)(6), and

(E) a simple retirement account (as defined in section 408(p)).

(6) SPECIAL RULE.—A withdrawal described in paragraph (1) (subject to the limitation of paragraph (2)(C)) shall not be taken into account for purposes of section 401(k)(3) or for purposes of applying the limitation under section 402(g)(1).

(x) SPECIAL RULES FOR ELIGIBLE COMBINED DEFINED BENEFIT PLANS AND QUALIFIED CASH OR DEFERRED ARRANGEMENTS.—

(1) GENERAL RULE.—Except as provided in this subsection, the requirements of this title shall be applied to any defined benefit plan or applicable defined contribution plan which is

part of an eligible combined plan in the same manner as if each such plan were not a part of the eligible combined plan. In the case of a termination of the defined benefit plan and the applicable defined contribution plan forming part of an eligible combined plan, the plan administrator shall terminate each such plan separately.

(2) ELIGIBLE COMBINED PLAN.—For purposes of this subsection—

(A) IN GENERAL.—The term “eligible combined plan” means a plan—

(i) which is maintained by an employer which, at the time the plan is established, is a small employer,

(ii) which consists of a defined benefit plan and an applicable defined contribution plan,

(iii) the assets of which are held in a single trust forming part of the plan and are clearly identified and allocated to the defined benefit plan and the applicable defined contribution plan to the extent necessary for the separate application of this title under paragraph (1), and

(iv) with respect to which the benefit, contribution, vesting, and nondiscrimination requirements of subparagraphs (B), (C), (D), (E), and (F) are met.

For purposes of this subparagraph, the term “small employer” has the meaning given such term by section 4980D(d)(2), except that such section shall be applied by substituting “500” for “50” each place it appears.

(B) BENEFIT REQUIREMENTS.—

(i) IN GENERAL.—The benefit requirements of this subparagraph are met with respect to the defined benefit plan forming part of the eligible combined plan if the accrued benefit of each participant derived from employer contributions, when expressed as an annual retirement benefit, is not less than the applicable percentage of the participant’s final average pay. For purposes of this clause, final average pay shall be determined using the period of consecutive years (not exceeding 5) during which the participant had the greatest aggregate compensation from the employer.

(ii) APPLICABLE PERCENTAGE.—For purposes of clause (i), the applicable percentage is the lesser of—

(I) 1 percent multiplied by the number of years of service with the employer, or

(II) 20 percent.

(iii) SPECIAL RULE FOR APPLICABLE DEFINED BENEFIT PLANS.—If the defined benefit plan under clause (i) is an applicable defined benefit plan as defined in section 411(a)(13)(B) which meets the interest credit requirements of section 411(b)(5)(B)(i), the plan shall be treated as meeting the requirements of clause (i) with respect to any plan year if each participant receives a pay credit for the year which is not less than the percentage of compensation determined in accordance with the following table:



(iv) YEARS OF SERVICE.—For purposes of this subparagraph, years of service shall be determined under the rules of paragraphs (4), (5), and (6) of section 411(a), except that the plan may not disregard any year of service because of a participant making, or failing to make, any elective deferral with respect to the qualified cash or deferred arrangement to which subparagraph (C) applies.

(C) CONTRIBUTION REQUIREMENTS.—

(i) IN GENERAL.—The contribution requirements of this subparagraph with respect to any applicable defined contribution plan forming part of an eligible combined plan are met if—

(I) the qualified cash or deferred arrangement included in such plan constitutes an automatic contribution arrangement, and

(II) the employer is required to make matching contributions on behalf of each employee eligible to participate in the arrangement in an amount equal to 50 percent of the elective contributions of the employee to the extent such elective contributions do not exceed 4 percent of compensation.

Rules similar to the rules of clauses (ii) and (iii) of section 401(k)(12)(B) shall apply for purposes of this clause.

(ii) NONELECTIVE CONTRIBUTIONS.—An applicable defined contribution plan shall not be treated as failing to meet the requirements of clause (i) because the employer makes nonelective contributions under the plan but such contributions shall not be taken into account in determining whether the requirements of clause (i)(II) are met.

(D) VESTING REQUIREMENTS.—The vesting requirements of this subparagraph are met if—

(i) in the case of a defined benefit plan forming part of an eligible combined plan an employee who has completed at least 3 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit under the plan derived from employer contributions, and

(ii) in the case of an applicable defined contribution plan forming part of eligible combined plan—

(I) an employee has a nonforfeitable right to any matching contribution made under the qualified cash or deferred arrangement included in such plan by an employer with respect to any elective contribution, including matching contributions in excess of the contributions required under subparagraph (C)(i)(II), and

(II) an employee who has completed at least 3 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived under the arrangement from nonelective contributions of the employer.

For purposes of this subparagraph, the rules of section 411 shall apply to the extent not inconsistent with this subparagraph.

(E) UNIFORM PROVISION OF CONTRIBUTIONS AND BENEFITS.—In the case of a defined benefit plan or applicable defined contribution plan forming part of an eligible combined plan, the requirements of this subparagraph are met if all contributions and benefits under each such plan, and all rights and features under each such plan, must be provided uniformly to all participants.

(F) REQUIREMENTS MUST BE MET WITHOUT TAKING INTO ACCOUNT SOCIAL SECURITY AND SIMILAR CONTRIBUTIONS AND BENEFITS OR OTHER PLANS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if the requirements of clauses (ii) and (iii) are met.

(ii) SOCIAL SECURITY AND SIMILAR CONTRIBUTIONS.—The requirements of this clause are met if—

(I) the requirements of subparagraphs (B) and (C) are met without regard to section 401(l), and

(II) the requirements of sections 401(a)(4) and 410(b) are met with respect to both the applicable defined contribution plan and defined benefit plan forming part of an eligible combined plan without regard to section 401(l).

(iii) OTHER PLANS AND ARRANGEMENTS.—The requirements of this clause are met if the applicable defined contribution plan and defined benefit plan forming part of an eligible combined plan meet the requirements of sections 401(a)(4) and 410(b) without being combined with any other plan.

(3) NONDISCRIMINATION REQUIREMENTS FOR QUALIFIED CASH OR DEFERRED ARRANGEMENT.—

(A) IN GENERAL.—A qualified cash or deferred arrangement which is included in an applicable defined contribution plan forming part of an eligible combined plan shall be treated as meeting the requirements of section 401(k)(3)(A)(ii) if the requirements of paragraph (2)(C) are met with respect to such arrangement.

(B) MATCHING CONTRIBUTIONS.—In applying section 401(m)(11) to any matching contribution with respect to a contribution to which paragraph (2)(C) applies, the contribution requirement of paragraph (2)(C) and the notice requirements of paragraph (5)(B) shall be substituted for the requirements otherwise applicable under clauses (i) and (ii) of section 401(m)(11)(A).

(4) SATISFACTION OF TOP-HEAVY RULES.—A defined benefit plan and applicable defined contribution plan forming part of an eligible combined plan for any plan year shall be treated as meeting the requirements of section 416 for the plan year.

(5) AUTOMATIC CONTRIBUTION ARRANGEMENT.—For purposes of this subsection—

(A) IN GENERAL.—A qualified cash or deferred arrangement shall be treated as an automatic contribution arrangement if the arrangement—

(i) provides that each employee eligible to participate in the arrangement is treated as having elected to have the employer make elective contributions in an amount equal to 4 percent of the employee's compensation unless the employee specifically elects not to have such contributions made or to have such contributions made at a different rate, and

(ii) meets the notice requirements under subparagraph (B).

(B) NOTICE REQUIREMENTS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if the requirements of clauses (ii) and (iii) are met.

(ii) REASONABLE PERIOD TO MAKE ELECTION.—The requirements of this clause are met if each employee to whom subparagraph (A)(i) applies—

(I) receives a notice explaining the employee's right under the arrangement to elect not to have elective contributions made on the employee's behalf or to have the contributions made at a different rate, and

(II) has a reasonable period of time after receipt of such notice and before the first elective contribution is made to make such election.

(iii) ANNUAL NOTICE OF RIGHTS AND OBLIGATIONS.—The requirements of this clause are met if each employee eligible to participate in the arrangement is, within a reasonable period before any year, given notice of the employee's rights and obligations under the arrangement.

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) shall be met with respect to the notices described in clauses (ii) and (iii) of this subparagraph.

(6) COORDINATION WITH OTHER REQUIREMENTS.—

(A) TREATMENT OF SEPARATE PLANS.—Section 414(k) shall not apply to an eligible combined plan.

(B) REPORTING.—An eligible combined plan shall be treated as a single plan for purposes of sections 6058 and 6059.

(7) APPLICABLE DEFINED CONTRIBUTION PLAN.—For purposes of this subsection—

(A) IN GENERAL.—The term “applicable defined contribution plan” means a defined contribution plan which includes a qualified cash or deferred arrangement.

(B) QUALIFIED CASH OR DEFERRED ARRANGEMENT.—The term “qualified cash or deferred arrangement” has the meaning given such term by section 401(k)(2).

(y) COOPERATIVE AND SMALL EMPLOYER CHARITY PENSION PLANS.—

(1) IN GENERAL.—For purposes of this title, except as provided in this subsection, a CSEC plan is a defined benefit plan (other than a multiemployer plan)—

(A) to which section 104 of the Pension Protection Act of 2006 applies, without regard to—

(i) section 104(a)(2) of such Act;

(ii) the amendments to such section 104 by section 202(b) of the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010; and  
 (iii) paragraph (3)(B);

(B) that, as of June 25, 2010, was maintained by more than one employer and all of the employers were organizations described in section 501(c)(3);

(C) that, as of June 25, 2010, was maintained by an employer—

(i) described in section 501(c)(3),  
 (ii) chartered under part B of subtitle II of title 36, United States Code,  
 (iii) with employees in at least 40 States, and  
 (iv) whose primary exempt purpose is to provide services with respect to children; or

(D) that, as of January 1, 2000, was maintained by an employer—

(i) described in section 501(c)(3),  
 (ii) who has been in existence since at least 1938,  
 (iii) who conducts medical research directly or indirectly through grant making, and  
 (iv) whose primary exempt purpose is to provide services with respect to mothers and children.

(2) AGGREGATION.—All employers that are treated as a single employer under subsection (b) or (c) shall be treated as a single employer for purposes of determining if a plan was maintained by more than one employer under subparagraphs (B) and (C) of paragraph (1).

(3) ELECTION.—

(A) IN GENERAL.—If a plan falls within the definition of a CSEC plan under this subsection (without regard to this paragraph), such plan shall be a CSEC plan unless the plan sponsor elects not later than the close of the first plan year of the plan beginning after December 31, 2013, not to be treated as a CSEC plan. An election under the preceding sentence shall take effect for such plan year and, once made, may be revoked only with the consent of the Secretary.

(B) SPECIAL RULE.—If a plan described in subparagraph (A) is treated as a CSEC plan, section 104 of the Pension Protection Act of 2006, as amended by the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, shall cease to apply to such plan as of the first date as of which such plan is treated as a CSEC plan.

(z) CERTAIN PLAN TRANSFERS AND MERGERS.—

(1) IN GENERAL.—Under rules prescribed by the Secretary, except as provided in paragraph (2), no amount shall be includible in gross income by reason of—

(A) a transfer of all or a portion of the accrued benefit of a participant or beneficiary, whether or not vested, from a church plan that is a plan described in section 401(a) or an annuity contract described in section 403(b) to an annuity contract described in section 403(b), if such plan and annuity contract are both maintained by the same church or convention or association of churches,

(B) a transfer of all or a portion of the accrued benefit of a participant or beneficiary, whether or not vested, from an annuity contract described in section 403(b) to a church plan that is a plan described in section 401(a), if such plan and annuity contract are both maintained by the same church or convention or association of churches, or

(C) a merger of a church plan that is a plan described in section 401(a), or an annuity contract described in section 403(b), with an annuity contract described in section 403(b), if such plan and annuity contract are both maintained by the same church or convention or association of churches.

(2) LIMITATION.—Paragraph (1) shall not apply to a transfer or merger unless the participant's or beneficiary's total accrued benefit immediately after the transfer or merger is equal to or greater than the participant's or beneficiary's total accrued benefit immediately before the transfer or merger, and such total accrued benefit is nonforfeitable after the transfer or merger.

(3) QUALIFICATION.—A plan or annuity contract shall not fail to be considered to be described in section 401(a) or 403(b) merely because such plan or annuity contract engages in a transfer or merger described in this subsection.

(4) DEFINITIONS.—For purposes of this subsection—

(A) CHURCH OR CONVENTION OR ASSOCIATION OF CHURCHES.—The term “church or convention or association of churches” includes an organization described in subparagraph (A) or (B)(ii) of subsection (e)(3).

(B) ANNUITY CONTRACT.—The term “annuity contract” includes a custodial account described in section 403(b)(7) and a retirement income account described in section 403(b)(9).

(C) ACCRUED BENEFIT.—The term “accrued benefit” means—

(i) in the case of a defined benefit plan, the employee's accrued benefit determined under the plan, and

(ii) in the case of a plan other than a defined benefit plan, the balance of the employee's account under the plan.

(aa) CORRECTING AUTOMATIC CONTRIBUTION ERRORS.—

(1) IN GENERAL.—Any plan or arrangement shall not fail to be treated as a plan described in sections 401(a), 403(b), 408, or 457(b), as applicable, solely by reason of a corrected error.

(2) CORRECTED ERROR DEFINED.—For purposes of this subsection, the term “corrected error” means a reasonable administrative error in implementing an automatic enrollment or automatic escalation feature in accordance with the terms of an eligible automatic contribution arrangement (as defined under subsection (w)(3)), provided that such implementation error—

(A) is corrected by the date that is 91/2 months after the end of the plan year during which the failure occurred,

(B) is corrected in a manner that is favorable to the participant, and

(C) is of a type which is so corrected for all similarly situated participants in a nondiscriminatory manner.

*Such correction may occur before or after the participant has terminated employment and may occur without regard to whether the error is identified by the Secretary.*

*(3) REGULATIONS AND GUIDANCE FOR FAVORABLE CORRECTION METHODS.—The Secretary shall, by regulations or other guidance of general applicability, specify the correction methods that are in a manner favorable to the participant for purposes of paragraph (2)(B).*

*(bb) SPECIAL RULES APPLICABLE TO BENEFIT OVERPAYMENTS.—*

*(1) IN GENERAL.—A plan shall not fail to be treated as described in clause (i), (ii), (iii), or (iv) of section 219(g)(5)(A) and shall not fail to be treated as satisfying the requirements of section 401(a) or 403) merely because—*

*(A) the plan fails to obtain payment from any participant, beneficiary, employer, plan sponsor, fiduciary, or other party on account of any inadvertent benefit overpayment made by the plan, or*

*(B) the plan sponsor amends the plan to increase past or future benefit payments to affected participants and beneficiaries in order to adjust for prior inadvertent benefit overpayments.*

*(2) REDUCTION IN FUTURE BENEFIT PAYMENTS AND RECOVERY FROM RESPONSIBLE PARTY.—Paragraph (1) shall not fail to apply to a plan merely because, after discovering a benefit overpayment, such plan—*

*(A) reduces future benefit payments to the correct amount provided for under the terms of the plan, or*

*(B) seeks recovery from the person or persons responsible for such overpayment.*

*(3) EMPLOYER FUNDING OBLIGATIONS.—Nothing in this subsection shall relieve an employer of any obligation imposed on it to make contributions to a plan to meet the minimum funding standards under sections 412 and 430 or to prevent or restore an impermissible forfeiture in accordance with section 411.*

*(4) OBSERVANCE OF BENEFIT LIMITATIONS.—Notwithstanding paragraph (1), a plan to which paragraph (1) applies shall observe any limitations imposed on it by section 401(a)(17) or 415. The plan may enforce such limitations using any method approved by the Secretary for recouping benefits previously paid or allocations previously made in excess of such limitations.*

*(5) COORDINATION WITH OTHER QUALIFICATION REQUIREMENTS.—The Secretary may issue regulations or other guidance of general applicability specifying how benefit overpayments and their recoupment or non-recoupment from a participant or beneficiary shall be taken into account for purposes of satisfying any requirement applicable to a plan to which paragraph (1) applies.*

*(cc) ELIMINATING UNNECESSARY PLAN REQUIREMENTS RELATED TO UNENROLLED PARTICIPANTS.—*

*(1) IN GENERAL.—Notwithstanding any other provision of this title, with respect to any defined contribution plan, no disclosure, notice, or other plan document (other than the notices and documents described in subparagraphs (A) and (B)) shall be re-*

quired to be furnished under this title to any unenrolled participant if the unenrolled participant receives—

(A) an annual reminder notice (in paper format, or in any electronic format consented to by the participant) of such participant's eligibility to participate in such plan and any applicable election deadlines under the plan, and

(B) any document requested by such participant which the participant would be entitled to receive without regard to this subsection.

(2) **UNENROLLED PARTICIPANT.**—For purposes of this subsection, the term “unenrolled participant” means an employee who—

(A) is eligible to participate in a defined contribution plan,

(B) has received all required notices, disclosures, and other plan documents required to be furnished under this title and the summary plan description as provided in section 104(b) of the Employee Retirement Income Security Act of 1974 in connection with such participant's initial eligibility to participate in such plan,

(C) is not participating in such plan, and

(D) does not have a balance in the plan.

For purposes of this subsection, any eligibility to participate in the plan following any period for which such employee was not eligible to participate shall be treated as initial eligibility.

(3) **ANNUAL REMINDER NOTICE.**—For purposes of this subsection, the term “annual reminder notice” means the notice described in section 111(c) of the Employee Retirement Income Security Act of 1974.

**SEC. 414A. REQUIREMENTS RELATED TO AUTOMATIC ENROLLMENT.**

(a) **IN GENERAL.**—Except as otherwise provided in this section—

(1) an arrangement shall not be treated as a qualified cash or deferred arrangement described in section 401(k) unless such arrangement meets the automatic enrollment requirements of subsection (b), and

(2) an annuity contract otherwise described in section 403(b)(1) which is purchased under a salary reduction agreement shall not be treated as described in such section unless such agreement meets the automatic enrollment requirements of subsection (b).

(b) **AUTOMATIC ENROLLMENT REQUIREMENTS.**—

(1) **IN GENERAL.**—An arrangement or agreement meets the requirements of this subsection if such arrangement or agreement is an eligible automatic contribution arrangement (as defined in section 414(w)(3)) which meets the requirements of paragraphs (2) through (4).

(2) **ALLOWANCE OF PERMISSIBLE WITHDRAWALS.**—An eligible automatic contribution arrangement meets the requirements of this paragraph if such arrangement allows employees to make permissible withdrawals (as defined in section 414(w)(2)).

(3) **MINIMUM CONTRIBUTION PERCENTAGE.**—

(A) **IN GENERAL.**—An eligible automatic contribution arrangement meets the requirements of this paragraph if—

(i) the uniform percentage of compensation contributed by the participant under such arrangement dur-

ing the first year of participation is not less than 3 percent and not more than 10 percent (unless the participant specifically elects not to have such contributions made or to have such contributions made at a different percentage), and

(ii) effective for the first day of each plan year starting after each completed year of participation under such arrangement such uniform percentage is increased by 1 percentage point (to at least 10 percent, but not more than 15 percent) unless the participant specifically elects not to have such contributions made or to have such contributions made at a different percentage.

(B) **INITIAL REDUCED CEILING FOR CERTAIN PLANS.**—In the case of any arrangement to which this section applies (other than an arrangement that meets the requirements of paragraph (12) or (13) of section 401(k)), for plan years ending before January 1, 2025, subparagraph (A)(ii) shall be applied by substituting “10 percent” for “15 percent”.

(4) **INVESTMENT REQUIREMENTS.**—An eligible automatic contribution arrangement meets the requirements of this paragraph if amounts contributed pursuant to such arrangement, and for which no investment is elected by the participant, are invested consistent with the requirements of section 2550.404c-5 of title 29, Code of Federal Regulations (or any successor regulations).

(c) **EXCEPTIONS.**—For purposes of this section—

(1) **SIMPLE PLANS.**—Subsection (a) shall not apply to any simple plan (within the meaning of section 401(k)(11)).

(2) **EXCEPTION FOR PLANS OR ARRANGEMENTS ESTABLISHED BEFORE ENACTMENT OF SECTION.**—

(A) **IN GENERAL.**—Subsection (a) shall not apply to—

(i) any qualified cash or deferred arrangement established before the date of the enactment of this section, or

(ii) any annuity contract purchased under a plan established before the date of the enactment of this section.

(B) **POST-ENACTMENT ADOPTION OF MULTIPLE EMPLOYER PLAN.**—Subparagraph (A) shall not apply in the case of an employer adopting after such date of enactment a plan maintained by more than one employer, and subsection (a) shall apply with respect to such employer as if such plan were a single plan.

(3) **EXCEPTION FOR GOVERNMENTAL AND CHURCH PLANS.**—Subsection (a) shall not apply to any governmental plan (within the meaning of section 414(d)) or any church plan (within the meaning of section 414(e)).

(4) **EXCEPTION FOR NEW AND SMALL BUSINESSES.**—

(A) **NEW BUSINESS.**—Subsection (a) shall not apply to any qualified cash or deferred arrangement, or any annuity contract purchased under a plan, while the employer maintaining such plan (and any predecessor employer) has been in existence for less than 3 years.

(B) **SMALL BUSINESSES.**—Subsection (a) shall not apply to any qualified cash or deferred arrangement, any annuity



*contract purchased under a plan, earlier than the date that is 1 year after the close of the first taxable year with respect to which the employer maintaining the plan normally employed more than 10 employees.*

*(C) TREATMENT OF MULTIPLE EMPLOYER PLANS.—In the case of a plan maintained by more than 1 employer, subparagraphs (A) and (B) shall be applied separately with respect to each such employer, and all such employers to which subsection (a) applies (after the application of this paragraph) shall be treated as maintaining a separate plan for purposes of this section.*

\* \* \* \* \*

#### **SEC. 416. SPECIAL RULES FOR TOP-HEAVY PLANS.**

(a) **GENERAL RULE.**—A trust shall not constitute a qualified trust under section 401(a) for any plan year if the plan of which it is a part is a top-heavy plan for such plan year unless such plan meets—

- (1) the vesting requirements of subsection (b), and
- (2) the minimum benefit requirements of subsection (c).

(b) **VESTING REQUIREMENTS.**—

(1) **IN GENERAL.**—A plan satisfies the requirements of this subsection if it satisfies the requirements of either of the following subparagraphs:

(A) **3-YEAR VESTING.**—A plan satisfies the requirements of this subparagraph if an employee who has completed at least 3 years of service with the employer or employers maintaining the plan has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) **6-YEAR GRADED VESTING.**—A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

(2) **CERTAIN RULES MADE APPLICABLE.**—Except to the extent inconsistent with the provisions of this subsection, the rules of section 411 shall apply for purposes of this subsection.

(c) **PLAN MUST PROVIDE MINIMUM BENEFITS.**—

(1) **DEFINED BENEFIT PLANS.**—

(A) **IN GENERAL.**—A defined benefit plan meets the requirements of this subsection if the accrued benefit derived from employer contributions of each participant who is a non-key employee, when expressed as an annual retirement benefit, is not less than the applicable percentage of the participant's average compensation for years in the testing period.

(B) **APPLICABLE PERCENTAGE.**—For purposes of subparagraph (A), the term “applicable percentage” means the lesser of—

- (i) 2 percent multiplied by the number of years of service with the employer, or
- (ii) 20 percent.

(C) **YEARS OF SERVICE.**—For purposes of this paragraph—

(i) IN GENERAL.—Except as provided in clause (ii) or (iii), years of service shall be determined under the rules of paragraphs (4), (5), and (6) of section 411(a).

(ii) EXCEPTION FOR YEARS DURING WHICH PLAN WAS NOT TOP-HEAVY.—A year of service with the employer shall not be taken into account under this paragraph if—

(I) the plan was not a top-heavy plan for any plan year ending during such year of service, or

(II) such year of service was completed in a plan year beginning before January 1, 1984.

(iii) EXCEPTION FOR PLAN UNDER WHICH NO KEY EMPLOYEE (OR FORMER KEY EMPLOYEE) BENEFITS FOR PLAN YEAR.—For purposes of determining an employee's years of service with the employer, any service with the employer shall be disregarded to the extent that such service occurs during a plan year when the plan benefits (within the meaning of section 410(b)) no key employee or former key employee.

(D) AVERAGE COMPENSATION FOR HIGH 5 YEARS.—For purposes of this paragraph—

(i) IN GENERAL.—A participant's testing period shall be the period of consecutive years (not exceeding 5) during which the participant had the greatest aggregate compensation from the employer.

(ii) YEAR MUST BE INCLUDED IN YEAR OF SERVICE.—The years taken into account under clause (i) shall be properly adjusted for years not included in a year of service.

(iii) CERTAIN YEARS NOT TAKEN INTO ACCOUNT.—Except to the extent provided in the plan, a year shall not be taken into account under clause (i) if—

(I) such year ends in a plan year beginning before January 1, 1984, or

(II) such year begins after the close of the last year in which the plan was a top-heavy plan.

(E) ANNUAL RETIREMENT BENEFIT.—For purposes of this paragraph, the term "annual retirement benefit" means a benefit payable annually in the form of a single life annuity (with no ancillary benefits) beginning at the normal retirement age under the plan.

(2) DEFINED CONTRIBUTION PLANS.—

(A) IN GENERAL.—A defined contribution plan meets the requirements of the subsection if the employer contribution for the year for each participant who is a non-key employee is not less than 3 percent of such participant's compensation (within the meaning of section 415). Employer matching contributions (as defined in section 401(m)(4)(A)) shall be taken into account for purposes of this subparagraph (and any reduction under this sentence shall not be taken into account in determining whether section 401(k)(4)(A) applies).

(B) SPECIAL RULE WHERE MAXIMUM CONTRIBUTION LESS THAN 3 PERCENT.—

(i) IN GENERAL.—The percentage referred to in subparagraph (A) for any year shall not exceed the percentage at which contributions are made (or required to be made) under the plan for the year for the key employee for whom such percentage is the highest for the year.

(ii) TREATMENT OF AGGREGATION GROUPS.—(I) For purposes of this subparagraph, all defined contribution plans required to be included in an aggregation group under subsection (g)(2)(A)(i) shall be treated as one plan.

(II) This subparagraph shall not apply to any plan required to be included in an aggregation group if such plan enables a defined benefit plan required to be included in such group to meet the requirements of section 401(a)(4) or 410.

(C) SEPARATE APPLICATION TO EMPLOYEES NOT MEETING AGE AND SERVICE REQUIREMENTS.—*If employees not meeting the age or service requirements of section 410(a)(1) (without regard to subparagraph (B) thereof) are covered under a plan of the employer which meets the requirements of subparagraphs (A) and (B) separately with respect to such employees, such employees may be excluded from consideration in determining whether any plan of the employer meets the requirements of subparagraphs (A) and (B).*

(e) PLAN MUST MEET REQUIREMENTS WITHOUT TAKING INTO ACCOUNT SOCIAL SECURITY AND SIMILAR CONTRIBUTIONS AND BENEFITS.—A top-heavy plan shall not be treated as meeting the requirement of subsection (b) or (c) unless such plan meets such requirement without taking into account contributions or benefits under chapter 2 (relating to tax on self-employment income), chapter 21 (relating to Federal Insurance Contributions Act), title II of the Social Security Act, or any other Federal or State law.

(f) COORDINATION WHERE EMPLOYER HAS 2 OR MORE PLANS.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section where the employer has 2 or more plans including (but not limited to) regulations to prevent inappropriate omissions or required duplication of minimum benefits or contributions.

(g) TOP-HEAVY PLAN DEFINED.—For purposes of this section—

(1) IN GENERAL.—

(A) PLANS NOT REQUIRED TO BE AGGREGATED.—Except as provided in subparagraph (B), the term “top-heavy plan” means, with respect to any plan year—

(i) any defined benefit plan if, as of the determination date, the present value of the cumulative accrued benefits under the plan for key employees exceeds 60 percent of the present value of the cumulative accrued benefits under the plan for all employees, and

(ii) any defined contribution plan if, as of the determination date, the aggregate of the accounts of key employees under the plan exceeds 60 percent of the aggregate of the accounts of all employees under such plan.

(B) AGGREGATED PLANS.—Each plan of an employer required to be included in an aggregation group shall be treated as a top-heavy plan if such group is a top-heavy group.

(2) AGGREGATION.—For purposes of this subsection—

(A) AGGREGATION GROUP.—

(i) REQUIRED AGGREGATION.—The term “aggregation group” means—

(I) each plan of the employer in which a key employee is a participant, and

(II) each other plan of the employer which enables any plan described in subclause (I) to meet the requirements of section 401(a)(4) or 410.

(ii) PERMISSIVE AGGREGATION.—The employer may treat any plan not required to be included in an aggregation group under clause (i) as being part of such group if such group would continue to meet the requirements of sections 401(a)(4) and 410 with such plan being taken into account.

(B) TOP-HEAVY GROUP.—The term “top-heavy group” means any aggregation group if—

(i) the sum (as of the determination date) of—

(I) the present value of the cumulative accrued benefits for key employees under all defined benefit plans included in such group, and

(II) the aggregate of the accounts of key employees under all defined contribution plans included in such group,

(ii) exceeds 60 percent of a similar sum determined for all employees.

(3) DISTRIBUTIONS DURING LAST YEAR BEFORE DETERMINATION DATE TAKEN INTO ACCOUNT.—

(A) IN GENERAL.—For purposes of determining—

(i) the present value of the cumulative accrued benefit for any employee, or

(ii) the amount of the account of any employee, such present value or amount shall be increased by the aggregate distributions made with respect to such employee under the plan during the 1-year period ending on the termination date. The preceding sentence shall also apply to distributions under a terminated plan which if it had not been terminated would have been required to be included in an aggregation group.

(B) 5-YEAR PERIOD IN CASE OF IN-SERVICE DISTRIBUTION.—In the case of any distribution made for a reason other than severance from employment, death, or disability, subparagraph (A) shall be applied by substituting “5-year period” for “1-year period”.

(4) OTHER SPECIAL RULES.—For purposes of this subsection—

(A) ROLLOVER CONTRIBUTIONS TO PLAN NOT TAKEN INTO ACCOUNT.—Except to the extent provided in regulations, any rollover contribution (or similar transfer) initiated by the employee and made after December 31, 1983, to a plan shall not be taken into account with respect to the transferee plan for purposes of determining whether such plan

is a top-heavy plan (or whether any aggregation group which includes such plan is a top-heavy group).

(B) BENEFITS NOT TAKEN INTO ACCOUNT IF EMPLOYEE CEASES TO BE KEY EMPLOYEE.—If any individual is a non-key employee with respect to any plan for any plan year, but such individual was a key employee with respect to such plan for any prior plan year, any accrued benefit for such employee (and the account of such employee) shall not be taken into account.

(C) DETERMINATION DATE.—The term “determination date” means, with respect to any plan year—

- (i) the last day of the preceding plan year, or
- (ii) in the case of the first plan year of any plan, the last day of such plan year.

(D) YEARS.—To the extent provided in regulations, this section shall be applied on the basis of any year specified in such regulations in lieu of plan years.

(E) BENEFITS NOT TAKEN INTO ACCOUNT IF EMPLOYEE NOT EMPLOYED FOR LAST YEAR BEFORE DETERMINATION DATE.—If any individual has not performed services for the employer maintaining the plan at any time during the 1-year period ending on the determination date, any accrued benefit for such individual (and the account of such individual) shall not be taken into account.

(F) ACCRUED BENEFITS TREATED AS ACCRUING RATABLY.—The accrued benefit of any employee (other than a key employee) shall be determined—

- (i) under the method which is used for accrual purposes for all plans of the employer, or
- (ii) if there is no method described in clause (i), as if such benefit accrued not more rapidly than the slowest accrual rate permitted under section 411(b)(1)(C).

(G) SIMPLE RETIREMENT ACCOUNTS.—The term “top-heavy plan” shall not include a simple retirement account under section 408(p).

(H) CASH OR DEFERRED ARRANGEMENTS USING ALTERNATIVE METHODS OF MEETING NONDISCRIMINATION REQUIREMENTS.—The term “top-heavy plan” shall not include a plan which consists solely of—

- (i) a cash or deferred arrangement which meets the requirements of section 401(k)(12) or 401(k)(13), and
- (ii) matching contributions with respect to which the requirements of section 401(m)(11) or 401(m)(12) are met.

If, but for this subparagraph, a plan would be treated as a top-heavy plan because it is a member of an aggregation group which is a top-heavy group, contributions under the plan may be taken into account in determining whether any other plan in the group meets the requirements of subsection (c)(2).

(i) DEFINITIONS.—For purposes of this section—

(1) KEY EMPLOYEE.—

(A) IN GENERAL.—The term “key employee” means an employee who, at any time during the plan year, is—

- (i) an officer of the employer having an annual compensation greater than \$130,000,
- (ii) a 5-percent owner of the employer, or
- (iii) a 1-percent owner of the employer having an annual compensation from the employer of more than \$150,000.

For purposes of clause (i), no more than 50 employees (or, if lesser, the greater of 3 or 10 percent of the employees) shall be treated as officers. In the case of plan years beginning after December 31, 2002, the \$130,000 amount in clause (i) shall be adjusted at the same time and in the same manner as under section 415(d), except that the base period shall be the calendar quarter beginning July 1, 2001, and any increase under this sentence which is not a multiple of \$5,000 shall be rounded to the next lower multiple of \$5,000. Such term shall not include any officer or employee of an entity referred to in section 414(d) (relating to governmental plans). For purposes of determining the number of officers taken into account under clause (i), employees described in section 414(q)(5) shall be excluded.

(B) PERCENTAGE OWNERS.—

- (i) 5-PERCENT OWNER.—For purposes of this paragraph, the term “5-percent owner” means—

(I) if the employer is a corporation, any person who owns (or is considered as owning within the meaning of section 318) more than 5 percent of the outstanding stock of the corporation or stock possessing more than 5 percent of the total combined voting power of all stock of the corporation, or

(II) if the employer is not a corporation, any person who owns more than 5 percent of the capital or profits interest in the employer.

- (ii) 1-PERCENT OWNER.—For purposes of this paragraph, the term “1-percent owner” means any person who would be described in clause (i) if “1 percent” were substituted for “5 percent” each place it appears in clause (i).

- (iii) CONSTRUCTIVE OWNERSHIP RULES.—For purposes of this subparagraph—

(I) subparagraph (C) of section 318(a)(2) shall be applied by substituting “5 percent” for “50 percent”, and

(II) in the case of any employer which is not a corporation, ownership in such employer shall be determined in accordance with regulations prescribed by the Secretary which shall be based on principles similar to the principles of section 318 (as modified by subclause (I)).

(C) AGGREGATION RULES DO NOT APPLY FOR PURPOSES OF DETERMINING OWNERSHIP IN THE EMPLOYER.—The rules of subsections (b), (c), and (m) of section 414 shall not apply for purposes of determining ownership in the employer.

- (D) COMPENSATION.—For purposes of this paragraph, the term “compensation” has the meaning given such term by section 414(q)(4).
- (2) NON-KEY EMPLOYEE.—The term “non-key employee” means any employee who is not a key employee.
- (3) SELF-EMPLOYED INDIVIDUALS.—In the case of a self-employed individual described in section 401(c)(1)—
- (A) such individual shall be treated as an employee, and
- (B) such individual’s earned income (within the meaning of section 401(c)(2)) shall be treated as compensation.
- (4) TREATMENT OF EMPLOYEES COVERED BY COLLECTIVE BARGAINING AGREEMENTS.—The requirements of subsections (b), (c), and (d) shall not apply with respect to any employee included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and 1 or more employers if there is evidence that retirement benefits were the subject of good faith bargaining between such employee representatives and such employer or employers.
- (5) TREATMENT OF BENEFICIARIES.—The terms “employee” and “key employee” include their beneficiaries.
- (6) TREATMENT OF SIMPLIFIED EMPLOYEE PENSIONS.—
- (A) TREATMENT AS DEFINED CONTRIBUTION PLANS.—A simplified employee pension shall be treated as a defined contribution plan.
- (B) ELECTION TO HAVE DETERMINATIONS BASED ON EMPLOYER CONTRIBUTIONS.—In the case of a simplified employee pension, at the election of the employer, paragraphs (1)(A)(ii) and (2)(B) of subsection (g) shall be applied by taking into account aggregate employer contributions in lieu of the aggregate of the accounts of employees.

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## **Subchapter E—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING**

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### **PART II—METHODS OF ACCOUNTING**

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#### **Subpart B—TAXABLE YEAR FOR WHICH ITEMS OF GROSS INCOME INCLUDED**

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#### **SEC. 457. DEFERRED COMPENSATION PLANS OF STATE AND LOCAL GOVERNMENTS AND TAX-EXEMPT ORGANIZATIONS.**

##### **(a) YEAR OF INCLUSION IN GROSS INCOME.—**

(1) IN GENERAL.—Any amount of compensation deferred under an eligible deferred compensation plan, and any income attributable to the amounts so deferred, shall be includible in gross income only for the taxable year in which such compensation or other income—

(A) is paid to the participant or other beneficiary, in the case of a plan of an eligible employer described in subsection (e)(1)(A), and

(B) is paid or otherwise made available to the participant or other beneficiary, in the case of a plan of an eligible employer described in subsection (e)(1)(B).

(2) SPECIAL RULE FOR ROLLOVER AMOUNTS.—To the extent provided in section 72(t)(9), section 72(t) shall apply to any amount includible in gross income under this subsection.

(3) SPECIAL RULE FOR HEALTH AND LONG-TERM CARE INSURANCE.—In the case of a plan of an eligible employer described in subsection (e)(1)(A), to the extent provided in section 402(l), paragraph (1) shall not apply to amounts otherwise includible in gross income under this subsection.

(b) ELIGIBLE DEFERRED COMPENSATION PLAN DEFINED.—For purposes of this section, the term “eligible deferred compensation plan” means a plan established and maintained by an eligible employer—

(1) in which only individuals who perform service for the employer may be participants,

(2) which provides that (except as provided in paragraph (3)) the maximum amount which may be deferred under the plan for the taxable year (other than rollover amounts) shall not exceed the lesser of—

(A) the applicable dollar amount, or

(B) 100 percent of the participant’s includible compensation,

(3) which may provide that, for 1 or more of the participant’s last 3 taxable years ending before he attains normal retirement age under the plan, the ceiling set forth in paragraph (2) shall be the lesser of—

(A) twice the dollar amount in effect under subsection

(b)(2)(A), or

(B) the sum of—

(i) the plan ceiling established for purposes of paragraph (2) for the taxable year (determined without regard to this paragraph), plus

(ii) so much of the plan ceiling established for purposes of paragraph (2) for taxable years before the taxable year as has not previously been used under paragraph (2) or this paragraph,

[(4) which provides that compensation will be deferred for any calendar month only if an agreement providing for such deferral has been entered into before the beginning of such month,]

(4) which provides that compensation—

(A) in the case of an eligible employer described in subsection (e)(1)(A), will be deferred only if an agreement providing for such deferral has been entered into before the compensation is currently available to the individual, and

(B) in any other case, will be deferred for any calendar month only if an agreement providing for such deferral has been entered into before the beginning of such month,

(5) which meets the distribution requirements of subsection (d), and



(6) except as provided in subsection (g), which provides that—

(A) all amounts of compensation deferred under the plan,

(B) all property and rights purchased with such amounts, and

(C) all income attributable to such amounts, property, or rights,

shall remain (until made available to the participant or other beneficiary) solely the property and rights of the employer (without being restricted to the provision of benefits under the plan), subject only to the claims of the employer's general creditors.

A plan which is established and maintained by an employer which is described in subsection (e)(1)(A) and which is administered in a manner which is inconsistent with the requirements of any of the preceding paragraphs shall be treated as not meeting the requirements of such paragraph as of the 1st plan year beginning more than 180 days after the date of notification by the Secretary of the inconsistency unless the employer corrects the inconsistency before the 1st day of such plan year. *A plan which is established and maintained by an employer which is described in subsection (e)(1)(A) shall not be treated as failing to meet the requirements of this subsection solely because the plan, or another plan maintained by the employer which meets the requirements of section 401(a) or 403(b), provides for matching contributions on account of qualified student loan payments as described in section 401(m)(13).*

(c) LIMITATION.—The maximum amount of the compensation of any one individual which may be deferred under subsection (a) during any taxable year shall not exceed the amount in effect under subsection (b)(2)(A) (as modified by any adjustment provided under subsection (b)(3)).

(d) DISTRIBUTION REQUIREMENTS.—

(1) IN GENERAL.—For purposes of subsection (b)(5), a plan meets the distribution requirements of this subsection if—

(A) under the plan amounts will not be made available to participants or beneficiaries earlier than—

(i) the calendar year in which the participant attains age 70½ (in the case of a plan maintained by an employer described in subsection (e)(1)(A), age 59½),

(ii) when the participant has a severance from employment with the employer,

(iii) when the participant is faced with an unforeseeable emergency (determined in the manner prescribed by the Secretary in regulations), or

(iv) except as may be otherwise provided by regulations, in the case of a plan maintained by an employer described in subsection (e)(1)(A), with respect to amounts invested in a lifetime income investment (as defined in section 401(a)(38)(B)(ii)), the date that is 90 days prior to the date that such lifetime income investment may no longer be held as an investment option under the plan,

(B) the plan meets the minimum distribution requirements of paragraph (2),

(C) in the case of a plan maintained by an employer described in subsection (e)(1)(A), the plan meets requirements similar to the requirements of section 401(a)(31), and

(D) except as may be otherwise provided by regulations, in the case of amounts described in subparagraph (A)(iv), such amounts will be distributed only in the form of a qualified distribution (as defined in section 401(a)(38)(B)(i)) or a qualified plan distribution annuity contract (as defined in section 401(a)(38)(B)(iv)).

Any amount transferred in a direct trustee-to-trustee transfer in accordance with section 401(a)(31) shall not be includible in gross income for the taxable year of transfer.

(2) MINIMUM DISTRIBUTION REQUIREMENTS.—A plan meets the minimum distribution requirements of this paragraph if such plan meets the requirements of section 401(a)(9).

(3) SPECIAL RULE FOR GOVERNMENT PLAN.—An eligible deferred compensation plan of an employer described in subsection (e)(1)(A) shall not be treated as failing to meet the requirements of this subsection solely by reason of making a distribution described in subsection (e)(9)(A).

(4) PARTICIPANT CERTIFICATION.—*In determining whether a distribution of a participant is made when the participant is faced with an unforeseeable emergency, the administrator of a plan maintained by an eligible employer described in subsection (e)(1)(A) may rely on a certification by the participant that the distribution is made when the participant is faced with unforeseeable emergency of a type that is specifically described in regulations prescribed by the Secretary as an unforeseeable emergency and that the distribution is not in excess of the amount reasonably necessary to satisfy the emergency need.*

(e) OTHER DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

(1) ELIGIBLE EMPLOYER.—The term “eligible employer” means—

(A) a State, political subdivision of a State, and any agency or instrumentality of a State or political subdivision of a State, and

(B) any other organization (other than a governmental unit) exempt from tax under this subtitle.

(2) PERFORMANCE OF SERVICE.—The performance of service includes performance of service as an independent contractor and the person (or governmental unit) for whom such services are performed shall be treated as the employer.

(3) PARTICIPANT.—The term “participant” means an individual who is eligible to defer compensation under the plan.

(4) BENEFICIARY.—The term “beneficiary” means a beneficiary of the participant, his estate, or any other person whose interest in the plan is derived from the participant.

(5) INCLUDIBLE COMPENSATION.—The term “includible compensation” has the meaning given to the term “participant’s compensation” by section 415(c)(3).

(6) COMPENSATION TAKEN INTO ACCOUNT AT PRESENT VALUE.—Compensation shall be taken into account at its present value.

(7) **COMMUNITY PROPERTY LAWS.**—The amount of includible compensation shall be determined without regard to any community property laws.

(8) **INCOME ATTRIBUTABLE.**—Gains from the disposition of property shall be treated as income attributable to such property.

(9) **BENEFITS OF TAX EXEMPT ORGANIZATION PLANS NOT TREATED AS MADE AVAILABLE BY REASON OF CERTAIN ELECTIONS, ETC..**—In the case of an eligible deferred compensation plan of an employer described in subsection (e)(1)(B)—

(A) **TOTAL AMOUNT PAYABLE IS DOLLAR LIMIT OR LESS.**—

The total amount payable to a participant under the plan shall not be treated as made available merely because the participant may elect to receive such amount (or the plan may distribute such amount without the participant's consent) if—

(i) the portion of such amount which is not attributable to rollover contributions (as defined in section 411(a)(11)(D)) does not exceed the dollar limit under section 411(a)(11)(A), and

(ii) such amount may be distributed only if—

(I) no amount has been deferred under the plan with respect to such participant during the 2-year period ending on the date of the distribution, and

(II) there has been no prior distribution under the plan to such participant to which this subparagraph applied.

A plan shall not be treated as failing to meet the distribution requirements of subsection (d) by reason of a distribution to which this subparagraph applies.

(B) **ELECTION TO DEFER COMMENCEMENT OF DISTRIBUTIONS.**—The total amount payable to a participant under the plan shall not be treated as made available merely because the participant may elect to defer commencement of distributions under the plan if—

(i) such election is made after amounts may be available under the plan in accordance with subsection (d)(1)(A) and before commencement of such distributions, and

(ii) the participant may make only 1 such election.

(10) **TRANSFERS BETWEEN PLANS.**—A participant shall not be required to include in gross income any portion of the entire amount payable to such participant solely by reason of the transfer of such portion from 1 eligible deferred compensation plan to another eligible deferred compensation plan.

(11) **CERTAIN PLANS EXCLUDED.**—

(A) **IN GENERAL.**—The following plans shall be treated as not providing for the deferral of compensation:

(i) Any bona fide vacation leave, sick leave, compensatory time, severance pay, disability pay, or death benefit plan.

(ii) Any plan paying solely length of service awards to bona fide volunteers (or their beneficiaries) on account of qualified services performed by such volunteers.

(B) SPECIAL RULES APPLICABLE TO LENGTH OF SERVICE AWARD PLANS.—

(i) BONA FIDE VOLUNTEER.—An individual shall be treated as a bona fide volunteer for purposes of subparagraph (A)(ii) if the only compensation received by such individual for performing qualified services is in the form of—

(I) reimbursement for (or a reasonable allowance for) reasonable expenses incurred in the performance of such services, or

(II) reasonable benefits (including length of service awards), and nominal fees for such services, customarily paid by eligible employers in connection with the performance of such services by volunteers.

(ii) LIMITATION ON ACCRUALS.—A plan shall not be treated as described in subparagraph (A)(ii) if the aggregate amount of length of service awards accruing with respect to any year of service for any bona fide volunteer exceeds \$6,000.

(iii) COST OF LIVING ADJUSTMENT.—In the case of taxable years beginning after December 31, 2017, the Secretary shall adjust the \$6,000 amount under clause (ii) at the same time and in the same manner as under section 415(d), except that the base period shall be the calendar quarter beginning July 1, 2016, and any increase under this paragraph that is not a multiple of \$500 shall be rounded to the next lowest multiple of \$500.

(iv) SPECIAL RULE FOR APPLICATION OF LIMITATION ON ACCRUALS FOR CERTAIN PLANS.—In the case of a plan described in subparagraph (A)(ii) which is a defined benefit plan (as defined in section 414(j)), the limitation under clause (ii) shall apply to the actuarial present value of the aggregate amount of length of service awards accruing with respect to any year of service. Such actuarial present value with respect to any year shall be calculated using reasonable actuarial assumptions and methods, assuming payment will be made under the most valuable form of payment under the plan with payment commencing at the later of the earliest age at which unreduced benefits are payable under the plan or the participant's age at the time of the calculation.

(C) QUALIFIED SERVICES.—For purposes of this paragraph, the term “qualified services” means fire fighting and prevention services, emergency medical services, and ambulance services.

(D) CERTAIN VOLUNTARY EARLY RETIREMENT INCENTIVE PLANS.—

(i) IN GENERAL.—If an applicable voluntary early retirement incentive plan—

(I) makes payments or supplements as an early retirement benefit, a retirement-type subsidy, or a

benefit described in the last sentence of section 411(a)(9), and

(II) such payments or supplements are made in coordination with a defined benefit plan which is described in section 401(a) and includes a trust exempt from tax under section 501(a) and which is maintained by an eligible employer described in paragraph (1)(A) or by an education association described in clause (ii)(II),

such applicable plan shall be treated for purposes of subparagraph (A)(i) as a bona fide severance pay plan with respect to such payments or supplements to the extent such payments or supplements could otherwise have been provided under such defined benefit plan (determined as if section 411 applied to such defined benefit plan).

(ii) APPLICABLE VOLUNTARY EARLY RETIREMENT INCENTIVE PLAN.—For purposes of this subparagraph, the term “applicable voluntary early retirement incentive plan” means a voluntary early retirement incentive plan maintained by—

(I) a local educational agency (as defined in section 8101 of the Elementary and Secondary Education Act of 1965), or

(II) an education association which principally represents employees of 1 or more agencies described in subclause (I) and which is described in section 501(c)(5) or (6) and exempt from tax under section 501(a).

(12) EXCEPTION FOR NONELECTIVE DEFERRED COMPENSATION OF NONEMPLOYEES.—

(A) IN GENERAL.—This section shall not apply to nonelective deferred compensation attributable to services not performed as an employee.

(B) NONELECTIVE DEFERRED COMPENSATION.—For purposes of subparagraph (A), deferred compensation shall be treated as nonelective only if all individuals (other than those who have not satisfied any applicable initial service requirement) with the same relationship to the payor are covered under the same plan with no individual variations or options under the plan.

(13) SPECIAL RULE FOR CHURCHES.—The term “eligible employer” shall not include a church (as defined in section 3121(w)(3)(A)) or qualified church-controlled organization (as defined in section 3121(w)(3)(B)).

(14) TREATMENT OF QUALIFIED GOVERNMENTAL EXCESS BENEFIT ARRANGEMENTS.—Subsections (b)(2) and (c)(1) shall not apply to any qualified governmental excess benefit arrangement (as defined in section 415(m)(3)), and benefits provided under such an arrangement shall not be taken into account in determining whether any other plan is an eligible deferred compensation plan.

(15) APPLICABLE DOLLAR AMOUNT.—

(A) IN GENERAL.—The applicable dollar amount is \$15,000.

(B) COST-OF-LIVING ADJUSTMENTS.—In the case of taxable years beginning after December 31, 2006, the Secretary shall adjust the \$15,000 amount under subparagraph (A) at the same time and in the same manner as under section 415(d), except that the base period shall be the calendar quarter beginning July 1, 2005, and any increase under this paragraph which is not a multiple of \$500 shall be rounded to the next lowest multiple of \$500.

(16) ROLLOVER AMOUNTS.—

(A) GENERAL RULE.—In the case of an eligible deferred compensation plan established and maintained by an employer described in subsection (e)(1)(A), if—

(i) any portion of the balance to the credit of an employee in such plan is paid to such employee in an eligible rollover distribution (within the meaning of section 402(c)(4)),

(ii) the employee transfers any portion of the property such employee receives in such distribution to an eligible retirement plan described in section 402(c)(8)(B), and

(iii) in the case of a distribution of property other than money, the amount so transferred consists of the property distributed,

then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

(B) CERTAIN RULES MADE APPLICABLE.—The rules of paragraphs (2) through (7), (9), and (11) of section 402(c) and section 402(f) shall apply for purposes of subparagraph (A).

(C) REPORTING.—Rollovers under this paragraph shall be reported to the Secretary in the same manner as rollovers from qualified retirement plans (as defined in section 4974(c)).

(17) TRUSTEE-TO-TRUSTEE TRANSFERS TO PURCHASE PERMISSIVE SERVICE CREDIT.—No amount shall be includible in gross income by reason of a direct trustee-to-trustee transfer to a defined benefit governmental plan (as defined in section 414(d)) if such transfer is—

(A) for the purchase of permissive service credit (as defined in section 415(n)(3)(A)) under such plan, or

(B) a repayment to which section 415 does not apply by reason of subsection (k)(3) thereof.

(18) COORDINATION WITH CATCH-UP CONTRIBUTIONS FOR INDIVIDUALS AGE 50 OR OLDER.—In the case of an individual who is an eligible participant (as defined by section 414(v)) and who is a participant in an eligible deferred compensation plan of an employer described in paragraph (1)(A), subsections (b)(3) and (c) shall be applied by substituting for the amount otherwise determined under the applicable subsection the greater of—

(A) the sum of—

(i) the plan ceiling established for purposes of subsection (b)(2) (without regard to subsection (b)(3)), plus

(ii) *the lesser of any designated Roth contributions made by the participant to the plan or the applicable*

dollar amount for the taxable year determined under section 414(v)(2)(B)(i), or

(B) the amount determined under the applicable subsection (without regard to this paragraph).

(f) TAX TREATMENT OF PARTICIPANTS WHERE PLAN OR ARRANGEMENT OF EMPLOYER IS NOT ELIGIBLE.—

(1) IN GENERAL.—In the case of a plan of an eligible employer providing for a deferral of compensation, if such plan is not an eligible deferred compensation plan, then—

(A) the compensation shall be included in the gross income of the participant or beneficiary for the 1st taxable year in which there is no substantial risk of forfeiture of the rights to such compensation, and

(B) the tax treatment of any amount made available under the plan to a participant or beneficiary shall be determined under section 72 (relating to annuities, etc.).

(2) EXCEPTIONS.—Paragraph (1) shall not apply to—

(A) a plan described in section 401(a) which includes a trust exempt from tax under section 501(a),

(B) an annuity plan or contract described in section 403,

(C) that portion of any plan which consists of a transfer of property described in section 83,

(D) that portion of any plan which consists of a trust to which section 402(b) applies,

(E) a qualified governmental excess benefit arrangement described in section 415(m), and

(F) that portion of any applicable employment retention plan described in paragraph (4) with respect to any participant.

(3) DEFINITIONS.—For purposes of this subsection—

(A) PLAN INCLUDES ARRANGEMENTS, ETC.—The term “plan” includes any agreement or arrangement.

(B) SUBSTANTIAL RISK OF FORFEITURE.—The rights of a person to compensation are subject to a substantial risk of forfeiture if such person’s rights to such compensation are conditioned upon the future performance of substantial services by any individual.

(4) EMPLOYMENT RETENTION PLANS.—For purposes of paragraph (2)(F)—

(A) IN GENERAL.—The portion of an applicable employment retention plan described in this paragraph with respect to any participant is that portion of the plan which provides benefits payable to the participant not in excess of twice the applicable dollar limit determined under subsection (e)(15).

(B) OTHER RULES.—

(i) LIMITATION.—Paragraph (2)(F) shall only apply to the portion of the plan described in subparagraph (A) for years preceding the year in which such portion is paid or otherwise made available to the participant.

(ii) TREATMENT.—A plan shall not be treated for purposes of this title as providing for the deferral of compensation for any year with respect to the portion of the plan described in subparagraph (A).

(C) **APPLICABLE EMPLOYMENT RETENTION PLAN.**—The term “applicable employment retention plan” means an employment retention plan maintained by—

(i) a local educational agency (as defined in section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801)), or

(ii) an education association which principally represents employees of 1 or more agencies described in clause (i) and which is described in section 501(c)(5) or (6) and exempt from taxation under section 501(a).

(D) **EMPLOYMENT RETENTION PLAN.**—The term “employment retention plan” means a plan to pay, upon termination of employment, compensation to an employee of a local educational agency or education association described in subparagraph (C) for purposes of—

(i) retaining the services of the employee, or

(ii) rewarding such employee for the employee’s service with 1 or more such agencies or associations.

(g) **GOVERNMENTAL PLANS MUST MAINTAIN SET-ASIDES FOR EXCLUSIVE BENEFIT OF PARTICIPANTS.**—

(1) **IN GENERAL.**—A plan maintained by an eligible employer described in subsection (e)(1)(A) shall not be treated as an eligible deferred compensation plan unless all assets and income of the plan described in subsection (b)(6) are held in trust for the exclusive benefit of participants and their beneficiaries.

(2) **TAXABILITY OF TRUSTS AND PARTICIPANTS.**—For purposes of this title—

(A) a trust described in paragraph (1) shall be treated as an organization exempt from taxation under section 501(a), and

(B) notwithstanding any other provision of this title, amounts in the trust shall be includible in the gross income of participants and beneficiaries only to the extent, and at the time, provided in this section.

(3) **CUSTODIAL ACCOUNTS AND CONTRACTS.**—For purposes of this subsection, custodial accounts and contracts described in section 401(f) shall be treated as trusts under rules similar to the rules under section 401(f).

(4) **DEATH BENEFITS UNDER USERRA-QUALIFIED ACTIVE MILITARY SERVICE.**—A plan described in paragraph (1) shall not be treated as an eligible deferred compensation plan unless such plan meets the requirements of section 401(a)(37).

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## **Subtitle C—Employment Taxes**

### **CHAPTER 25—GENERAL PROVISIONS RELATING TO EMPLOYMENT TAXES**

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#### **SEC. 3511. CERTIFIED PROFESSIONAL EMPLOYER ORGANIZATIONS.**

(a) **GENERAL RULES.**—For purposes of the taxes, and other obligations, imposed by this subtitle—



(1) a certified professional employer organization shall be treated as the employer (and no other person shall be treated as the employer) of any work site employee performing services for any customer of such organization, but only with respect to remuneration remitted by such organization to such work site employee, and

(2) the exemptions, exclusions, definitions, and other rules which are based on type of employer and which would (but for paragraph (1)) apply shall apply with respect to such taxes imposed on such remuneration.

(b) SUCCESSOR EMPLOYER STATUS.—For purposes of sections 3121(a)(1), 3231(e)(2)(C), and 3306(b)(1)—

(1) a certified professional employer organization entering into a service contract with a customer with respect to a work site employee shall be treated as a successor employer and the customer shall be treated as a predecessor employer during the term of such service contract, and

(2) a customer whose service contract with a certified professional employer organization is terminated with respect to a work site employee shall be treated as a successor employer and the certified professional employer organization shall be treated as a predecessor employer.

(c) LIABILITY OF CERTIFIED PROFESSIONAL EMPLOYER ORGANIZATION.—Solely for purposes of its liability for the taxes and other obligations imposed by this subtitle—

(1) a certified professional employer organization shall be treated as the employer of any individual (other than a work site employee or a person described in subsection (f)) who is performing services covered by a contract meeting the requirements of section 7705(e)(2), but only with respect to remuneration remitted by such organization to such individual, and

(2) the exemptions, exclusions, definitions, and other rules which are based on type of employer and which would (but for paragraph (1)) apply shall apply with respect to such taxes imposed on such remuneration.

(d) TREATMENT OF CREDITS.—

(1) IN GENERAL.—For purposes of any credit specified in paragraph (2)—

(A) such credit with respect to a work site employee performing services for the customer applies to the customer, not the certified professional employer organization,

(B) the customer, and not the certified professional employer organization, shall take into account wages and employment taxes—

(i) paid by the certified professional employer organization with respect to the work site employee, and

(ii) for which the certified professional employer organization receives payment from the customer, and

(C) the certified professional employer organization shall furnish the customer and the Secretary with any information necessary for the customer to claim such credit.

(2) CREDITS SPECIFIED.—A credit is specified in this paragraph if such credit is allowed under—

(A) section 41 (credit for increasing research activity),

(B) section 45A (Indian employment credit),

(C) section 45B (credit for portion of employer social security taxes paid with respect to employee cash tips),

(D) section 45C (clinical testing expenses for certain drugs for rare diseases or conditions),

(E) section 45R (employee health insurance expenses of small employers),

(F) section 45U (military spouse retirement plan eligibility credit),

[(F)] (G) section 51 (work opportunity credit),

[(G)] (H) section 1396 (empowerment zone employment credit), and

[(H)] (I) any other section as provided by the Secretary.

(e) SPECIAL RULE FOR RELATED PARTY.—This section shall not apply in the case of a customer which bears a relationship to a certified professional employer organization described in section 267(b) or 707(b). For purposes of the preceding sentence, such sections shall be applied by substituting “10 percent” for “50 percent”.

(f) SPECIAL RULE FOR CERTAIN INDIVIDUALS.—For purposes of the taxes imposed under this subtitle, an individual with net earnings from self-employment derived from the customer’s trade or business (including a partner in a partnership that is a customer) is not a work site employee with respect to remuneration paid by a certified professional employer organization.

(g) REPORTING REQUIREMENTS AND OBLIGATIONS.—The Secretary shall develop such reporting and recordkeeping rules, regulations, and procedures as the Secretary determines necessary or appropriate to ensure compliance with this title by certified professional employer organizations or persons that have been so certified. Such rules shall include—

(1) notification of the Secretary in such manner as the Secretary shall prescribe in the case of the commencement or termination of a service contract described in section 7705(e)(2) between such a person and a customer, and the employer identification number of such customer,

(2) such information as the Secretary determines necessary for the customer to claim the credits identified in subsection (d) and the manner in which such information is to be provided, as prescribed by the Secretary, and

(3) such other information as the Secretary determines is essential to promote compliance with respect to the credits identified in subsection (d) and section 3302, and

shall be designed in a manner which streamlines, to the extent possible, the application of requirements of this section and section 7705, the exchange of information between a certified professional employer organization and its customers, and the reporting and recordkeeping obligations of the certified professional employer organization.

(h) REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section.

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## Subtitle D—Miscellaneous Excise Taxes

### CHAPTER 43—QUALIFIED PENSION, ETC., PLANS

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#### SEC. 4973. TAX ON EXCESS CONTRIBUTIONS TO CERTAIN TAX-FAVORED ACCOUNTS AND ANNUITIES.

(a) TAX IMPOSED.—In the case of—

- (1) an individual retirement account (within the meaning of section 408(a)),
- (2) an Archer MSA (within the meaning of section 220(d)),
- (3) an individual retirement annuity (within the meaning of section 408(b)), a custodial account treated as an annuity contract under section 403(b)(7)(A) (relating to custodial accounts for regulated investment company stock),
- (4) a Coverdell education savings account (as defined in section 530),
- (5) a health savings account (within the meaning of section 223(d)), or

(6) an ABLE account (within the meaning of section 529A), there is imposed for each taxable year a tax in an amount equal to 6 percent of the amount of the excess contributions to such individual's accounts or annuities (determined as of the close of the taxable year). The amount of such tax for any taxable year shall not exceed 6 percent of the value of the account or annuity (determined as of the close of the taxable year). In the case of an endowment contract described in section 408(b), the tax imposed by this section does not apply to any amount allocable to life, health, accident, or other insurance under such contract. The tax imposed by this subsection shall be paid by such individual.

(b) EXCESS CONTRIBUTIONS.—For purposes of this section, in the case of individual retirement accounts or individual retirement annuities, the term “excess contributions” means the sum of—

(1) the excess (if any) of—

(A) the amount contributed for the taxable year to the accounts or for the annuities (other than a contribution to a Roth IRA or a rollover contribution described in section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16)), over

(B) the amount allowable as a deduction under section 219 for such contributions, and

(2) the amount determined under this subsection for the preceding taxable year reduced by the sum of—

(A) the distributions out of the account for the taxable year which were included in the gross income of the payee under section 408(d)(1),

(B) the distributions out of the account for the taxable year to which section 408(d)(5) applies, and

(C) the excess (if any) of the maximum amount allowable as a deduction under section 219 for the taxable year over the amount contributed (determined without regard to section 219(f)(6)) to the accounts or for the annuities (including the amount contributed to a Roth IRA) for the taxable year.

For purposes of this subsection, any contribution which is distributed from the individual retirement account or the individual retirement annuity in a distribution to which section 408(d)(4) applies shall be treated as an amount not contributed. For purposes of paragraphs (1)(B) and (2)(C), the amount allowable as a deduction under section 219 shall be computed without regard to section 219(g). *Such term shall not include any designated nondeductible contribution (as defined in subparagraph (C) of section 408(o)(2)) which does not exceed the nondeductible limit under subparagraph (B) thereof by reason of an election under section 408(o)(5).*

(c) SECTION 403(B) CONTRACTS.—For purposes of this section, in the case of a custodial account referred to in subsection (a)(3), the term “excess contributions” means the sum of—

(1) the excess (if any) of the amount contributed for the taxable year to such account (other than a rollover contribution described in section 403(b)(8) or 408(d)(3)(A)(iii)), over the lesser of the amount excludable from gross income under section 403(b) or the amount permitted to be contributed under the limitations contained in section 415 (or under whichever such section is applicable, if only one is applicable), and

(2) the amount determined under this subsection for the preceding taxable year, reduced by—

(A) the excess (if any) of the lesser of (i) the amount excludable from gross income under section 403(b) or (ii) the amount permitted to be contributed under the limitations contained in section 415 over the amount contributed to the account for the taxable year (or under whichever such section is applicable, if only one is applicable), and

(B) the sum of the distributions out of the account (for all prior taxable years) which are included in gross income under section 72(e).

(d) EXCESS CONTRIBUTIONS TO ARCHER MSAs.—For purposes of this section, in the case of Archer MSAs (within the meaning of section 220(d)), the term “excess contributions” means the sum of—

(1) the aggregate amount contributed for the taxable year to the accounts (other than rollover contributions described in section 220(f)(5)) which is neither excludable from gross income under section 106(b) nor allowable as a deduction under section 220 for such year, and

(2) the amount determined under this subsection for the preceding taxable year, reduced by the sum of—

(A) the distributions out of the accounts which were included in gross income under section 220(f)(2), and

(B) the excess (if any) of—

(i) the maximum amount allowable as a deduction under section 220(b)(1) (determined without regard to section 106(b)) for the taxable year, over

(ii) the amount contributed to the accounts for the taxable year.

For purposes of this subsection, any contribution which is distributed out of the Archer MSA in a distribution to which section 220(f)(3) or section 138(c)(3) applies shall be treated as an amount not contributed.

(e) EXCESS CONTRIBUTIONS TO COVERDELL EDUCATION SAVINGS ACCOUNTS.—For purposes of this section—

(1) IN GENERAL.—In the case of Coverdell education savings accounts maintained for the benefit of any one beneficiary, the term “excess contributions” means the sum of—

(A) the amount by which the amount contributed for the taxable year to such accounts exceeds \$2,000 (or, if less, the sum of the maximum amounts permitted to be contributed under section 530(c) by the contributors to such accounts for such year); and

(B) the amount determined under this subsection for the preceding taxable year, reduced by the sum of—

(i) the distributions out of the accounts for the taxable year (other than rollover distributions); and

(ii) the excess (if any) of the maximum amount which may be contributed to the accounts for the taxable year over the amount contributed to the accounts for the taxable year.

(2) SPECIAL RULES.—For purposes of paragraph (1), the following contributions shall not be taken into account:

(A) Any contribution which is distributed out of the Coverdell education savings account in a distribution to which section 530(d)(4)(C) applies.

(B) Any rollover contribution.

(f) EXCESS CONTRIBUTIONS TO ROTH IRAS.—For purposes of this section, in the case of contributions to a Roth IRA (within the meaning of section 408A(b)), the term “excess contributions” means the sum of—

(1) the excess (if any) of—

(A) the amount contributed for the taxable year to Roth IRAs (other than a qualified rollover contribution described in section 408A(e)), over

(B) the amount allowable as a contribution under sections 408A(c)(2) and (c)(3), and

(2) the amount determined under this subsection for the preceding taxable year, reduced by the sum of—

(A) the distributions out of the accounts for the taxable year, and

(B) the excess (if any) of the maximum amount allowable as a contribution under sections 408A(c)(2) and (c)(3) for the taxable year over the amount contributed by the individual to all individual retirement plans for the taxable year.

For purposes of this subsection, any contribution which is distributed from a Roth IRA in a distribution described in section 408(d)(4) shall be treated as an amount not contributed.

(g) EXCESS CONTRIBUTIONS TO HEALTH SAVINGS ACCOUNTS.—For purposes of this section, in the case of health savings accounts (within the meaning of section 223(d)), the term “excess contributions” means the sum of—

(1) the aggregate amount contributed for the taxable year to the accounts (other than a rollover contribution described in section 220(f)(5) or 223(f)(5)) which is neither excludable from gross income under section 106(d) nor allowable as a deduction under section 223 for such year, and

(2) the amount determined under this subsection for the preceding taxable year, reduced by the sum of—

(A) the distributions out of the accounts which were included in gross income under section 223(f)(2), and

(B) the excess (if any) of—

(i) the maximum amount allowable as a deduction under section 223(b) (determined without regard to section 106(d)) for the taxable year, over

(ii) the amount contributed to the accounts for the taxable year.

For purposes of this subsection, any contribution which is distributed out of the health savings account in a distribution to which section 223(f)(3) applies shall be treated as an amount not contributed.

(h) **EXCESS CONTRIBUTIONS TO ABLE ACCOUNT.**—For purposes of this section—

(1) **IN GENERAL.**—In the case of an ABLE account (within the meaning of section 529A), the term “excess contributions” means the amount by which the amount contributed for the taxable year to such account (other than contributions under section 529A(c)(1)(C)) exceeds the contribution limit under section 529A(b)(2)(B).

(2) **SPECIAL RULE.**—For purposes of this subsection, any contribution which is distributed out of the ABLE account in a distribution to which the last sentence of section 529A(b)(2) applies shall be treated as an amount not contributed.

**SEC. 4974. EXCISE TAX ON CERTAIN ACCUMULATIONS IN QUALIFIED RETIREMENT PLANS.**

(a) **GENERAL RULE.**—If the amount distributed during the taxable year of the payee under any qualified retirement plan or any eligible deferred compensation plan (as defined in section 457(b)) is less than the minimum required distribution for such taxable year, there is hereby imposed a tax equal to ~~50 percent~~ 25 percent of the amount by which such minimum required distribution exceeds the actual amount distributed during the taxable year. The tax imposed by this section shall be paid by the payee.

(b) **MINIMUM REQUIRED DISTRIBUTION.**—For purposes of this section, the term “minimum required distribution” means the minimum amount required to be distributed during a taxable year under section 401(a)(9), 403(b)(10), 408(a)(6), 408(b)(3), or 457(d)(2), as the case may be, as determined under regulations prescribed by the Secretary.

(c) **QUALIFIED RETIREMENT PLAN.**—For purposes of this section, the term “qualified retirement plan” means—

(1) a plan described in section 401(a) which includes a trust exempt from tax under section 501(a),

(2) an annuity plan described in section 403(a),

(3) an annuity contract described in section 403(b),

(4) an individual retirement account described in section 408(a), or

(5) an individual retirement annuity described in section 408(b).

Such term includes any plan, contract, account, or annuity which, at any time, has been determined by the Secretary to be such a plan, contract, account, or annuity.

(d) **WAIVER OF TAX IN CERTAIN CASES.**—If the taxpayer establishes to the satisfaction of the Secretary that—

(1) the shortfall described in subsection (a) in the amount distributed during any taxable year was due to reasonable error, and

(2) reasonable steps are being taken to remedy the shortfall, the Secretary may waive the tax imposed by subsection (a) for the taxable year.

(e) *REDUCTION OF TAX IN CERTAIN CASES.*—

(1) *REDUCTION.*—*In the case of a taxpayer who—*

(A) *corrects, during the correction window, a shortfall of distributions from an individual retirement plan which resulted in imposition of a tax under subsection (a), and*

(B) *submits a return, during the correction window, reflecting such tax (as modified by this subsection), the first sentence of subsection (a) shall be applied by substituting “10 percent” for “25 percent”.*

(2) *CORRECTION WINDOW.*—*For purposes of this subsection, the term “correction window” means the period of time beginning on the date on which the tax under subsection (a) is imposed with respect to a shortfall of distributions from an individual retirement plan, and ending on the earlier of—*

(A) *the date on which the Secretary initiates an audit, or otherwise demands payment, with respect to the shortfall of distributions, or*

(B) *the last day of the second taxable year that begins after the end of the taxable year in which the tax under subsection (a) is imposed.*

#### **SEC. 4975. TAX ON PROHIBITED TRANSACTIONS.**

(a) **INITIAL TAXES ON DISQUALIFIED PERSON.**—There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).

(b) **ADDITIONAL TAXES ON DISQUALIFIED PERSON.**—In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

(c) **PROHIBITED TRANSACTION.**—

(1) **GENERAL RULE.**—For purposes of this section, the term “prohibited transaction” means any direct or indirect—

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

(2) SPECIAL EXEMPTION.—The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any disqualified person or transaction, orders of disqualified persons or transactions, from all or part of the restrictions imposed by paragraph (1) of this subsection. Action under this subparagraph may be taken only after consultation and coordination with the Secretary of Labor. The Secretary may not grant an exemption under this paragraph unless he finds that such exemption is—

(A) administratively feasible,

(B) in the interests of the plan and of its participants and beneficiaries, and

(C) protective of the rights of participants and beneficiaries of the plan.

Before granting an exemption under this paragraph, the Secretary shall require adequate notice to be given to interested persons and shall publish notice in the Federal Register of the pendency of such exemption and shall afford interested persons an opportunity to present views. No exemption may be granted under this paragraph with respect to a transaction described in subparagraph (E) or (F) of paragraph (1) unless the Secretary affords an opportunity for a hearing and makes a determination on the record with respect to the findings required under subparagraphs (A), (B), and (C) of this paragraph, except that in lieu of such hearing the Secretary may accept any record made by the Secretary of Labor with respect to an application for exemption under section 408(a) of title I of the Employee Retirement Income Security Act of 1974.

(3) SPECIAL RULE FOR INDIVIDUAL RETIREMENT ACCOUNTS.—An individual for whose benefit an individual retirement account is established and his beneficiaries shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, [the account ceases to be an individual retirement account by reason of the application of section 408(e)(2)(A) or if section 408(e)(4) applies to such account.] *the portion of the account used in the transaction is treated as distributed under paragraph (2)(A) or (4) of section 408(e).*

(4) SPECIAL RULE FOR ARCHER MSAs.—An individual for whose benefit an Archer MSA (within the meaning of section 220(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 220(e)(2) applies to such transaction.

(5) SPECIAL RULE FOR COVERDELL EDUCATION SAVINGS ACCOUNTS.—An individual for whose benefit a Coverdell education savings account is established and any contributor to such account shall be exempt from the tax imposed by this section with respect to any transaction concerning such account



(which would otherwise be taxable under this section) if section 530(d) applies with respect to such transaction.

(6) SPECIAL RULE FOR HEALTH SAVINGS ACCOUNTS.—An individual for whose benefit a health savings account (within the meaning of section 223(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be a health savings account by reason of the application of section 223(e)(2) to such account.

(7) SPECIAL RULE FOR PROVISION OF PHARMACY BENEFIT SERVICES.—Any party to an arrangement which satisfies the requirements of section 408(h) of the Employee Retirement Income Security Act of 1974 shall be exempt from the tax imposed by this section with respect to such arrangement.

(d) EXEMPTIONS.—Except as provided in subsection (f)(6), the prohibitions provided in subsection (c) shall not apply to—

(1) any loan made by the plan to a disqualified person who is a participant or beneficiary of the plan if such loan—

(A) is available to all such participants or beneficiaries on a reasonably equivalent basis,

(B) is not made available to highly compensated employees (within the meaning of section 414(q)) in an amount greater than the amount made available to other employees,

(C) is made in accordance with specific provisions regarding such loans set forth in the plan,

(D) bears a reasonable rate of interest, and

(E) is adequately secured;

(2) any contract, or reasonable arrangement, made with a disqualified person for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor;

(3) any loan to a leveraged employee stock ownership plan (as defined in subsection (e)(7)), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at a reasonable rate of interest, and any collateral which is given to a disqualified person by the plan consists only of qualifying employer securities (as defined in subsection (e)(8));

(4) the investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliates thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment;

(5) any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a disqualified person which is wholly owned (directly or indirectly) by the employer establishing the plan, or by any person which is a disqualified person with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are disqualified persons (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan);

(6) the provision of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such service is provided at not more than reasonable compensation, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the provision of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and under such guidelines the bank or similar financial institution does not provide such ancillary service—

(i) in an excessive or unreasonable manner, and

(ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans;

(7) the exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion;

(8) any transaction between a plan and a common or collective trust fund or pooled investment fund maintained by a disqualified person which is a bank or trust company supervised by a State or Federal agency or between a plan and a pooled investment fund of an insurance company qualified to do business in a State if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than a reasonable compensation, and

- (C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan;
- (9) receipt by a disqualified person of any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;
- (10) receipt by a disqualified person of any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan, but no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan or from an employee organization whose members are participants in such plan shall receive compensation from such fund, except for reimbursement of expenses properly and actually incurred;
- (11) service by a disqualified person as a fiduciary in addition to being an officer, employee, agent, or other representative of a disqualified person;
- (12) the making by a fiduciary of a distribution of the assets of the trust in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of title IV of the Employee Retirement Income Security Act of 1974 (relating to allocation of assets);
- (13) any transaction which is exempt from section 406 of such Act by reason of section 408(e) of such Act (or which would be so exempt if such section 406 applied to such transaction) or which is exempt from section 406 of such Act by reason of section 408(b)(12) of such Act;
- (14) any transaction required or permitted under part 1 of subtitle E of title IV or section 4223 of the Employee Retirement Income Security Act of 1974, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F);
- (15) a merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 of such Act, but this paragraph shall not apply with respect to the application of subsection (c)(1)(E) or (F);
- (16) a sale of stock held by a trust which constitutes an individual retirement account under section 408(a) to the individual for whose benefit such account is established if—
- (A) such stock is in a bank (as defined in section 581) or a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(1))),
  - (B) such stock is held by such trust as of the date of the enactment of this paragraph,
  - (C) such sale is pursuant to an election under section 1362(a) by such bank or company,

- (D) such sale is for fair market value at the time of sale (as established by an independent appraiser) and the terms of the sale are otherwise at least as favorable to such trust as the terms that would apply on a sale to an unrelated party,
  - (E) such trust does not pay any commissions, costs, or other expenses in connection with the sale, and
  - (F) the stock is sold in a single transaction for cash not later than 120 days after the S corporation election is made;
- (17) any transaction in connection with the provision of investment advice described in subsection (e)(3)(B) to a participant or beneficiary in a plan that permits such participant or beneficiary to direct the investment of plan assets in an individual account, if—
- (A) the transaction is—
    - (i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,
    - (ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or
    - (iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice; and
  - (B) the requirements of subsection (f)(8) are met,
- (18) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a disqualified person (other than a fiduciary described in subsection (e)(3)) with respect to a plan if—
- (A) the transaction involves a block trade,
  - (B) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,
  - (C) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length transaction, and
  - (D) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length transaction with an unrelated party,
- (19) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a disqualified person if—
- (A) the transaction is executed through an electronic communication network, alternative trading system, or similar execution system or trading venue subject to regulation and oversight by—

- (i) the applicable Federal regulating entity, or
  - (ii) such foreign regulatory entity as the Secretary of Labor may determine by regulation,
- (B) either—

- (i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

- (ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the price and compensation associated with an arm's length transaction with an unrelated party,

(D) if the disqualified person has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue,

(20) transactions described in subparagraphs (A), (B), and (D) of subsection (c)(1) between a plan and a person that is a disqualified person other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of subsection (e)(3)(B)) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of subsection (e)(2), or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration,

(21) any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either) and a plan (as defined in this section) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other disqualified person, if—

- (A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

- (B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable

arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

(D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or provide investment advice, with respect to the transaction,

(22) any transaction described in subsection (c)(1)(A) involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if—

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a-7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least \$100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 407(d)(7) of the Employee Retirement Income Security Act of 1974), the master trust has assets of at least \$100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the par-

ties involved in the cross-trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time, **[or]**

(23) except as provided in subsection (f)(11), a transaction described in subparagraph (A), (B), (C), or (D) of subsection (c)(1) in connection with the acquisition, holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period~~].~~, **or**

(24) *the provision of a de minimis financial incentive described in section 401(k)(4)(A) or 403(b)(12)(A).*

(e) DEFINITIONS.—

(1) PLAN.—For purposes of this section, the term “plan” means—

(A) a trust described in section 401(a) which forms a part of a plan, or a plan described in section 403(a), which trust or plan is exempt from tax under section 501(a),

(B) an individual retirement account described in section 408(a),

(C) an individual retirement annuity described in section 408(b),

(D) an Archer MSA described in section 220(d),

(E) a health savings account described in section 223(d),

(F) a Coverdell education savings account described in section 530, or

(G) a trust, plan, account, or annuity which, at any time, has been determined by the Secretary to be described in any preceding subparagraph of this paragraph.

(2) DISQUALIFIED PERSON.—For purposes of this section, the term “disqualified person” means a person who is—

- (A) a fiduciary;
- (B) a person providing services to the plan;
- (C) an employer any of whose employees are covered by the plan;
- (D) an employee organization any of whose members are covered by the plan;
- (E) an owner, direct or indirect, of 50 percent or more of—

- (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

- (ii) the capital interest or the profits interest of a partnership, or

- (iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

- (F) a member of the family (as defined in paragraph (6)) of any individual described in subparagraph (A), (B), (C), or (E);

- (G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

- (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

- (ii) the capital interest or profits interest of such partnership, or

- (iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

- (H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or

- (I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).

(3) FIDUCIARY.—For purposes of this section, the term “fiduciary” means any person who—

- (A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

- (B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or



(C) has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974.

(4) STOCKHOLDINGS.—For purposes of paragraphs (2)(E)(i) and (G)(i) there shall be taken into account indirect stockholdings which would be taken into account under section 267(c), except that, for purposes of this paragraph, section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(5) PARTNERSHIPS; TRUSTS.—For purposes of paragraphs (2)(E)(ii) and (iii), (G)(ii) and (iii), and (I) the ownership of profits or beneficial interests shall be determined in accordance with the rules for constructive ownership of stock provided in section 267(c) (other than paragraph (3) thereof), except that section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(6) MEMBER OF FAMILY.—For purposes of paragraph (2)(F), the family of any individual shall include his spouse, ancestor, lineal descendant, and any spouse of a lineal descendant.

(7) EMPLOYEE STOCK OWNERSHIP PLAN.—The term “employee stock ownership plan” means a defined contribution plan—

(A) which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a), and which are designed to invest primarily in qualifying employer securities; and

(B) which is otherwise defined in regulations prescribed by the Secretary.

A plan shall not be treated as an employee stock ownership plan unless it meets the requirements of section 409(h), section 409(o), and, if applicable, section 409(n), section 409(p), and section 664(g) and, if the employer has a registration-type class of securities (as defined in section 409(e)(4)), it meets the requirements of section 409(e).

(8) QUALIFYING EMPLOYER SECURITY.—The term “qualifying employer security” means any employer security within the meaning of section 409(l). If any moneys or other property of a plan are invested in shares of an investment company registered under the Investment Company Act of 1940, the investment shall not cause that investment company or that investment company’s investment adviser or principal underwriter to be treated as a fiduciary or a disqualified person for purposes of this section, except when an investment company or its investment adviser or principal underwriter acts in connection with a plan covering employees of the investment company, its investment adviser, or its principal underwriter.

(9) SECTION MADE APPLICABLE TO WITHDRAWAL LIABILITY PAYMENT FUNDS.—For purposes of this section—

(A) IN GENERAL.—The term “plan” includes a trust described in section 501(c)(22).

(B) DISQUALIFIED PERSON.—In the case of any trust to which this section applies by reason of subparagraph (A),

the term “disqualified person” includes any person who is a disqualified person with respect to any plan to which such trust is permitted to make payments under section 4223 of the Employee Retirement Income Security Act of 1974.

(f) OTHER DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

(1) JOINT AND SEVERAL LIABILITY.—If more than one person is liable under subsection (a) or (b) with respect to any one prohibited transaction, all such persons shall be jointly and severally liable under such subsection with respect to such transaction.

(2) TAXABLE PERIOD.—The term “taxable period” means, with respect to any prohibited transaction, the period beginning with the date on which the prohibited transaction occurs and ending on the earliest of—

(A) the date of mailing a notice of deficiency with respect to the tax imposed by subsection (a) under section 6212,

(B) the date on which the tax imposed by subsection (a) is assessed, or

(C) the date on which correction of the prohibited transaction is completed.

(3) SALE OR EXCHANGE; ENCUMBERED PROPERTY.—A transfer or real or personal property by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a disqualified person placed on the property within the 10-year period ending on the date of the transfer.

(4) AMOUNT INVOLVED.—The term “amount involved” means, with respect to a prohibited transaction, the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received; except that, in the case of services described in paragraphs (2) and (10) of subsection (d) the amount involved shall be only the excess compensation. For purposes of the preceding sentence, the fair market value—

(A) in the case of the tax imposed by subsection (a), shall be determined as of the date on which the prohibited transaction occurs; and

(B) in the case of the tax imposed by subsection (b), shall be the highest fair market value during the taxable period.

(5) CORRECTION.—The terms “correction” and “correct” mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

(6) EXEMPTIONS NOT TO APPLY TO CERTAIN TRANSACTIONS.—

(A) IN GENERAL.—In the case of a trust described in section 401(a) which is part of a plan providing contributions or benefits for employees some or all of whom are owner-employees (as defined in section 401(c)(3)), the exemptions provided by subsection (d) (other than paragraphs (9) and

(12)) shall not apply to a transaction in which the plan directly or indirectly—

(i) lends any part of the corpus or income of the plan to,

(ii) pays any compensation for personal services rendered to the plan to, or

(iii) acquires for the plan any property from, or sells any property to,

any such owner-employee, a member of the family (as defined in section 267(c)(4)) of any such owner-employee, or any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(B) SPECIAL RULES FOR SHAREHOLDER-EMPLOYEES, ETC.—

(i) IN GENERAL.—For purposes of subparagraph (A), the following shall be treated as owner-employees:

(I) A shareholder-employee.

(II) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37)).

(III) An employer or association of employees which establishes such an individual retirement plan under section 408(c).

(ii) EXCEPTION FOR CERTAIN TRANSACTIONS INVOLVING SHAREHOLDER-EMPLOYEES.—Subparagraph (A)(iii) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in subsection (e)(7)) by a shareholder-employee, a member of the family (as defined in section 267(c)(4)) of such shareholder-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in subparagraph (A).

(iii) LOAN EXCEPTION.—For purposes of subparagraph (A)(i), the term “owner-employee” shall only include a person described in subclause (II) or (III) of clause (i).

(C) SHAREHOLDER-EMPLOYEE.—For purposes of subparagraph (B), the term “shareholder-employee” means an employee or officer of an S corporation who owns (or is considered as owning within the meaning of section 318(a)(1)) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(7) S CORPORATION REPAYMENT OF LOANS FOR QUALIFYING EMPLOYER SECURITIES.—A plan shall not be treated as violating the requirements of section 401 or 409 or subsection (e)(7), or as engaging in a prohibited transaction for purposes of subsection (d)(3), merely by reason of any distribution (as described in section 1368(a)) with respect to S corporation stock that constitutes qualifying employer securities, which in accordance with the plan provisions is used to make payments on a loan described in subsection (d)(3) the proceeds of which

were used to acquire such qualifying employer securities (whether or not allocated to participants). The preceding sentence shall not apply in the case of a distribution which is paid with respect to any employer security which is allocated to a participant unless the plan provides that employer securities with a fair market value of not less than the amount of such distribution are allocated to such participant for the year which (but for the preceding sentence) such distribution would have been allocated to such participant.

(8) PROVISION OF INVESTMENT ADVICE TO PARTICIPANT AND BENEFICIARIES.—

(A) IN GENERAL.—The prohibitions provided in subsection (c) shall not apply to transactions described in subsection (d)(17) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

(B) ELIGIBLE INVESTMENT ADVICE ARRANGEMENT.—For purposes of this paragraph, the term “eligible investment advice arrangement” means an arrangement—

(i) which either—

(I) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

(II) uses a computer model under an investment advice program meeting the requirements of subparagraph (C) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(ii) with respect to which the requirements of subparagraphs (D), (E), (F), (G), (H), and (I) are met.

(C) INVESTMENT ADVICE PROGRAM USING COMPUTER MODEL.—

(i) IN GENERAL.—An investment advice program meets the requirements of this subparagraph if the requirements of clauses (ii), (iii), and (iv) are met.

(ii) COMPUTER MODEL.—The requirements of this clause are met if the investment advice provided under the investment advice program is provided pursuant to a computer model that—

(I) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

(II) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

(III) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(IV) operates in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser, and

(V) takes into account all investment options under the plan in specifying how a participant's account balance should be invested and is not inappropriately weighted with respect to any investment option.

(iii) CERTIFICATION.—

(I) IN GENERAL.—The requirements of this clause are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary of Labor, that the computer model meets the requirements of clause (ii).

(II) RENEWAL OF CERTIFICATIONS.—If, as determined under regulations prescribed by the Secretary of Labor, there are material modifications to a computer model, the requirements of this clause are met only if a certification described in subclause (I) is obtained with respect to the computer model as so modified.

(III) ELIGIBLE INVESTMENT EXPERT.—The term “eligible investment expert” means any person which meets such requirements as the Secretary of Labor may provide and which does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee, agent, or registered representative of the investment adviser or related person).

(iv) EXCLUSIVITY OF RECOMMENDATION.—The requirements of this clause are met with respect to any investment advice program if—

(I) the only investment advice provided under the program is the advice generated by the computer model described in clause (ii), and

(II) any transaction described in subsection (d)(17)(A)(ii) occurs solely at the direction of the participant or beneficiary.

Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in clause (i), but only if such request has not been solicited by any person connected with carrying out the arrangement.

(D) EXPRESS AUTHORIZATION BY SEPARATE FIDUCIARY.—The requirements of this subparagraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

## (E) AUDITS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing—

(I) conducts an annual audit of the arrangement for compliance with the requirements of this paragraph, and

(II) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this paragraph.

(ii) SPECIAL RULE FOR INDIVIDUAL RETIREMENT AND SIMILAR PLANS.—In the case of a plan described in subparagraphs (B) through (F) (and so much of subparagraph (G) as relates to such subparagraphs) of subsection (e)(1), in lieu of the requirements of clause (i), audits of the arrangement shall be conducted at such times and in such manner as the Secretary of Labor may prescribe.

(iii) INDEPENDENT AUDITOR.—For purposes of this subparagraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

## (F) DISCLOSURE.—The requirements of this subparagraph are met if—

(i) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)—

(I) of the role of any party that has a material affiliation or contractual relationship with the fiduciary adviser in the development of the investment advice program and in the selection of investment options available under the plan,

(II) of the past performance and historical rates of return of the investment options available under the plan,

(III) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

(IV) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

(V) of the manner, and under what circumstances, any participant or beneficiary infor-

mation provided under the arrangement will be used or disclosed,

(VI) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

(VII) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

(VIII) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property, and

(ii) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser—

(I) maintains the information described in clause (i) in accurate form and in the manner described in subparagraph (H),

(II) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

(III) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(IV) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

(G) OTHER CONDITIONS.—The requirements of this subparagraph are met if—

(i) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

(ii) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

(iii) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

(iv) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

(H) STANDARDS FOR PRESENTATION OF INFORMATION.—

(i) IN GENERAL.—The requirements of this subparagraph are met if the notification required to be provided to participants and beneficiaries under subparagraph (F)(i) is written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise such

participants and beneficiaries of the information required to be provided in the notification.

(ii) MODEL FORM FOR DISCLOSURE OF FEES AND OTHER COMPENSATION.—The Secretary of Labor shall issue a model form for the disclosure of fees and other compensation required in subparagraph (F)(i)(III) which meets the requirements of clause (i).

(I) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—The requirements of this subparagraph are met if a fiduciary adviser who has provided advice referred to in subparagraph (A) maintains, for a period of not less than 6 years after the provision of the advice, any records necessary for determining whether the requirements of the preceding provisions of this paragraph and of subsection (d)(17) have been met. A transaction prohibited under subsection (c) shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(J) DEFINITIONS.—For purposes of this paragraph and subsection (d)(17)—

(i) FIDUCIARY ADVISER.—The term “fiduciary adviser” means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in subsection (e)(3)(B) by the person to a participant or beneficiary of the plan and who is—

(I) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(II) a bank or similar financial institution referred to in subsection (d)(4) or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

(III) an insurance company qualified to do business under the laws of a State,

(IV) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(V) an affiliate of a person described in any of subclauses (I) through (IV), or

(VI) an employee, agent, or registered representative of a person described in subclauses (I) through (V) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

For purposes of this title, a person who develops the computer model described in subparagraph (C)(ii) or markets



the investment advice program or computer model shall be treated as a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in subsection (e)(3)(B) to a participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this paragraph and subsection (d)(17), except that the Secretary of Labor may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

(ii) **AFFILIATE.**—The term “affiliate” of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3))).

(iii) **REGISTERED REPRESENTATIVE.**—The term “registered representative” of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

(9) **BLOCK TRADE.**—The term “block trade” means any trade of at least 10,000 shares or with a market value of at least \$200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(10) **ADEQUATE CONSIDERATION.**—The term “adequate consideration” means—

(A) in the case of a security for which there is a generally recognized market—

(i) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, taking into account factors such as the size of the transaction and marketability of the security, or

(ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary of Labor.

(11) **CORRECTION PERIOD.**—

(A) **IN GENERAL.**—For purposes of subsection (d)(23), the term “correction period” means the 14-day period beginning on the date on which the disqualified person discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph and subsection (d)(23)) constitute a prohibited transaction.

(B) **EXCEPTIONS.**—

(i) EMPLOYER SECURITIES.—Subsection (d)(23) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 407(d)(1) of the Employee Retirement Income Security Act of 1974) or the acquisition, sale, or lease of employer real property (as defined in section 407(d)(2) of such Act).

(ii) KNOWING PROHIBITED TRANSACTION.—In the case of any disqualified person, subsection (d)(23) does not apply to a transaction if, at the time the transaction is entered into, the disqualified person knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a prohibited transaction.

(C) ABATEMENT OF TAX WHERE THERE IS A CORRECTION.—If a transaction is not treated as a prohibited transaction by reason of subsection (d)(23), then no tax under subsections (a) and (b) shall be assessed with respect to such transaction, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment.

(D) DEFINITIONS.—For purposes of this paragraph and subsection (d)(23)—

(i) SECURITY.—The term “security” has the meaning given such term by section 475(c)(2) (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) COMMODITY.—The term “commodity” has the meaning given such term by section 475(e)(2) (without regard to subparagraph (D)(iii) thereof).

(iii) CORRECT.—The term “correct” means, with respect to a transaction—

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

(g) APPLICATION OF SECTION.—This section shall not apply—

(1) in the case of a plan to which a guaranteed benefit policy (as defined in section 401(b)(2)(B) of the Employee Retirement Income Security Act of 1974) is issued, to any assets of the insurance company, insurance service, or insurance organization merely because of its issuance of such policy;

(2) to a governmental plan (within the meaning of section 414(d)); or

(3) to a church plan (within the meaning of section 414(e)) with respect to which the election provided by section 410(d) has not been made.

In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, by reason of such investment, be deemed to include any assets of such company.

(h) NOTIFICATION OF SECRETARY OF LABOR.—Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax.

(i) CROSS REFERENCE.—For provisions concerning coordination procedures between Secretary of Labor and Secretary of the Treasury with respect to application of tax imposed by this section and for authority to waive imposition of the tax imposed by subsection (b), see section 3003 of the Employee Retirement Income Security Act of 1974.

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## **Subtitle F—Procedure and Administration**

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## **CHAPTER 61—INFORMATION AND RETURNS**

\* \* \* \* \*

### **Subchapter A—RETURNS AND RECORDS**

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### **PART II—TAX RETURNS OR STATEMENTS**

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#### **Subpart A—GENERAL REQUIREMENT**

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#### **SEC. 6011. GENERAL REQUIREMENT OF RETURN, STATEMENT, OR LIST.**

(a) GENERAL RULE.—When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

(b) IDENTIFICATION OF TAXPAYER.—The Secretary is authorized to require such information with respect to persons subject to the taxes imposed by chapter 21 or chapter 24 as is necessary or helpful in securing proper identification of such persons.

(c) RETURNS, ETC., OF DISCS AND FORMER DISCS AND FORMER FSC'S.—

(1) RECORDS AND INFORMATION.—A DISC, former DISC, or former FSC (as defined in section 922 as in effect before its repeal by the FSC Repeal and Extraterritorial Income Exclusion Act of 2000) shall for the taxable year—

(A) furnish such information to persons who were shareholders at any time during such taxable year, and to the Secretary, and

(B) keep such records, as may be required by regulations prescribed by the Secretary.

(2) RETURNS.—A DISC shall file for the taxable year such returns as may be prescribed by the Secretary by forms or regulations.

(d) AUTHORITY TO REQUIRE INFORMATION CONCERNING SECTION 912 ALLOWANCES.—The Secretary may by regulations require any individual who receives allowances which are excluded from gross income under section 912 for any taxable year to include on his return of the taxes imposed by subtitle A for such taxable year such information with respect to the amount and type of such allowances as the Secretary determines to be appropriate.

(e) REGULATIONS REQUIRING RETURNS ON MAGNETIC MEDIA, ETC.—

(1) IN GENERAL.—The Secretary shall prescribe regulations providing standards for determining which returns must be filed on magnetic media or in other machine-readable form. Except as provided in paragraph (3), the Secretary may not require returns of any tax imposed by subtitle A on individuals, estates, and trusts to be other than on paper forms supplied by the Secretary.

(2) REQUIREMENTS OF [REGULATIONS.—] [In prescribing] REGULATIONS.—

(A) IN GENERAL.—*In prescribing* regulations under paragraph (1), the Secretary—

[(A)] (i) shall not require any person to file returns on magnetic media unless such person is required to file at least the applicable number of returns during the calendar year, and

[(B)] (ii) shall take into account (among other relevant factors) the ability of the taxpayer to comply at reasonable cost with the requirements of such regulations.

(B) EXCEPTIONS.—*Notwithstanding subparagraph (A), the Secretary shall require returns or reports required under—*

*(i) sections 6057, 6058, and 6059, and*

*(ii) sections 408(i), 6041, and 6047 to the extent such return or report relates to the tax treatment of a distribution from a plan, account, contract, or annuity, to be filed on magnetic media, but only with respect to persons who are required to file at least 50 returns during the calendar year which includes the first day of the plan year to which such returns or reports relate.*

(3) SPECIAL RULE FOR TAX RETURN PREPARERS.—

(A) IN GENERAL.—The Secretary shall require that any individual income tax return prepared by a tax return preparer be filed on magnetic media if—

(i) such return is filed by such tax return preparer, and

(ii) such tax return preparer is a specified tax return preparer for the calendar year during which such return is filed.

(B) SPECIFIED TAX RETURN PREPARER.—For purposes of this paragraph, the term “specified tax return preparer”

means, with respect to any calendar year, any tax return preparer unless such preparer reasonably expects to file 10 or fewer individual income tax returns during such calendar year.

(C) INDIVIDUAL INCOME TAX RETURN.—For purposes of this paragraph, the term “individual income tax return” means any return of the tax imposed by subtitle A on individuals, estates, or trusts.

(D) EXCEPTION FOR CERTAIN PREPARERS LOCATED IN AREAS WITHOUT INTERNET ACCESS.—The Secretary may waive the requirement of subparagraph (A) if the Secretary determines, on the basis of an application by the tax return preparer, that the preparer cannot meet such requirement by reason of being located in a geographic area which does not have access to internet service (other than dial-up or satellite service).

(4) SPECIAL RULE FOR RETURNS FILED BY FINANCIAL INSTITUTIONS WITH RESPECT TO WITHHOLDING ON FOREIGN TRANSFERS.—The numerical limitation under paragraph (2)(A) shall not apply to any return filed by a financial institution (as defined in section 1471(d)(5)) with respect to tax for which such institution is made liable under section 1461 or 1474(a).

(5) APPLICABLE NUMBER.—

(A) IN GENERAL.—For purposes of paragraph (2)(A), the applicable number shall be—

- (i) except as provided in subparagraph (B), in the case of calendar years before 2021, 250,
- (ii) in the case of calendar year 2021, 100, and
- (iii) in the case of calendar years after 2021, 10.

(B) SPECIAL RULE FOR PARTNERSHIPS FOR 2018, 2019, 2020, AND 2021.—In the case of a partnership, for any calendar year before 2022, the applicable number shall be—

- (i) in the case of calendar year 2018, 200,
- (ii) in the case of calendar year 2019, 150,
- (iii) in the case of calendar year 2020, 100, and
- (iv) in the case of calendar year 2021, 50.

(6) PARTNERSHIPS REQUIRED TO FILE ON MAGNETIC MEDIA.—Notwithstanding paragraph (2)(A), the Secretary shall require partnerships having more than 100 partners to file returns on magnetic media.

(6) APPLICATION OF NUMERICAL LIMITATION TO RETURNS RELATING TO DEFERRED COMPENSATION PLANS.—For purposes of applying the numerical limitation under paragraph (2)(A) to any return required under section 6058, information regarding each plan for which information is provided on such return shall be treated as a separate return.

(f) PROMOTION OF ELECTRONIC FILING.—

(1) IN GENERAL.—The Secretary is authorized to promote the benefits of and encourage the use of electronic tax administration programs, as they become available, through the use of mass communications and other means.

(2) INCENTIVES.—The Secretary may implement procedures to provide for the payment of appropriate incentives for electronically filed returns.

(g) **DISCLOSURE OF REPORTABLE TRANSACTION TO TAX-EXEMPT ENTITY.**—Any taxable party to a prohibited tax shelter transaction (as defined in section 4965(e)(1)) shall by statement disclose to any tax-exempt entity (as defined in section 4965(c)) which is a party to such transaction that such transaction is such a prohibited tax shelter transaction.

(h) **MANDATORY E-FILING OF UNRELATED BUSINESS INCOME TAX RETURN.**—Any organization required to file an annual return under this section which relates to any tax imposed by section 511 shall file such return in electronic form.

(i) **INCOME, ESTATE, AND GIFT TAXES.**—For requirement that returns of income, estate, and gift taxes be made whether or not there is tax liability, see subparts B and C.

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### PART III—INFORMATION RETURNS

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#### Subpart E—REGISTRATION OF AND INFORMATION CONCERNING PENSION, ETC., PLANS

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#### SEC. 6057. ANNUAL REGISTRATION, ETC.

(a) **ANNUAL REGISTRATION.**—

(1) **GENERAL RULE.**—Within such period after the end of a plan year as the Secretary may by regulations prescribe, the plan administrator (within the meaning of section 414(g)) of each plan to which the vesting standards of section 203 of part 2 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 applies for such plan year shall file a registration statement with the Secretary.

(2) **CONTENTS.**—The registration statement required by paragraph (1) shall set forth—

(A) the name of the plan,

(B) the name and address of the plan administrator,

(C) the name and taxpayer identifying number of each participant in the plan—

(i) who, **[during such plan year]** *during the plan year immediately preceding such plan year*, separated from the service covered by the plan, *and*

(ii) who is entitled to a deferred vested benefit under the plan as of the end of such plan year, *and*

**[(iii) with respect to whom retirement benefits were not paid under the plan during such plan year,]**

(D) the nature, amount, and form of the deferred vested benefit to which such participant is entitled, **[and]**

(E) *the name and taxpayer identifying number of each participant or former participant in the plan—*

*(i) who, during the current plan year or any previous plan year, was reported under subparagraph (C), and with respect to whom the benefits described in subparagraph (C)(ii) were fully paid during the plan year,*

(ii) *with respect to whom any amount was distributed under section 401(a)(31)(B) during the plan year, or*

(iii) *with respect to whom a deferred annuity contract was distributed during the plan year,*

(F) *in the case of a participant or former participant to whom subparagraph (E) applies—*

(i) *in the case of a participant described in clause (ii) thereof, the name and address of the designated trustee or issuer described in section 401(a)(31)(B)(i) and the account number of the individual retirement plan to which the amount was distributed, and*

(ii) *in the case of a participant described in clause (iii) thereof, the name and address of the issuer of such annuity contract and the contract or certificate number, and*

[(E)] (G) such other information as the Secretary may require.

At the time he files the registration statement under this subsection, the plan administrator shall furnish evidence satisfactory to the Secretary that he has complied with the requirement contained in subsection (e).

(b) NOTIFICATION OF CHANGE IN STATUS.—Any plan administrator required to register under subsection (a) shall also notify the Secretary, at such time as may be prescribed by regulations, of—

(1) any change in the name of the plan,

(2) any change in the name or address of the plan administrator,

(3) the termination of the plan, or

(4) the merger or consolidation of the plan with any other plan or its division into two or more plans.

(c) VOLUNTARY REPORTS.—To the extent provided in regulations prescribed by the Secretary, the Secretary may receive from—

(1) any plan to which subsection (a) applies, and

(2) any other plan (including any governmental plan or church plan (within the meaning of section 414)),

such information (including information relating to plan years beginning before January 1, 1974) as the plan administrator may wish to file with respect to the deferred vested benefit rights of any participant separated from the service covered by the plan during any plan year.

(d) TRANSMISSION OF INFORMATION TO COMMISSIONER OF SOCIAL SECURITY.—The Secretary shall transmit copies of any statements, notifications, reports, or other information obtained by him under this section to the Commissioner of Social Security.

(e) INDIVIDUAL STATEMENT TO PARTICIPANT.—Each plan administrator required to file a registration statement under subsection (a) shall, before the expiration of the time prescribed for the filing of such registration statement, also furnish to each participant described in subsection (a)(2)(C) an individual statement setting forth the information with respect to such participant required to be contained in such registration statement. Such statement shall also include a notice to the participant of any benefits which are forfeitable if the participant dies before a certain date, *and, with respect to any benefit of the individual subject to section 401(a)(31)(B), a*

*notice of availability of, and the contact information for, the Retirement Savings Lost and Found established under section 306(a)(1) of the Securing a Strong Retirement Act of 2021.*

(f) REGULATIONS.—

(1) IN GENERAL.—The Secretary, after consultation with the Commissioner of Social Security, may prescribe such regulations as may be necessary to carry out the provisions of this section.

(2) PLANS TO WHICH MORE THAN ONE EMPLOYER CONTRIBUTES.—This section shall apply to any plan to which more than one employer is required to contribute only to the extent provided in regulations prescribed under this subsection.

(g) 403(b) MULTIPLE EMPLOYER PLANS TREATED AS ONE PLAN.—*In the case of annuity contracts to which this section applies and to which section 403(b) applies by reason of the plan under which such contracts are purchased meeting the requirements of paragraph (15) thereof, such plan shall be treated as a single plan for purposes of this section.*

[(g)] (h) CROSS REFERENCES.—For provisions relating to penalties for failure to register or furnish statements required by this section, see section 6652(d) and section 6690.

For coordination between Department of the Treasury and the Department of Labor with regard to administration of this section, see section 3004 of the Employee Retirement Income Security Act of 1974.

**SEC. 6058. INFORMATION REQUIRED IN CONNECTION WITH CERTAIN PLANS OF DEFERRED COMPENSATION.**

(a) IN GENERAL.—Every employer who maintains a pension, annuity, stock bonus, profit-sharing, or other funded plan of deferred compensation described in part I of subchapter D of chapter 1, or the plan administrator (within the meaning of section 414(g)) of the plan, shall file an annual return stating such information as the Secretary may by regulations prescribe with respect to the qualification, financial conditions, and operations of the plan; except that, in the discretion of the Secretary, the employer may be relieved from stating in its return any information which is reported in other returns.

(b) ACTUARIAL STATEMENT IN CASE OF MERGERS, ETC.—Not less than 30 days before a merger, consolidation, or transfer of assets or liabilities of a plan described in subsection (a) to another plan, the plan administrator (within the meaning of section 414(g)) shall file an actuarial statement of valuation evidencing compliance with the requirements of section 401(a)(12).

(c) EMPLOYER.—For purposes of this section, the term “employer” includes a person described in section 401(c)(4) and an individual who establishes an individual retirement plan.

(d) COORDINATION WITH INCOME TAX RETURNS, ETC.—An individual who establishes an individual retirement plan shall not be required to file a return under this section with respect to such plan for any taxable year for which there is—

(1) no special IRP tax, and

(2) no plan activity other than—

(A) the making of contributions (other than rollover contributions), and

(B) the making of distributions.



(e) SPECIAL IRP TAX DEFINED.—For purposes of this section, the term “special IRP tax” means a tax imposed by—

(1) section 4973, or

(2) section 4974.

(f) 403(b) MULTIPLE EMPLOYER PLANS TREATED AS ONE PLAN.—*In the case of annuity contracts to which this section applies and to which section 403(b) applies by reason of the plan under which such contracts are purchased meeting the requirements of paragraph (15) thereof, such plan shall be treated as a single plan for purposes of this section.*

[(f)] (g) CROSS REFERENCES.—For provisions relating to penalties for failure to file a return required by this section, see section 6652(e).

For coordination between the Department of the Treasury and the Department of Labor with respect to the information required under this section, see section 3004 of title III of the Employee Retirement Income Security Act of 1974.

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## CHAPTER 66—LIMITATIONS

### Subchapter A—LIMITATIONS ON ASSESSMENT AND COLLECTION

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#### SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

(a) GENERAL RULE.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term “return” means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

(b) TIME RETURN DEEMED FILED.—

(1) EARLY RETURN.—For purposes of this section, a return of tax imposed by this title, except tax imposed by chapter 3, 4, 21, or 24, filed before the last day prescribed by law or by regulations promulgated pursuant to law for the filing thereof, shall be considered as filed on such last day.

(2) RETURN OF CERTAIN EMPLOYMENT AND WITHHOLDING TAXES.—For purposes of this section, if a return of tax imposed by chapter 3, 4, 21, or 24 for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such calendar year.

(3) RETURN EXECUTED BY SECRETARY.—Notwithstanding the provisions of paragraph (2) of section 6020(b), the execution of a return by the Secretary pursuant to the authority conferred

by such section shall not start the running of the period of limitations on assessment and collection.

(4) RETURN OF EXCISE TAXES.—For purposes of this section, the filing of a return for a specified period on which an entry has been made with respect to a tax imposed under a provision of subtitle D (including a return on which an entry has been made showing no liability for such tax for such period) shall constitute the filing of a return of all amounts of such tax which, if properly paid, would be required to be reported on such return for such period.

(c) EXCEPTIONS.—

(1) FALSE RETURN.—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) WILLFUL ATTEMPT TO EVADE TAX.—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) NO RETURN.—In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(4) EXTENSION BY AGREEMENT.—

(A) IN GENERAL.—Where, before the expiration of the time prescribed for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(B) NOTICE TO TAXPAYER OF RIGHT TO REFUSE OR LIMIT EXTENSION.—The Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent.

(5) TAX RESULTING FROM CHANGES IN CERTAIN INCOME TAX OR ESTATE TAX CREDITS.—For special rules applicable in cases where the adjustment of certain taxes allowed as a credit against income taxes or estate taxes results in additional tax, see section 905(c) (relating to the foreign tax credit for income tax purposes) and section 2016 (relating to taxes of foreign countries, States, etc., claimed as credit against estate taxes).

(6) TERMINATION OF PRIVATE FOUNDATION STATUS.—In the case of a tax on termination of private foundation status under section 507, such tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(7) SPECIAL RULE FOR CERTAIN AMENDED RETURNS.—Where, within the 60-day period ending on the day on which the time prescribed in this section for the assessment of any tax imposed by subtitle A for any taxable year would otherwise ex-

pire, the Secretary receives a written document signed by the taxpayer showing that the taxpayer owes an additional amount of such tax for such taxable year, the period for the assessment of such additional amount shall not expire before the day 60 days after the day on which the Secretary receives such document.

(8) FAILURE TO NOTIFY SECRETARY OF CERTAIN FOREIGN TRANSFERS.—

(A) IN GENERAL.—In the case of any information which is required to be reported to the Secretary pursuant to an election under section 1295(b) or under section 1298(f), 6038, 6038A, 6038B, 6038D, 6046, 6046A, or 6048, the time for assessment of any tax imposed by this title with respect to any tax return, event, or period to which such information relates shall not expire before the date which is 3 years after the date on which the Secretary is furnished the information required to be reported under such section.

(B) APPLICATION TO FAILURES DUE TO REASONABLE CAUSE.—If the failure to furnish the information referred to in subparagraph (A) is due to reasonable cause and not willful neglect, subparagraph (A) shall apply only to the item or items related to such failure.

(9) GIFT TAX ON CERTAIN GIFTS NOT SHOWN ON RETURN.—If any gift of property the value of which (or any increase in taxable gifts required under section 2701(d) which) is required to be shown on a return of tax imposed by chapter 12 (without regard to section 2503(b)), and is not shown on such return, any tax imposed by chapter 12 on such gift may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. The preceding sentence shall not apply to any item which is disclosed in such return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature of such item.

(10) LISTED TRANSACTIONS.—If a taxpayer fails to include on any return or statement for any taxable year any information with respect to a listed transaction (as defined in section 6707A(c)(2)) which is required under section 6011 to be included with such return or statement, the time for assessment of any tax imposed by this title with respect to such transaction shall not expire before the date which is 1 year after the earlier of—

(A) the date on which the Secretary is furnished the information so required, or

(B) the date that a material advisor meets the requirements of section 6112 with respect to a request by the Secretary under section 6112(b) relating to such transaction with respect to such taxpayer.

(11) CERTAIN ORDERS OF CRIMINAL RESTITUTION.—In the case of any amount described in section 6201(a)(4), such amount may be assessed, or a proceeding in court for the collection of such amount may be begun without assessment, at any time.

(12) CERTAIN TAXES ATTRIBUTABLE TO PARTNERSHIP ADJUSTMENTS.—In the case of any partnership adjustment determined under subchapter C of chapter 63, the period for assessment of

any tax imposed under chapter 2 or 2A which is attributable to such adjustment shall not expire before the date that is 1 year after—

(A) in the case of an adjustment pursuant to the decision of a court in a proceeding brought under section 6234, such decision becomes final, or

(B) in any other case, 90 days after the date on which the notice of the final partnership adjustment is mailed under section 6231.

(d) REQUEST FOR PROMPT ASSESSMENT.—Except as otherwise provided in subsection (c), (e), or (f), in the case of any tax (other than the tax imposed by chapter 11 of subtitle B, relating to estate taxes) for which return is required in the case of a decedent, or by his estate during the period of administration, or by a corporation, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within 18 months after written request therefor (filed after the return is made and filed in such manner and such form as may be prescribed by regulations of the Secretary) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of 3 years after the return was filed. This subsection shall not apply in the case of a corporation unless—

(1)(A) such written request notifies the Secretary that the corporation contemplates dissolution at or before the expiration of such 18-month period, (B) the dissolution is in good faith begun before the expiration of such 18-month period, and (C) the dissolution is completed;

(2)(A) such written request notifies the Secretary that a dissolution has in good faith been begun, and (B) the dissolution is completed; or

(3) a dissolution has been completed at the time such written request is made.

(e) SUBSTANTIAL OMISSION OF ITEMS.—Except as otherwise provided in subsection (c)—

(1) INCOME TAXES.—In the case of any tax imposed by subtitle A—

(A) GENERAL RULE.—If the taxpayer omits from gross income an amount properly includible therein and—

(i) such amount is in excess of 25 percent of the amount of gross income stated in the return, or

(ii) such amount—

(I) is attributable to one or more assets with respect to which information is required to be reported under section 6038D (or would be so required if such section were applied without regard to the dollar threshold specified in subsection (a) thereof and without regard to any exceptions provided pursuant to subsection (h)(1) thereof), and

(II) is in excess of \$5,000,

the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

(B) DETERMINATION OF GROSS INCOME.—For purposes of subparagraph (A)—

(i) In the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services;

(ii) An understatement of gross income by reason of an overstatement of unrecovered cost or other basis is an omission from gross income; and

(iii) In determining the amount omitted from gross income (other than in the case of an overstatement of unrecovered cost or other basis), there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.

(C) CONSTRUCTIVE DIVIDENDS.—If the taxpayer omits from gross income an amount properly includible therein under section 951(a), the tax may be assessed, or a proceeding in court for the collection of such tax may be done without assessing, at any time within 6 years after the return was filed.

(2) ESTATE AND GIFT TAXES.—In the case of a return of estate tax under chapter 11 or a return of gift tax under chapter 12, if the taxpayer omits from the gross estate or from the total amount of the gifts made during the period for which the return was filed items includible in such gross estate or such total gifts, as the case may be, as exceed in amount 25 percent of the gross estate stated in the return or the total amount of gifts stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. In determining the items omitted from the gross estate or the total gifts, there shall not be taken into account any item which is omitted from the gross estate or from the total gifts stated in the return if such item is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.

(3) EXCISE TAXES.—In the case of a return of a tax imposed under a provision of subtitle D, if the return omits an amount of such tax properly includible thereon which exceeds 25 percent of the amount of such tax reported thereon, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return is filed. In determining the amount of tax omitted on a return, there shall not be taken into account any amount of tax imposed by chapter 41, 42, 43, or 44 which is omitted from the return if the transaction giving rise to such tax is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the existence and nature of such item.

(f) PERSONAL HOLDING COMPANY TAX.—If a corporation which is a personal holding company for any taxable year fails to file with its return under chapter 1 for such year a schedule setting forth—

(1) the items of gross income and adjusted ordinary gross income, described in section 543, received by the corporation during such year, and

(2) the names and addresses of the individuals who owned, within the meaning of section 544 (relating to rules for determining stock ownership), at any time during the last half of such year more than 50 percent in value of the outstanding capital stock of the corporation,

the personal holding company tax for such year may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return for such year was filed.

(g) CERTAIN INCOME TAX RETURNS OF CORPORATIONS.—

(1) TRUSTS OR PARTNERSHIPS.—If a taxpayer determines in good faith that it is a trust or partnership and files a return as such under subtitle A, and if such taxpayer is thereafter held to be a corporation for the taxable year for which the return is filed, such return shall be deemed the return of the corporation for purposes of this section.

(2) EXEMPT ORGANIZATIONS.—If a taxpayer determines in good faith that it is an exempt organization and files a return as such under section 6033, and if such taxpayer is thereafter held to be a taxable organization for the taxable year for which the return is filed, such return shall be deemed the return of the organization for purposes of this section.

(3) DISC.—If a corporation determines in good faith that it is a DISC (as defined in section 992(a)) and files a return as such under section 6011(c)(2) and if such corporation is thereafter held to be a corporation which is not a DISC for the taxable year for which the return is filed, such return shall be deemed the return of a corporation which is not a DISC for purposes of this section.

(h) NET OPERATING LOSS OR CAPITAL LOSS CARRYBACKS.—In the case of a deficiency attributable to the application to the taxpayer of a net operating loss carryback or a capital loss carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3)), such deficiency may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the net operating loss or net capital loss which results in such carryback may be assessed.

(i) FOREIGN TAX CARRYBACKS.—In the case of a deficiency attributable to the application to the taxpayer of a carryback under section 904(c) (relating to carryback and carryover of excess foreign taxes) or under section 907(f) (relating to carryback and carryover of disallowed foreign oil and gas taxes), such deficiency may be assessed at any time before the expiration of one year after the expiration of the period within which a deficiency may be assessed for the taxable year of the excess taxes described in section 904(c) or 907(f) which result in such carryback.

(j) CERTAIN CREDIT CARRYBACKS.—

(1) IN GENERAL.—In the case of a deficiency attributable to the application to the taxpayer of a credit carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3)), such deficiency may be assessed at any time before the expiration of the period within which a defi-

ciency for the taxable year of the unused credit which results in such carryback may be assessed, or with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent taxable year, at any time before the expiration of the period within which a deficiency for such subsequent taxable year may be assessed.

(2) CREDIT CARRYBACK DEFINED.—For purposes of this subsection, the term “credit carryback” has the meaning given such term by section 6511(d)(4)(C).

(k) TENTATIVE CARRYBACK ADJUSTMENT ASSESSMENT PERIOD.—In a case where an amount has been applied, credited, or refunded under section 6411 (relating to tentative carryback and refund adjustments) by reason of a net operating loss carryback, a capital loss carryback, or a credit carryback (as defined in section 6511(d)(4)(C)) to a prior taxable year, the period described in subsection (a) of this section for assessing a deficiency for such prior taxable year shall be extended to include the period described in subsection (h) or (j), whichever is applicable; except that the amount which may be assessed solely by reason of this subsection shall not exceed the amount so applied, credited, or refunded under section 6411, reduced by any amount which may be assessed solely by reason of subsection (h) or (j), as the case may be.

(l) SPECIAL RULE FOR CHAPTER 42 AND SIMILAR TAXES.—

(1) IN GENERAL.—For purposes of any tax imposed by section 4912, by chapter 42 (other than section 4940), or by section 4975, the return referred to in this section shall be the return filed by the private foundation, plan, trust, or other organization (as the case may be) for the year in which the act (or failure to act) giving rise to liability for such tax occurred. For purposes of section 4940, such return is the return filed by the private foundation for the taxable year for which the tax is imposed.

(2) CERTAIN CONTRIBUTIONS TO SECTION 501(C)(3) ORGANIZATIONS.—In the case of a deficiency of tax of a private foundation making a contribution in the manner provided in section 4942(g)(3) (relating to certain contributions to section 501(c)(3) organizations) attributable to the failure of a section 501(c)(3) organization to make the distribution prescribed by section 4942(g)(3), such deficiency may be assessed at any time before the expiration of one year after the expiration of the period within which a deficiency may be assessed for the taxable year with respect to which the contribution was made.

(3) CERTAIN SET-ASIDES DESCRIBED IN SECTION 4942(G)(2).—In the case of a deficiency attributable to the failure of an amount set aside by a private foundation for a specific project to be treated as a qualifying distribution under the provisions of section 4942(g)(2)(B)(ii), such deficiency may be assessed at any time before the expiration of 2 years after the expiration of the period within which a deficiency may be assessed for the taxable year to which the amount set aside relates.

(4) INDIVIDUAL RETIREMENT PLANS.—

(A) IN GENERAL.—*For purposes of any tax imposed by section 4973 or 4974 in connection with an individual retirement plan, the return referred to in this section shall be*

*the income tax return filed by the person on whom the tax under such section is imposed for the year in which the act (or failure to act) giving rise to the liability for such tax occurred.*

*(B) RULE IN CASE OF INDIVIDUALS NOT REQUIRED TO FILE RETURN.—In the case of a person who is not required to file an income tax return for such year—*

*(i) the return referred to in this section shall be the income tax return that such person would have been required to file but for the fact that such person was not required to file such return, and*

*(ii) the 3-year period referred to in subsection (a) with respect to the return shall be deemed to begin on the date by which the return would have been required to be filed (excluding any extension thereof).*

(m) DEFICIENCIES ATTRIBUTABLE TO ELECTION OF CERTAIN CREDITS.—The period for assessing a deficiency attributable to any election under section 30B(h)(9), 30C(e)(4), 30D(e)(4), 35(g)(11), 40(f), 43, 45B, 45C(d)(4), 45H(g), or 51(j) (or any revocation thereof) shall not expire before the date 1 year after the date on which the Secretary is notified of such election (or revocation).

(n) CROSS REFERENCE.—For period of limitations for assessment and collection in the case of a joint income return filed after separate returns have been filed, see section 6013(b)(3) and (4).

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## **CHAPTER 68—ADDITIONS TO THE TAX, ADDITIONAL AMOUNTS, AND ASSESSABLE PENALTIES**

### **Subchapter A—ADDITIONS TO THE TAX AND ADDITIONAL AMOUNTS**

#### **PART I—GENERAL PROVISIONS**

\* \* \* \* \*

#### **SEC. 6652. FAILURE TO FILE CERTAIN INFORMATION RETURNS, REGISTRATION STATEMENTS, ETC.**

(a) RETURNS WITH RESPECT TO CERTAIN PAYMENTS AGGREGATING LESS THAN \$10.—In the case of each failure to file a statement of a payment to another person required under the authority of—

(1) section 6042(a)(2) (relating to payments of dividends aggregating less than \$10), or

(2) section 6044(a)(2) (relating to payments of patronage dividends aggregating less than \$10),

on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not to willful neglect, there shall be paid (upon notice and demand by the Secretary and in the same manner as tax) by the person failing to so file the statement, \$1 for each such statement not so filed, but the total amount imposed on the delinquent person for all such failures during the calendar year shall not exceed \$1,000.



(b) **FAILURE TO REPORT TIPS.**—In the case of failure by an employee to report to his employer on the date and in the manner prescribed therefor any amount of tips required to be so reported by section 6053(a) which are wages (as defined in section 3121(a)) or which are compensation (as defined in section 3231(e)), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be paid by the employee, in addition to the tax imposed by section 3101 or section 3201 (as the case may be) with respect to the amount of tips which he so failed to report, an amount equal to 50 percent of such tax.

(c) **RETURNS BY EXEMPT ORGANIZATIONS AND BY CERTAIN TRUSTS.**—

(1) **ANNUAL RETURNS UNDER SECTION 6033(A)(1) OR 6012(A)(6).**—

(A) **PENALTY ON ORGANIZATION.**—In the case of—

(i) a failure to file a return required under section 6033(a)(1) (relating to returns by exempt organizations) or section 6012(a)(6) (relating to returns by political organizations) on the date and in the manner prescribed therefor (determined with regard to any extension of time for filing), or

(ii) a failure to include any of the information required to be shown on a return filed under section 6033(a)(1) or section 6012(a)(6) or to show the correct information,

there shall be paid by the exempt organization \$20 for each day during which such failure continues. The maximum penalty under this subparagraph on failures with respect to any 1 return shall not exceed the lesser of \$10,000 or 5 percent of the gross receipts of the organization for the year. In the case of an organization having gross receipts exceeding \$1,000,000 for any year, with respect to the return required under section 6033(a)(1) or section 6012(a)(6) for such year, in applying the first sentence of this subparagraph, the amount of the penalty for each day during which a failure continues shall be \$100 in lieu of the amount otherwise specified, and, in lieu of applying the second sentence of this subparagraph, the maximum penalty under this subparagraph shall not exceed \$50,000.

(B) **MANAGERS.**—

(i) **IN GENERAL.**—The Secretary may make a written demand on any organization subject to penalty under subparagraph (A) specifying therein a reasonable future date by which the return shall be filed (or the information furnished) for purposes of this subparagraph.

(ii) **FAILURE TO COMPLY WITH DEMAND.**—If any person fails to comply with any demand under clause (i) on or before the date specified in such demand, there shall be paid by the person failing to so comply \$10 for each day after the expiration of the time specified in such demand during which such failure continues. The maximum penalty imposed under this subparagraph on all persons for failures with respect to any 1 return shall not exceed \$5,000.

(C) PUBLIC INSPECTION OF ANNUAL RETURNS AND REPORTS.—In the case of a failure to comply with the requirements of section 6104(d) with respect to any annual return on the date and in the manner prescribed therefor (determined with regard to any extension of time for filing) or report required under section 527(j), there shall be paid by the person failing to meet such requirements \$20 for each day during which such failure continues. The maximum penalty imposed under this subparagraph on all persons for failures with respect to any 1 return or report shall not exceed \$10,000.

(D) PUBLIC INSPECTION OF APPLICATIONS FOR EXEMPTION AND NOTICE OF STATUS.—In the case of a failure to comply with the requirements of section 6104(d) with respect to any exempt status application materials (as defined in such section) or notice materials (as defined in such section) on the date and in the manner prescribed therefor, there shall be paid by the person failing to meet such requirements \$20 for each day during which such failure continues.

(E) NO PENALTY FOR CERTAIN ANNUAL NOTICES.—This paragraph shall not apply with respect to any notice required under section 6033(i).

(2) RETURNS UNDER SECTION 6034 OR 6043(B).—

(A) PENALTY ON ORGANIZATION OR TRUST.—In the case of a failure to file a return required under section 6034 (relating to returns by certain trusts) or section 6043(b) (relating to terminations, etc., of exempt organizations), on the date and in the manner prescribed therefor (determined with regard to any extension of time for filing), there shall be paid by the exempt organization or trust failing so to file \$10 for each day during which such failure continues, but the total amount imposed under this subparagraph on any organization or trust for failure to file any 1 return shall not exceed \$5,000.

(B) MANAGERS.—The Secretary may make written demand on an organization or trust failing to file under subparagraph (A) specifying therein a reasonable future date by which such filing shall be made for purposes of this subparagraph. If such filing is not made on or before such date, there shall be paid by the person failing so to file \$10 for each day after the expiration of the time specified in the written demand during which such failure continues, but the total amount imposed under this subparagraph on all persons for failure to file any 1 return shall not exceed \$5,000.

(C) SPLIT-INTEREST TRUSTS.—In the case of a trust which is required to file a return under section 6034(a), subparagraphs (A) and (B) of this paragraph shall not apply and paragraph (1) shall apply in the same manner as if such return were required under section 6033, except that—

- (i) the 5 percent limitation in the second sentence of paragraph (1)(A) shall not apply,
- (ii) in the case of any trust with gross income in excess of \$250,000, in applying the first sentence of

paragraph (1)(A), the amount of the penalty for each day during which a failure continues shall be \$100 in lieu of the amount otherwise specified, and in lieu of applying the second sentence of paragraph (1)(A), the maximum penalty under paragraph (1)(A) shall not exceed \$50,000, and

(iii) the third sentence of paragraph (1)(A) shall be disregarded.

In addition to any penalty imposed on the trust pursuant to this subparagraph, if the person required to file such return knowingly fails to file the return, such penalty shall also be imposed on such person who shall be personally liable for such penalty.

(3) DISCLOSURE UNDER SECTION 6033(A)(2).—

(A) PENALTY ON ENTITIES.—In the case of a failure to file a disclosure required under section 6033(a)(2), there shall be paid by the tax-exempt entity (the entity manager in the case of a tax-exempt entity described in paragraph (4), (5), (6), or (7) of section 4965(c)) \$100 for each day during which such failure continues. The maximum penalty under this subparagraph on failures with respect to any 1 disclosure shall not exceed \$50,000.

(B) WRITTEN DEMAND.—

(i) IN GENERAL.—The Secretary may make a written demand on any entity or manager subject to penalty under subparagraph (A) specifying therein a reasonable future date by which the disclosure shall be filed for purposes of this subparagraph.

(ii) FAILURE TO COMPLY WITH DEMAND.—If any entity or manager fails to comply with any demand under clause (i) on or before the date specified in such demand, there shall be paid by such entity or manager failing to so comply \$100 for each day after the expiration of the time specified in such demand during which such failure continues. The maximum penalty imposed under this subparagraph on all entities and managers for failures with respect to any 1 disclosure shall not exceed \$10,000.

(C) DEFINITIONS.—Any term used in this section which is also used in section 4965 shall have the meaning given such term under section 4965.

(4) NOTICES UNDER SECTION 506.—

(A) PENALTY ON ORGANIZATION.—In the case of a failure to submit a notice required under section 506(a) (relating to organizations required to notify Secretary of intent to operate as 501(c)(4)) on the date and in the manner prescribed therefor, there shall be paid by the organization failing to so submit \$20 for each day during which such failure continues, but the total amount imposed under this subparagraph on any organization for failure to submit any one notice shall not exceed \$5,000.

(B) MANAGERS.—The Secretary may make written demand on an organization subject to penalty under subparagraph (A) specifying in such demand a reasonable future date by which the notice shall be submitted for pur-

poses of this subparagraph. If such notice is not submitted on or before such date, there shall be paid by the person failing to so submit \$20 for each day after the expiration of the time specified in the written demand during which such failure continues, but the total amount imposed under this subparagraph on all persons for failure to submit any one notice shall not exceed \$5,000.

(5) REASONABLE CAUSE EXCEPTION.—No penalty shall be imposed under this subsection with respect to any failure if it is shown that such failure is due to reasonable cause.

(6) OTHER SPECIAL RULES.—

(A) TREATMENT AS TAX.—Any penalty imposed under this subsection shall be paid on notice and demand of the Secretary and in the same manner as tax.

(B) JOINT AND SEVERAL LIABILITY.—If more than 1 person is liable under this subsection for any penalty with respect to any failure, all such persons shall be jointly and severally liable with respect to such failure.

(C) PERSON.—For purposes of this subsection, the term “person” means any officer, director, trustee, employee, or other individual who is under a duty to perform the act in respect of which the violation occurs.

(7) ADJUSTMENT FOR INFLATION.—

(A) IN GENERAL.—In the case of any failure relating to a return required to be filed in a calendar year beginning after 2014, each of the dollar amounts under paragraphs (1), (2), and (3) shall be increased by an amount equal to such dollar amount multiplied by the cost-of-living adjustment determined under section 1(f)(3) for the calendar year determined by substituting “calendar year 2013” for “calendar year 2016” in subparagraph (A)(ii) thereof.

(B) ROUNDING.—If any amount adjusted under subparagraph (A)—

(i) is not less than \$5,000 and is not a multiple of \$500, such amount shall be rounded to the next lowest multiple of \$500, and

(ii) is not described in clause (i) and is not a multiple of \$5, such amount shall be rounded to the next lowest multiple of \$5.

(d) ANNUAL REGISTRATION AND OTHER NOTIFICATION BY PENSION PLAN.—

(1) REGISTRATION.—In the case of any failure to file a registration statement required under section 6057(a) (relating to annual registration of certain plans) which includes all participants required to be included in such statement, on the date prescribed therefor (determined without regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be paid (on notice and demand by the Secretary and in the same manner as tax) by the person failing so to file, an amount equal to \$10 for each participant with respect to whom there is a failure to file, multiplied by the number of days during which such failure continues, but the total amount imposed under this paragraph on any person for any failure to file with respect to any plan year shall not exceed \$50,000.

(2) NOTIFICATION OF CHANGE OF STATUS.—In the case of failure to file a notification required under section 6057(b) (relating to notification of change of status) on the date prescribed therefor (determined without regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be paid (on notice and demand by the Secretary and in the same manner as tax) by the person failing so to file, \$10 for each day during which such failure continues, but the total amounts imposed under this paragraph on any person for failure to file any notification shall not exceed \$10,000.

(e) INFORMATION REQUIRED IN CONNECTION WITH CERTAIN PLANS OF DEFERRED COMPENSATION, ETC.—In the case of failure to file a return or statement required under section 6058 (relating to information required in connection with certain plans of deferred compensation), 6047 (relating to information relating to certain trusts and annuity and bond purchase plans), or 6039D (relating to returns and records with respect to certain fringe benefit plans) on the date and in the manner prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be paid (on notice and demand by the Secretary and in the same manner as tax) by the person failing so to file, \$250 for each day during which such failure continues, but the total amount imposed under this subsection on any person for failure to file any return shall not exceed \$150,000. This subsection shall not apply to any return or statement which is an information return described in section 6724(d)(1)(C)(ii) or a payee statement described in section 6724(d)(2)(AA).

(f) RETURNS REQUIRED UNDER SECTION 6039C.—

(1) IN GENERAL.—In the case of each failure to make a return required by section 6039C which contains the information required by such section on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not to willful neglect, the amount determined under paragraph (2) shall be paid (upon notice and demand by the Secretary and in the same manner as tax) by the person failing to make such return.

(2) AMOUNT OF PENALTY.—For purposes of paragraph (1), the amount determined under this paragraph with respect to any failure shall be \$25 for each day during which such failure continues.

(3) LIMITATION.—The amount determined under paragraph (2) with respect to any person for failing to meet the requirements of section 6039C for any calendar year shall not exceed the lesser of—

(A) \$25,000, or

(B) 5 percent of the aggregate of the fair market value of the United States real property interests owned by such person at any time during such year.

For purposes of the preceding sentence, fair market value shall be determined as of the end of the calendar year (or, in the case of any property disposed of during the calendar year, as of the date of such disposition).

(h) FAILURE TO GIVE NOTICE TO RECIPIENTS OF CERTAIN PENSION, ETC., DISTRIBUTIONS.—In the case of each failure to provide notice as required by section 3405(e)(10)(B), at the time prescribed therefor, unless it is shown that such failure is due to reasonable cause and not to willful neglect, there shall be paid, on notice and demand of the Secretary and in the same manner as tax, by the person failing to provide such notice, an amount equal to \$100 for each such failure, but the total amount imposed on such person for all such failures during any calendar year shall not exceed \$50,000.

(i) FAILURE TO GIVE WRITTEN EXPLANATION [TO RECIPIENTS] OR NOTIFICATION OF CERTAIN QUALIFYING ROLLOVER DISTRIBUTIONS.—In the case of each failure to provide a written explanation as required by section [402(f),] *402(f) or a notification as required by section 402(e)(6)(B)*, at the time prescribed therefor, unless it is shown that such failure is due to reasonable cause and not to willful neglect, there shall be paid, on notice and demand of the Secretary and in the same manner as tax, by the person failing to provide [such written explanation] *such written explanation or notification*, an amount equal to \$100 for each such failure, but the total amount imposed on such person for all such failures during any calendar year shall not exceed \$50,000.

(j) FAILURE TO FILE CERTIFICATION WITH RESPECT TO CERTAIN RESIDENTIAL RENTAL PROJECTS.—In the case of each failure to provide a certification as required by section 142(d)(7) at the time prescribed therefor, unless it is shown that such failure is due to reasonable cause and not to willful neglect, there shall be paid, on notice and demand of the Secretary and in the same manner as tax, by the person failing to provide such certification, an amount equal to \$100 for each such failure.

(k) FAILURE TO MAKE REPORTS REQUIRED UNDER SECTION 1202.—In the case of a failure to make a report required under section 1202(d)(1)(C) which contains the information required by such section on the date prescribed therefor (determined with regard to any extension of time for filing), there shall be paid (on notice and demand by the Secretary and in the same manner as tax) by the person failing to make such report, an amount equal to \$50 for each report with respect to which there was such a failure. In the case of any failure due to negligence or intentional disregard, the preceding sentence shall be applied by substituting “\$100” for “\$50”. In the case of a report covering periods in 2 or more years, the penalty determined under preceding provisions of this subsection shall be multiplied by the number of such years. No penalty shall be imposed under this subsection on any failure which is shown to be due to reasonable cause and not willful neglect.

(l) FAILURE TO FILE RETURN WITH RESPECT TO CERTAIN CORPORATE TRANSACTIONS.—In the case of any failure to make a return required under section 6043(c) containing the information required by such section on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be paid (on notice and demand by the Secretary and in the same manner as tax) by the person failing to file such return, an amount equal to \$500 for each day during which such failure continues, but the total amount imposed under this subsection with respect to any return shall not exceed \$100,000.

(m) **ALCOHOL AND TOBACCO TAXES.**—For penalties for failure to file certain information returns with respect to alcohol and tobacco taxes, see, generally, subtitle E.

(n) **FAILURE TO MAKE REPORTS REQUIRED UNDER SECTIONS 3511, 6053(c)(8), AND 7705.**—In the case of a failure to make a report required under section 3511, 6053(c)(8), or 7705 which contains the information required by such section on the date prescribed therefor (determined with regard to any extension of time for filing), there shall be paid (on notice and demand by the Secretary and in the same manner as tax) by the person failing to make such report, an amount equal to \$50 for each report with respect to which there was such a failure. In the case of any failure due to negligence or intentional disregard the preceding sentence shall be applied by substituting “\$100” for “\$50”.

(o) **FAILURE TO PROVIDE NOTICES WITH RESPECT TO QUALIFIED SMALL EMPLOYER HEALTH REIMBURSEMENT ARRANGEMENTS.**—In the case of each failure to provide a written notice as required by section 9831(d)(4), unless it is shown that such failure is due to reasonable cause and not willful neglect, there shall be paid, on notice and demand of the Secretary and in the same manner as tax, by the person failing to provide such written notice, an amount equal to \$50 per employee per incident of failure to provide such notice, but the total amount imposed on such person for all such failures during any calendar year shall not exceed \$2,500.

(p) **FAILURE TO PROVIDE NOTICE UNDER SECTION 83(I).**—In the case of each failure to provide a notice as required by section 83(i)(6), at the time prescribed therefor, unless it is shown that such failure is due to reasonable cause and not to willful neglect, there shall be paid, on notice and demand of the Secretary and in the same manner as tax, by the person failing to provide such notice, an amount equal to \$100 for each such failure, but the total amount imposed on such person for all such failures during any calendar year shall not exceed \$50,000.

\* \* \* \* \*

## INVESTMENT COMPANY ACT OF 1940

\* \* \* \* \*

### TITLE I—INVESTMENT COMPANIES

\* \* \* \* \*

#### DEFINITION OF INVESTMENT COMPANY

**SEC. 3. (a)(1)** When used in this title, “investment company” means any issuer which—

(A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

(B) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

(2) As used in this section, "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which (i) are not investment companies, and (ii) are not relying on the exception from the definition of investment company in paragraph (1) or (7) of subsection (c).

(b) Notwithstanding paragraph (1)(C) of subsection (a), none of the following persons is an investment company within the meaning of this title:

(1) Any issuer primarily engaged, directly or through a wholly-owned subsidiary or subsidiaries, in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities.

(2) Any issuer which the Commission, upon application by such issuer, finds and by order declares to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities either directly or (A) through majority-owned subsidiaries or (B) through controlled companies conducting similar types of businesses. The filing of an application under this paragraph in good faith by an issuer other than a registered investment company shall exempt the applicant for a period of sixty days from all provisions of this title applicable to investment companies as such. For cause shown, the Commission by order may extend such period of exemption for an additional period or periods. Whenever the Commission, upon its own motion or upon application, finds that the circumstances which gave rise to the issuance of an order granting an application under this paragraph no longer exist, the Commission shall by order revoke such order.

(3) Any issuer all the outstanding securities of which (other than short-term paper and directors' qualifying shares) are directly or indirectly owned by a company excepted from the definition of investment company by paragraph (1) or (2) of this subsection.

(c) Notwithstanding subsection (a), none of the following persons is an investment company within the meaning of this title:

(1) Any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons (or, in the case of a qualifying venture capital fund, 250 persons) and which is not making and does not presently propose to make a public offering of its securities. Such issuer shall be deemed to be an investment company for purposes of the limitations set forth in subparagraphs (A)(i) and (B)(i) of section 12(d)(1) governing the purchase or other acquisition by such issuer of any security issued by any registered investment company and the sale of any security issued by any



registered open-end investment company to any such issuer. For purposes of this paragraph:

(A) Beneficial ownership by a company shall be deemed to be beneficial ownership by one person, except that, if the company owns 10 per centum or more of the outstanding voting securities of the issuer, and is or, but for the exception provided for in this paragraph or paragraph (7), would be an investment company, the beneficial ownership shall be deemed to be that of the holders of such company's outstanding securities (other than short-term paper).

(B) Beneficial ownership by any person who acquires securities or interests in securities of an issuer described in the first sentence of this paragraph shall be deemed to be beneficial ownership by the person from whom such transfer was made, pursuant to such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title, where the transfer was caused by legal separation, divorce, death, or other involuntary event.

(C)(i) The term "qualifying venture capital fund" means a venture capital fund that has not more than \$10,000,000 in aggregate capital contributions and uncalled committed capital, with such dollar amount to be indexed for inflation once every 5 years by the Commission, beginning from a measurement made by the Commission on a date selected by the Commission, rounded to the nearest \$1,000,000.

(ii) The term "venture capital fund" has the meaning given the term in section 275.203(l)-1 of title 17, Code of Federal Regulations, or any successor regulation.

(2)(A) Any person primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, acting as broker, and acting as market intermediary, or any one or more of such activities, whose gross income normally is derived principally from such business and related activities.

(B) For purposes of this paragraph—

(i) the term "market intermediary" means any person that regularly holds itself out as being willing contemporaneously to engage in, and that is regularly engaged in, the business of entering into transactions on both sides of the market for a financial contract or one or more such financial contracts; and

(ii) the term "financial contract" means any arrangement that—

(I) takes the form of an individually negotiated contract, agreement, or option to buy, sell, lend, swap, or repurchase, or other similar individually negotiated transaction commonly entered into by participants in the financial markets;

(II) is in respect of securities, commodities, currencies, interest or other rates, other measures of

value, or any other financial or economic interest similar in purpose or function to any of the foregoing; and

(III) is entered into in response to a request from a counter party for a quotation, or is otherwise entered into and structured to accommodate the objectives of the counter party to such arrangement.

(3) Any bank or insurance company; any savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, or any receiver, conservator, liquidator, liquidating agent, or similar official or person thereof or therefor; or any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as a trustee, executor, administrator, or guardian, if—

(A) such fund is employed by the bank solely as an aid to the administration of trusts, estates, or other accounts created and maintained for a fiduciary purpose;

(B) except in connection with the ordinary advertising of the bank's fiduciary services, interests in such fund are not—

(i) advertised; or

(ii) offered for sale to the general public; and

(C) fees and expenses charged by such fund are not in contravention of fiduciary principles established under applicable Federal or State law.

(4) Any person substantially all of whose business is confined to making small loans, industrial banking, or similar businesses.

(5) Any person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.

(6) Any company primarily engaged, directly or through majority-owned subsidiaries, in one or more of the businesses described in paragraphs (3), (4), and (5), or in one or more of such businesses (from which not less than 25 percent of such company's gross income during its last fiscal year was derived) together with an additional business or businesses other than investing, reinvesting, owning, holding, or trading in securities.

(7)(A) Any issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities. Securities that are owned by persons who received the securities from a qualified purchaser as a gift or bequest, or in a case in which the transfer was caused by

legal separation, divorce, death, or other involuntary event, shall be deemed to be owned by a qualified purchaser, subject to such rules, regulations, and orders as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(B) Notwithstanding subparagraph (A), an issuer is within the exception provided by this paragraph if—

(i) in addition to qualified purchasers, outstanding securities of that issuer are beneficially owned by not more than 100 persons who are not qualified purchasers, if—

(I) such persons acquired any portion of the securities of such issuer on or before September 1, 1996; and

(II) at the time at which such persons initially acquired the securities of such issuer, the issuer was excepted by paragraph (1); and

(ii) prior to availing itself of the exception provided by this paragraph—

(I) such issuer has disclosed to each beneficial owner, as determined under paragraph (1), that future investors will be limited to qualified purchasers, and that ownership in such issuer is no longer limited to not more than 100 persons; and

(II) concurrently with or after such disclosure, such issuer has provided each beneficial owner, as determined under paragraph (1), with a reasonable opportunity to redeem any part or all of their interests in the issuer, notwithstanding any agreement to the contrary between the issuer and such persons, for that person's proportionate share of the issuer's net assets.

(C) Each person that elects to redeem under subparagraph (B)(ii)(II) shall receive an amount in cash equal to that person's proportionate share of the issuer's net assets, unless the issuer elects to provide such person with the option of receiving, and such person agrees to receive, all or a portion of such person's share in assets of the issuer. If the issuer elects to provide such persons with such an opportunity, disclosure concerning such opportunity shall be made in the disclosure required by subparagraph (B)(ii)(I).

(D) An issuer that is excepted under this paragraph shall nonetheless be deemed to be an investment company for purposes of the limitations set forth in subparagraphs (A)(i) and (B)(i) of section 12(d)(1) relating to the purchase or other acquisition by such issuer of any security issued by any registered investment company and the sale of any security issued by any registered open-end investment company to any such issuer.

(E) For purposes of determining compliance with this paragraph and paragraph (1), an issuer that is otherwise excepted under this paragraph and an issuer that is otherwise excepted under paragraph (1) shall not be treated by the Commission as being a single issuer for purposes of determining whether the outstanding securities of the issuer excepted under paragraph (1) are beneficially owned by not more than 100 persons or whether the outstanding securities of the issuer excepted under this paragraph are owned by persons that are not qualified purchasers. Nothing in this subparagraph shall be con-

strued to establish that a person is a bona fide qualified purchaser for purposes of this paragraph or a bona fide beneficial owner for purposes of paragraph (1).

(9) Any person substantially all of whose business consists of owning or holding oil, gas, or other mineral royalties or leases, or fractional interests therein, or certificates of interest or participation in or investment contracts relative to such royalties, leases, or fractional interests.

(10)(A) Any company organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes—

(i) no part of the net earnings of which inures to the benefit of any private shareholder or individual; or

(ii) which is or maintains a fund described in subparagraph (B).

(B) For the purposes of subparagraph (A)(ii), a fund is described in this subparagraph if such fund is a pooled income fund, collective trust fund, collective investment fund, or similar fund maintained by a charitable organization exclusively for the collective investment and reinvestment of one or more of the following:

(i) assets of the general endowment fund or other funds of one or more charitable organizations;

(ii) assets of a pooled income fund;

(iii) assets contributed to a charitable organization in exchange for the issuance of charitable gift annuities;

(iv) assets of a charitable remainder trust or of any other trust, the remainder interests of which are irrevocably dedicated to any charitable organization;

(v) assets of a charitable lead trust;

(vi) assets of a trust, the remainder interests of which are revocably dedicated to or for the benefit of 1 or more charitable organizations, if the ability to revoke the dedication is limited to circumstances involving—

(I) an adverse change in the financial circumstances of a settlor or an income beneficiary of the trust;

(II) a change in the identity of the charitable organization or organizations having the remainder interest, provided that the new beneficiary is also a charitable organization; or

(III) both the changes described in subclauses (I) and (II);

(vii) assets of a trust not described in clauses (i) through (v), the remainder interests of which are revocably dedicated to a charitable organization, subject to subparagraph (C); or

(viii) such assets as the Commission may prescribe by rule, regulation, or order in accordance with section 6(c).

(C) A fund that contains assets described in clause (vii) of subparagraph (B) shall be excluded from the definition of an investment company for a period of 3 years after the date of enactment of this subparagraph, but only if—

(i) such assets were contributed before the date which is 60 days after the date of enactment of this subparagraph; and

(ii) such assets are commingled in the fund with assets described in one or more of clauses (i) through (vi) and (viii) of subparagraph (B).

(D) For purposes of this paragraph—

(i) a trust or fund is “maintained” by a charitable organization if the organization serves as a trustee or administrator of the trust or fund or has the power to remove the trustees or administrators of the trust or fund and to designate new trustees or administrators;

(ii) the term “pooled income fund” has the same meaning as in section 642(c)(5) of the Internal Revenue Code of 1986;

(iii) the term “charitable organization” means an organization described in paragraphs (1) through (5) of section 170(c) or section 501(c)(3) of the Internal Revenue Code of 1986;

(iv) the term “charitable lead trust” means a trust described in section 170(f)(2)(B), 2055(e)(2)(B), or 2522(c)(2)(B) of the Internal Revenue Code of 1986;

(v) the term “charitable remainder trust” means a charitable remainder annuity trust or a charitable remainder unitrust, as those terms are defined in section 664(d) of the Internal Revenue Code of 1986; and

(vi) the term “charitable gift annuity” means an annuity issued by a charitable organization that is described in section 501(m)(5) of the Internal Revenue Code of 1986.

[(11) Any employee’s stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1986; or any governmental plan described in section 3(a)(2)(C) of the Securities Act of 1933; or any collective trust fund maintained by a bank consisting solely of assets of one or more of such trusts, government plans, or church plans, companies or accounts that are excluded from the definition of an investment company under paragraph (14) of this subsection; or any separate account the assets of which are derived solely from (A) contributions under pension or profit-sharing plans which meet the requirements of section 401 of the Internal Revenue Code of 1986 or the requirements for deduction of the employer’s contribution under section 404(a)(2) of such Code, (B) contributions under governmental plans in connection with which interests, participations, or securities are exempted from the registration provisions of section 5 of the Securities Act of 1933 by section 3(a)(2)(C) of such Act, and (C) advances made by an insurance company in connection with the operation of such separate account.]

(11) Any—

(A) *employee’s stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1986;*

(B) *custodial account meeting the requirements of section 403(b)(7) of such Code;*

(C) *governmental plan described in section 3(a)(2)(C) of the Securities Act of 1933;*

(D) *collective trust fund maintained by a bank consisting solely of assets of one or more—*

- (i) *trusts described in subparagraph (A);*
- (ii) *government plans described in subparagraph (C);*
- (iii) *church plans, companies, or accounts that are excluded from the definition of an investment company under paragraph (14) of this subsection; or*

(iv) *plans which meet the requirements of section 403(b) of the Internal Revenue Code of 1986 if—*

(I) *such plan is subject to title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.);*

(II) *any employer making such plan available agrees to serve as a fiduciary for the plan with respect to the selection of the plan's investments among which participants can choose; or*

(III) *such plan is a governmental plan (as defined in section 414(d) of such Code); or*

(E) *separate account the assets of which are derived solely from—*

(i) *contributions under pension or profit-sharing plans which meet the requirements of section 401 of the Internal Revenue Code of 1986 or the requirements for deduction of the employer's contribution under section 404(a)(2) of such Code;*

(ii) *contributions under governmental plans in connection with which interests, participations, or securities are exempted from the registration provisions of section 5 of the Securities Act of 1933 by section 3(a)(2)(C) of such Act;*

(iii) *advances made by an insurance company in connection with the operation of such separate account; and*

(iv) *contributions to a plan described in subparagraph (D)(iv).*

(12) Any voting trust the assets of which consist exclusively of securities of a single issuer which is not an investment company.

(13) Any security holders' protective committee or similar issuer having outstanding and issuing no securities other than certificates of deposit and short-term paper.

(14) Any church plan described in section 414(e) of the Internal Revenue Code of 1986, if, under any such plan, no part of the assets may be used for, or diverted to, purposes other than the exclusive benefit of plan participants or beneficiaries, or any company or account that is—

(A) *established by a person that is eligible to establish and maintain such a plan under section 414(e) of the Internal Revenue Code of 1986; and*

(B) *substantially all of the activities of which consist of—*

(i) *managing or holding assets contributed to such church plans or other assets which are permitted to be commingled with the assets of church plans under the Internal Revenue Code of 1986; or*

(ii) administering or providing benefits pursuant to church plans.

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## SECURITIES ACT OF 1933

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### TITLE I—

\* \* \* \* \*

#### EXEMPTED SECURITIES

SEC. 3. (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

(1) Reserved.

(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing; or any security issued or guaranteed by any bank; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve bank; or any interest or participation in any common trust fund or similar fund that is excluded from the definition of the term “investment company” under section 3(c)(3) of the Investment Company Act of 1940; or any security which is an industrial development bond (as defined in section 103(c)(2) of the Internal Revenue Code of 1954) the interest on which is excludable from gross income under section 103(a)(1) of such Code if, by reason of the application of paragraph (4) or (6) of section 103(c) of such Code (determined as if paragraphs (4)(A), (5), and (7) were not included in such section 103(c)), paragraph (1) of such section 103(c) does not apply to such security; or any interest or participation in a single trust fund, or in a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which interest, participation, or security is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954, (B) an annuity plan which meets the requirements for the deduction of the employer’s contributions under section 404(a)(2) of such Code, (C) a governmental plan as defined in section 414(d) of such Code which has been established by an employer for the exclusive benefit of its employees or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the funds accumulated under such plan, if under such plan it is impossible, prior to the satisfaction of all liabilities with re-

spect to such employees and their beneficiaries, for any part of the corpus or income to be used for, or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries, **[(or (D)) (D) a plan which meets the requirements of section 403(b) of such Code if (i) such plan is subject to title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), (ii) any employer making such plan available agrees to serve as a fiduciary for the plan with respect to the selection of the plan's investments among which participants can choose, or (iii) such plan is a governmental plan (as defined in section 414(d) of such Code); or (E) a church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940, other than any plan described in subparagraph (A), (B), [(C), or (D)] (C), (D), or (E) of this paragraph (i) the contributions under which are held in a single trust fund or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or any company directly or indirectly controlling, controlled by, or under common control with the employer, (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of such Code (other than a person participating in a church plan who is described in section 414(e)(3)(B) of the Internal Revenue Code of 1986), or [(iii) which is a plan funded] (iii) in the case of a plan not described in subparagraph (D), which is a plan funded by an annuity contract described in section 403(b) of such Code (other than a retirement income account described in section 403(b)(9) of the Internal Revenue Code of 1986, to the extent that the interest or participation in such single trust fund or collective trust fund is issued to a church, a convention or association of churches, or an organization described in section 414(e)(3)(A) of such Code establishing or maintaining the retirement income account or to a trust established by any such entity in connection with the retirement income account).** The Commission, by rules and regulations or order, shall exempt from the provisions of section 5 of this title any interest or participation issued in connection with a stock bonus, pension, profit-sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of the Internal Revenue Code of 1954, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title. For purposes of this paragraph, a security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank; and the term "bank" means any national bank, or any banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar offi-



cial; except that in the case of a common trust fund or similar fund, or a collective trust fund, the term "bank" has the same meaning as in the Investment Company Act of 1940;

(3) Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(4) Any security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual, or any security of a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940;

(5) Any security issued (A) by a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution; or (B) by (i) a farmer's cooperative organization exempt from tax under section 521 of the Internal Revenue Code of 1954, (ii) a corporation described in section 501(c)(16) of such Code and exempt from tax under section 501(a) of such Code, or (iii) a corporation described in section 501(c)(2) of such Code which is exempt from tax under section 501(a) of such Code and is organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization or corporation described in clause (i) or (ii);

(6) Any interest in a railroad equipment trust. For purposes of this paragraph "interest in a railroad equipment trust" means any interest in an equipment trust, lease, conditional sales contract, or other similar arrangement entered into, issued, assumed, guaranteed by, or for the benefit of, a common carrier to finance the acquisition of rolling stock, including motive power;

(7) Certificates issued by a receiver or by a trustee in bankruptcy, with the approval of the court;

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia;

(9) Except with respect to a security exchanged in a case under title 11, any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;

(10) Except with respect to a security exchanged in a case under title 11, any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where

the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;

(11) Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.

(12) Any equity security issued in connection with the acquisition by a holding company of a bank under section 3(a) of the Bank Holding Company Act of 1956 or a savings association under section 10(e) of the Home Owners' Loan Act, if—

(A) the acquisition occurs solely as part of a reorganization in which security holders exchange their shares of a bank or savings association for shares of a newly formed holding company with no significant assets other than securities of the bank or savings association and the existing subsidiaries of the bank or savings association;

(B) the security holders receive, after that reorganization, substantially the same proportional share interests in the holding company as they held in the bank or savings association, except for nominal changes in shareholders' interests resulting from lawful elimination of fractional interests and the exercise of dissenting shareholders' rights under State or Federal law;

(C) the rights and interests of security holders in the holding company are substantially the same as those in the bank or savings association prior to the transaction, other than as may be required by law; and

(D) the holding company has substantially the same assets and liabilities, on a consolidated basis, as the bank or savings association had prior to the transaction.

For purposes of this paragraph, the term "savings association" means a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act) the deposits of which are insured by the Federal Deposit Insurance Corporation.

(13) Any security issued by or any interest or participation in any church plan, company or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940.

(14) Any security futures product that is—

(A) cleared by a clearing agency registered under section 17A of the Securities Exchange Act of 1934 or exempt from registration under subsection (b)(7) of such section 17A; and

(B) traded on a national securities exchange or a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934.

(b) ADDITIONAL EXEMPTIONS.—

(1) **SMALL ISSUES EXEMPTIVE AUTHORITY.**—The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds \$5,000,000.

(2) **ADDITIONAL ISSUES.**—The Commission shall by rule or regulation add a class of securities to the securities exempted pursuant to this section in accordance with the following terms and conditions:

(A) The aggregate offering amount of all securities offered and sold within the prior 12-month period in reliance on the exemption added in accordance with this paragraph shall not exceed \$50,000,000.

(B) The securities may be offered and sold publicly.

(C) The securities shall not be restricted securities within the meaning of the Federal securities laws and the regulations promulgated thereunder.

(D) The civil liability provision in section 12(a)(2) shall apply to any person offering or selling such securities.

(E) The issuer may solicit interest in the offering prior to filing any offering statement, on such terms and conditions as the Commission may prescribe in the public interest or for the protection of investors.

(F) The Commission shall require the issuer to file audited financial statements with the Commission annually.

(G) Such other terms, conditions, or requirements as the Commission may determine necessary in the public interest and for the protection of investors, which may include—

(i) a requirement that the issuer prepare and electronically file with the Commission and distribute to prospective investors an offering statement, and any related documents, in such form and with such content as prescribed by the Commission, including audited financial statements, a description of the issuer's business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters; and

(ii) disqualification provisions under which the exemption shall not be available to the issuer or its predecessors, affiliates, officers, directors, underwriters, or other related persons, which shall be substantially similar to the disqualification provisions contained in the regulations adopted in accordance with section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 U.S.C. 77d note).

(3) **LIMITATION.**—Only the following types of securities may be exempted under a rule or regulation adopted pursuant to

paragraph (2): equity securities, debt securities, and debt securities convertible or exchangeable to equity interests, including any guarantees of such securities.

(4) PERIODIC DISCLOSURES.—Upon such terms and conditions as the Commission determines necessary in the public interest and for the protection of investors, the Commission by rule or regulation may require an issuer of a class of securities exempted under paragraph (2) to make available to investors and file with the Commission periodic disclosures regarding the issuer, its business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters, and also may provide for the suspension and termination of such a requirement with respect to that issuer.

(5) ADJUSTMENT.—Not later than 2 years after the date of enactment of the Small Company Capital Formation Act of 2011 and every 2 years thereafter, the Commission shall review the offering amount limitation described in paragraph (2)(A) and shall increase such amount as the Commission determines appropriate. If the Commission determines not to increase such amount, it shall report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate on its reasons for not increasing the amount.

(c) The Commission may from time to time by its rules and regulations and subject to such terms and conditions as may be prescribed therein, add to the securities exempted as provided in this section any class of securities issued by a small business investment company under the Small Business Investment Act of 1958 if it finds, having regard to the purposes of that Act, that the enforcement of this Act with respect to such securities is not necessary in the public interest and for the protection of investors.

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## SECURITIES EXCHANGE ACT OF 1934

\* \* \* \* \*

### TITLE I—REGULATION OF SECURITIES EXCHANGES

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#### DEFINITIONS AND APPLICATION OF TITLE

SEC. 3. (a) When used in this title, unless the context otherwise requires—

(1) The term “exchange” means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

(2) The term “facility” when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.

(3)(A) The term “member” when used with respect to a national securities exchange means (i) any natural person permitted to effect transactions on the floor of the exchange without the services of another person acting as broker, (ii) any registered broker or dealer with which such a natural person is associated, (iii) any registered broker or dealer permitted to designate as a representative such a natural person, and (iv) any other registered broker or dealer which agrees to be regulated by such exchange and with respect to which the exchange undertakes to enforce compliance with the provisions of this title, the rules and regulations thereunder, and its own rules. For purposes of sections 6(b)(1), 6(b)(4), 6(b)(6), 6(b)(7), 6(d), 17(d), 19(d), 19(e), 19(g), 19(h), and 21 of this title, the term “member” when used with respect to a national securities exchange also means, to the extent of the rules of the exchange specified by the Commission, any person required by the Commission to comply with such rules pursuant to section 6(f) of this title.

(B) The term “member” when used with respect to a registered securities association means any broker or dealer who agrees to be regulated by such association and with respect to whom the association undertakes to enforce compliance with the provisions of this title, the rules and regulations thereunder, and its own rules.

(4) **BROKER.**—

(A) **IN GENERAL.**—The term “broker” means any person engaged in the business of effecting transactions in securities for the account of others.

(B) **EXCEPTION FOR CERTAIN BANK ACTIVITIES.**—A bank shall not be considered to be a broker because the bank engages in any one or more of the following activities under the conditions described:

(i) **THIRD PARTY BROKERAGE ARRANGEMENTS.**—The bank enters into a contractual or other written arrangement with a broker or dealer registered under this title under which the broker or dealer offers brokerage services on or off the premises of the bank if—

(I) such broker or dealer is clearly identified as the person performing the brokerage services;

(II) the broker or dealer performs brokerage services in an area that is clearly marked and, to the extent practicable, physically separate from the routine deposit-taking activities of the bank;

(III) any materials used by the bank to advertise or promote generally the availability of brokerage services under the arrangement clearly in-

dicating that the brokerage services are being provided by the broker or dealer and not by the bank;

(IV) any materials used by the bank to advertise or promote generally the availability of brokerage services under the arrangement are in compliance with the Federal securities laws before distribution;

(V) bank employees (other than associated persons of a broker or dealer who are qualified pursuant to the rules of a self-regulatory organization) perform only clerical or ministerial functions in connection with brokerage transactions including scheduling appointments with the associated persons of a broker or dealer, except that bank employees may forward customer funds or securities and may describe in general terms the types of investment vehicles available from the bank and the broker or dealer under the arrangement;

(VI) bank employees do not receive incentive compensation for any brokerage transaction unless such employees are associated persons of a broker or dealer and are qualified pursuant to the rules of a self-regulatory organization, except that the bank employees may receive compensation for the referral of any customer if the compensation is a nominal one-time cash fee of a fixed dollar amount and the payment of the fee is not contingent on whether the referral results in a transaction;

(VII) such services are provided by the broker or dealer on a basis in which all customers that receive any services are fully disclosed to the broker or dealer;

(VIII) the bank does not carry a securities account of the customer except as permitted under clause (ii) or (viii) of this subparagraph; and

(IX) the bank, broker, or dealer informs each customer that the brokerage services are provided by the broker or dealer and not by the bank and that the securities are not deposits or other obligations of the bank, are not guaranteed by the bank, and are not insured by the Federal Deposit Insurance Corporation.

(ii) **TRUST ACTIVITIES.**—The bank effects transactions in a trustee capacity, or effects transactions in a fiduciary capacity in its trust department or other department that is regularly examined by bank examiners for compliance with fiduciary principles and standards, and—

(I) is chiefly compensated for such transactions, consistent with fiduciary principles and standards, on the basis of an administration or annual fee (payable on a monthly, quarterly, or other basis), a percentage of assets under management, or a flat or capped per order processing fee equal to

not more than the cost incurred by the bank in connection with executing securities transactions for trustee and fiduciary customers, or any combination of such fees; and

(II) does not publicly solicit brokerage business, other than by advertising that it effects transactions in securities in conjunction with advertising its other trust activities.

(iii) PERMISSIBLE SECURITIES TRANSACTIONS.—The bank effects transactions in—

(I) commercial paper, bankers acceptances, or commercial bills;

(II) exempted securities;

(III) qualified Canadian government obligations as defined in section 5136 of the Revised Statutes, in conformity with section 15C of this title and the rules and regulations thereunder, or obligations of the North American Development Bank; or

(IV) any standardized, credit enhanced debt security issued by a foreign government pursuant to the March 1989 plan of then Secretary of the Treasury Brady, used by such foreign government to retire outstanding commercial bank loans.

(iv) CERTAIN STOCK PURCHASE PLANS.—

(I) EMPLOYEE BENEFIT PLANS.—The bank effects transactions, as part of its transfer agency activities, in the securities of an issuer as part of any pension, retirement, profit-sharing, bonus, thrift, savings, incentive, or other similar benefit plan for the employees of that issuer or its affiliates (as defined in section 2 of the Bank Holding Company Act of 1956), if the bank does not solicit transactions or provide investment advice with respect to the purchase or sale of securities in connection with the plan.

(II) DIVIDEND REINVESTMENT PLANS.—The bank effects transactions, as part of its transfer agency activities, in the securities of an issuer as part of that issuer's dividend reinvestment plan, if—

(aa) the bank does not solicit transactions or provide investment advice with respect to the purchase or sale of securities in connection with the plan; and

(bb) the bank does not net shareholders' buy and sell orders, other than for programs for odd-lot holders or plans registered with the Commission.

(III) ISSUER PLANS.—The bank effects transactions, as part of its transfer agency activities, in the securities of an issuer as part of a plan or program for the purchase or sale of that issuer's shares, if—

(aa) the bank does not solicit transactions or provide investment advice with respect to

the purchase or sale of securities in connection with the plan or program; and

(bb) the bank does not net shareholders' buy and sell orders, other than for programs for odd-lot holders or plans registered with the Commission.

(IV) PERMISSIBLE DELIVERY OF MATERIALS.—The exception to being considered a broker for a bank engaged in activities described in subclauses (I), (II), and (III) will not be affected by delivery of written or electronic plan materials by a bank to employees of the issuer, shareholders of the issuer, or members of affinity groups of the issuer, so long as such materials are—

(aa) comparable in scope or nature to that permitted by the Commission as of the date of the enactment of the Gramm-Leach-Bliley Act; or

(bb) otherwise permitted by the Commission.

(v) SWEEP ACCOUNTS.—The bank effects transactions as part of a program for the investment or reinvestment of deposit funds into any no-load, open-end management investment company registered under the Investment Company Act of 1940 that holds itself out as a money market fund.

(vi) AFFILIATE TRANSACTIONS.—The bank effects transactions for the account of any affiliate of the bank (as defined in section 2 of the Bank Holding Company Act of 1956) other than—

(I) a registered broker or dealer; or

(II) an affiliate that is engaged in merchant banking, as described in section 4(k)(4)(H) of the Bank Holding Company Act of 1956.

(vii) PRIVATE SECURITIES OFFERINGS.—The bank—

(I) effects sales as part of a primary offering of securities not involving a public offering, pursuant to section 3(b), 4(2), or 4(5) of the Securities Act of 1933 or the rules and regulations issued thereunder;

(II) at any time after the date that is 1 year after the date of the enactment of the Gramm-Leach-Bliley Act, is not affiliated with a broker or dealer that has been registered for more than 1 year in accordance with this Act, and engages in dealing, market making, or underwriting activities, other than with respect to exempted securities; and

(III) if the bank is not affiliated with a broker or dealer, does not effect any primary offering described in subclause (I) the aggregate amount of which exceeds 25 percent of the capital of the bank, except that the limitation of this subclause shall not apply with respect to any sale of government securities or municipal securities.



## (viii) SAFEKEEPING AND CUSTODY ACTIVITIES.—

(I) IN GENERAL.—The bank, as part of customary banking activities—

(aa) provides safekeeping or custody services with respect to securities, including the exercise of warrants and other rights on behalf of customers;

(bb) facilitates the transfer of funds or securities, as a custodian or a clearing agency, in connection with the clearance and settlement of its customers' transactions in securities;

(cc) effects securities lending or borrowing transactions with or on behalf of customers as part of services provided to customers pursuant to division (aa) or (bb) or invests cash collateral pledged in connection with such transactions;

(dd) holds securities pledged by a customer to another person or securities subject to purchase or resale agreements involving a customer, or facilitates the pledging or transfer of such securities by book entry or as otherwise provided under applicable law, if the bank maintains records separately identifying the securities and the customer; or

(ee) serves as a custodian or provider of other related administrative services to any individual retirement account, pension, retirement, profit sharing, bonus, thrift savings, incentive, or other similar benefit plan.

(II) EXCEPTION FOR CARRYING BROKER ACTIVITIES.—The exception to being considered a broker for a bank engaged in activities described in subclause (I) shall not apply if the bank, in connection with such activities, acts in the United States as a carrying broker (as such term, and different formulations thereof, are used in section 15(c)(3) of this title and the rules and regulations thereunder) for any broker or dealer, unless such carrying broker activities are engaged in with respect to government securities (as defined in paragraph (42) of this subsection).

(ix) IDENTIFIED BANKING PRODUCTS.—The bank effects transactions in identified banking products as defined in section 206 of the Gramm-Leach-Bliley Act.

(x) MUNICIPAL SECURITIES.—The bank effects transactions in municipal securities.

(xi) DE MINIMIS EXCEPTION.—The bank effects, other than in transactions referred to in clauses (i) through (x), not more than 500 transactions in securities in any calendar year, and such transactions are not effected by an employee of the bank who is also an employee of a broker or dealer.

(C) EXECUTION BY BROKER OR DEALER.—The exception to being considered a broker for a bank engaged in activities

described in clauses (ii), (iv), and (viii) of subparagraph (B) shall not apply if the activities described in such provisions result in the trade in the United States of any security that is a publicly traded security in the United States, unless—

(i) the bank directs such trade to a registered broker or dealer for execution;

(ii) the trade is a cross trade or other substantially similar trade of a security that—

(I) is made by the bank or between the bank and an affiliated fiduciary; and

(II) is not in contravention of fiduciary principles established under applicable Federal or State law; or

(iii) the trade is conducted in some other manner permitted under rules, regulations, or orders as the Commission may prescribe or issue.

(D) FIDUCIARY CAPACITY.—For purposes of subparagraph (B)(ii), the term “fiduciary capacity” means—

(i) in the capacity as trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gift to minor act, or as an investment adviser if the bank receives a fee for its investment advice;

(ii) in any capacity in which the bank possesses investment discretion on behalf of another; or

(iii) in any other similar capacity.

(E) EXCEPTION FOR ENTITIES SUBJECT TO SECTION 15(e).—The term “broker” does not include a bank that—

(i) was, on the day before the date of enactment of the Gramm-Leach-Bliley Act, subject to section 15(e); and

(ii) is subject to such restrictions and requirements as the Commission considers appropriate.

(F) JOINT RULEMAKING REQUIRED.—The Commission and the Board of Governors of the Federal Reserve System shall jointly adopt a single set of rules or regulations to implement the exceptions in subparagraph (B).

(5) DEALER.—

(A) IN GENERAL.—The term “dealer” means any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person’s own account through a broker or otherwise.

(B) EXCEPTION FOR PERSON NOT ENGAGED IN THE BUSINESS OF DEALING.—The term “dealer” does not include a person that buys or sells securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person’s own account, either individually or in a fiduciary capacity, but not as a part of a regular business.

(C) EXCEPTION FOR CERTAIN BANK ACTIVITIES.—A bank shall not be considered to be a dealer because the bank en-

gages in any of the following activities under the conditions described:

(i) PERMISSIBLE SECURITIES TRANSACTIONS.—The bank buys or sells—

(I) commercial paper, bankers acceptances, or commercial bills;

(II) exempted securities;

(III) qualified Canadian government obligations as defined in section 5136 of the Revised Statutes of the United States, in conformity with section 15C of this title and the rules and regulations thereunder, or obligations of the North American Development Bank; or

(IV) any standardized, credit enhanced debt security issued by a foreign government pursuant to the March 1989 plan of then Secretary of the Treasury Brady, used by such foreign government to retire outstanding commercial bank loans.

(ii) INVESTMENT, TRUSTEE, AND FIDUCIARY TRANSACTIONS.—The bank buys or sells securities for investment purposes—

(I) for the bank; or

(II) for accounts for which the bank acts as a trustee or fiduciary.

(iii) ASSET-BACKED TRANSACTIONS.—The bank engages in the issuance or sale to qualified investors, through a grantor trust or other separate entity, of securities backed by or representing an interest in notes, drafts, acceptances, loans, leases, receivables, other obligations (other than securities of which the bank is not the issuer), or pools of any such obligations predominantly originated by—

(I) the bank;

(II) an affiliate of any such bank other than a broker or dealer; or

(III) a syndicate of banks of which the bank is a member, if the obligations or pool of obligations consists of mortgage obligations or consumer-related receivables.

(iv) IDENTIFIED BANKING PRODUCTS.—The bank buys or sells identified banking products, as defined in section 206 of the Gramm-Leach-Bliley Act.

(6) The term “bank” means (A) a banking institution organized under the laws of the United States or a Federal savings association, as defined in section 2(5) of the Home Owners’ Loan Act, (B) a member bank of the Federal Reserve System, (C) any other banking institution or savings association, as defined in section 2(4) of the Home Owners’ Loan Act, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency pursuant to the first section of Public Law 87–722 (12 U.S.C. 92a), and which is supervised and examined by State or Federal authority hav-

ing supervision over banks or savings associations, and which is not operated for the purpose of evading the provisions of this title, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

(7) The term “director” means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated.

(8) The term “issuer” means any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term “issuer” means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term “issuer” means the person by whom the equipment or property is, or is to be, used.

(9) The term “person” means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.

(10) The term “security” means any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a “security”; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker’s acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

(11) The term “equity security” means any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

(12)(A) The term “exempted security” or “exempted securities” includes—

- (i) government securities, as defined in paragraph (42) of this subsection;
  - (ii) municipal securities, as defined in paragraph (29) of this subsection;
  - (iii) any interest or participation in any common trust fund or similar fund that is excluded from the definition of the term “investment company” under section 3(c)(3) of the Investment Company Act of 1940;
  - (iv) any interest or participation in a single trust fund, or a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which interest, participation, or security is issued in connection with a qualified plan as defined in subparagraph (C) of this paragraph;
  - (v) any security issued by or any interest or participation in any pooled income fund, collective trust fund, collective investment fund, or similar fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940;
  - (vi) solely for purposes of sections 12, 13, 14, and 16 of this title, any security issued by or any interest or participation in any church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940; and
  - (vii) such other securities (which may include, among others, unregistered securities, the market in which is predominantly intrastate) as the Commission may, by such rules and regulations as it deems consistent with the public interest and the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more provisions of this title which by their terms do not apply to an “exempted security” or to “exempted securities”.
- (B)(i) Notwithstanding subparagraph (A)(i) of this paragraph, government securities shall not be deemed to be “exempted securities” for the purposes of section 17A of this title.
- (ii) Notwithstanding subparagraph (A)(ii) of this paragraph, municipal securities shall not be deemed to be “exempted securities” for the purposes of sections 15 and 17A of this title.
- (C) For purposes of subparagraph (A)(iv) of this paragraph, the term “qualified plan” means (i) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954, (ii) an annuity plan which meets the requirements for the deduction of the employer’s contribution under section 404(a)(2) of such Code, (iii) a governmental plan as defined in section 414(d) of such Code which has been established by an employer for the exclusive benefit of its employees or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the funds accumulated under such plan, if under such plan it is impossible, prior to the satisfaction of all liabilities with respect to such employees and their beneficiaries, for any part of the corpus or income to be used for, or diverted to, purposes other than the exclusive ben-

efit of such employees or their beneficiaries, **[or (iv)]** *(iv) a plan which meets the requirements of section 403(b) of such Code if (I) such plan is subject to title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), (II) in the case of a plan not described in clause (iv), is a plan funded any employer making such plan available agrees to serve as a fiduciary for the plan with respect to the selection of the plan's investments among which participants can choose, or (III) such plan is a governmental plan (as defined in section 414(d) of such Code), or (v) a church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940, other than any plan described in clause (i), **[(ii), or (iii)]** (ii), (iii), or (iv) of this subparagraph which (I) covers employees some or all of whom are employees within the meaning of section 401(c) of such Code, or **[(II) is a plan funded]** (II) *in the case of a plan not described in 19 clause (iv), is a plan funded by an annuity contract described in section 403(b) of such Code.**

(13) The terms “buy” and “purchase” each include any contract to buy, purchase, or otherwise acquire. For security futures products, such term includes any contract, agreement, or transaction for future delivery. For security-based swaps, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.

(14) The terms “sale” and “sell” each include any contract to sell or otherwise dispose of. For security futures products, such term includes any contract, agreement, or transaction for future delivery. For security-based swaps, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.

(15) The term “Commission” means the Securities and Exchange Commission established by section 4 of this title.

(16) The term “State” means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

(17) The term “interstate commerce” means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof. The term also includes intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or (B) any other interstate instrumentality.

(18) The term “person associated with a broker or dealer” or “associated person of a broker or dealer” means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are

solely clerical or ministerial shall not be included in the meaning of such term for purposes of section 15(b) of this title (other than paragraph (6) thereof).

(19) The terms “investment company,” “affiliated person,” “insurance company,” “separate account,” and “company” have the same meanings as in the Investment Company Act of 1940.

(20) The terms “investment adviser” and “underwriter” have the same meanings as in the Investment Advisers Act of 1940.

(21) The term “persons associated with a member” or “associated person of a member” when used with respect to a member of a national securities exchange or registered securities association means any partner, officer, director, or branch manager of such member (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such member, or any employee of such member.

(22)(A) The term “securities information processor” means any person engaged in the business of (i) collecting, processing, or preparing for distribution or publication, or assisting, participating in, or coordinating the distribution or publication of, information with respect to transactions in or quotations for any security (other than an exempted security) or (ii) distributing or publishing (whether by means of a ticker tape, a communications network, a terminal display device, or otherwise) on a current and continuing basis, information with respect to such transactions or quotations. The term “securities information processor” does not include any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation, any self-regulatory organization, any bank, broker, dealer, building and loan, savings and loan, or home-stead association, or cooperative bank, if such bank, broker, dealer, association, or cooperative bank would be deemed to be a securities information processor solely by reason of functions performed by such institutions as part of customary banking, brokerage, dealing, association, or cooperative bank activities, or any common carrier, as defined in section 3 of the Communications Act of 1934, subject to the jurisdiction of the Federal Communications Commission or a State commission, as defined in section 3 of that Act, unless the Commission determines that such carrier is engaged in the business of collecting, processing, or preparing for distribution or publication, information with respect to transactions in or quotations for any security.

(B) The term “exclusive processor” means any securities information processor or self-regulatory organization which, directly or indirectly, engages on an exclusive basis on behalf of any national securities exchange or registered securities association, or any national securities exchange or registered securities association which engages on an exclusive basis on its own behalf, in collecting, processing, or preparing for distribution or publication any information with respect to (i) transactions or quotations on or effected or made by means of any facility of such exchange or (ii) quotations distributed or pub-

lished by means of any electronic system operated or controlled by such association.

(23)(A) The term “clearing agency” means any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or who provides facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities. Such term also means any person, such as a securities depository, who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.

(B) The term “clearing agency” does not include (i) any Federal Reserve bank, Federal home loan bank, or Federal land bank; (ii) any national securities exchange or registered securities association solely by reason of its providing facilities for comparison of data respecting the terms of settlement of securities transactions effected on such exchange or by means of any electronic system operated or controlled by such association; (iii) any bank, broker, dealer, building and loan, savings and loan, or homestead association, or cooperative bank if such bank, broker, dealer, association, or cooperative bank would be deemed to be a clearing agency solely by reason of functions performed by such institution as part of customary banking, brokerage, dealing, association, or cooperative banking activities, or solely by reason of acting on behalf of a clearing agency or a participant therein in connection with the furnishing by the clearing agency of services to its participants or the use of services of the clearing agency by its participants, unless the Commission, by rule, otherwise provides as necessary or appropriate to assure the prompt and accurate clearance and settlement of securities transactions or to prevent evasion of this title; (iv) any life insurance company, its registered separate accounts, or a subsidiary of such insurance company solely by reason of functions commonly performed by such entities in connection with variable annuity contracts or variable life policies issued by such insurance company or its separate accounts; (v) any registered open-end investment company or unit investment trust solely by reason of functions commonly performed by it in connection with shares in such registered open-end investment company or unit investment trust, or (vi) any person solely by reason of its performing functions described in paragraph 25(E) of this subsection.

(24) The term “participant” when used with respect to a clearing agency means any person who uses a clearing agency to clear or settle securities transactions or to transfer, pledge, lend, or hypothecate securities. Such term does not include a person whose only use of a clearing agency is (A) through an-



other person who is a participant or (B) as a pledgee of securities.

(25) The term “transfer agent” means any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities in (A) countersigning such securities upon issuance; (B) monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar; (C) registering the transfer of such securities; (D) exchanging or converting such securities; or (E) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates. The term “transfer agent” does not include any insurance company or separate account which performs such functions solely with respect to variable annuity contracts or variable life policies which it issues or any registered clearing agency which performs such functions solely with respect to options contracts which it issues.

(26) The term “self-regulatory organization” means any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of sections 19(b), 19(c), and 23(b) of this title) the Municipal Securities Rulemaking Board established by section 15B of this title.

(27) The term “rules of an exchange”, “rules of an association”, or “rules of a clearing agency” means the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing, of an exchange, association of brokers and dealers, or clearing agency, respectively, and such of the stated policies, practices, and interpretations of such exchange, association, or clearing agency as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange, association, or clearing agency.

(28) The term “rules of a self-regulatory organization” means the rules of an exchange which is a national securities exchange, the rules of an association of brokers and dealers which is a registered securities association, the rules of a clearing agency which is a registered clearing agency, or the rules of the Municipal Securities Rulemaking Board.

(29) The term “municipal securities” means securities which are direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States, or any security which is an industrial development bond (as defined in section 103(c)(2) of the Internal Revenue Code of 1954) the interest on which is excludable from gross income under section 103(a)(1) of such Code if, by reason of the application of paragraph (4) or (6) of section 103(c) of such Code (determined as if paragraphs (4)(A), (5), and (7) were not included in such section 103(c)), paragraph (1) of such section 103(c) does not apply to such security.

(30) The term “municipal securities dealer” means any person (including a separately identifiable department or division of a bank) engaged in the business of buying and selling mu-

municipal securities for his own account, through a broker or otherwise, but does not include—

(A) any person insofar as he buys or sells such securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business; or

(B) a bank, unless the bank is engaged in the business of buying and selling municipal securities for its own account other than in a fiduciary capacity, through a broker or otherwise; *Provided, however,* That if the bank is engaged in such business through a separately identifiable department or division (as defined by the Municipal Securities Rulemaking Board in accordance with section 15B(b)(2)(H) of this title), the department or division and not the bank itself shall be deemed to be the municipal securities dealer.

(31) The term “municipal securities broker” means a broker engaged in the business of effecting transactions in municipal securities for the account of others.

(32) The term “person associated with a municipal securities dealer” when used with respect to a municipal securities dealer which is a bank or a division or department of a bank means any person directly engaged in the management, direction, supervision, or performance of any of the municipal securities dealer’s activities with respect to municipal securities, and any person directly or indirectly controlling such activities or controlled by the municipal securities dealer in connection with such activities.

(33) The term “municipal securities investment portfolio” means all municipal securities held for investment and not for sale as part of a regular business by a municipal securities dealer or by a person, directly or indirectly, controlling, controlled by, or under common control with a municipal securities dealer.

(34) The term “appropriate regulatory agency” means—

(A) When used with respect to a municipal securities dealer:

(i) the Comptroller of the Currency, in the case of a national bank, a subsidiary or a department or division of any such bank, a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary or department or division of any such Federal savings association;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a subsidiary or a department or division thereof, a bank holding company, a subsidiary of a bank holding company which is a bank other than a bank specified in clause (i), (iii), or (iv) of this subparagraph, a subsidiary or a department or division of such subsidiary, or a savings and loan holding company;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit In-

insurance Corporation (other than a member of the Federal Reserve System), a subsidiary or department or division of any such bank, a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary or a department or division of any such State savings association; and

(iv) the Commission in the case of all other municipal securities dealers.

(B) When used with respect to a clearing agency or transfer agent:

(i) the Comptroller of the Currency, in the case of a national bank, a subsidiary of any such bank, a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary of any such Federal savings association;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a subsidiary thereof, a bank holding company, a subsidiary of a bank holding company that is a bank other than a bank specified in clause (i) or (iii) of this subparagraph, or a savings and loan holding company;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System), a subsidiary of any such bank, a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary of any such State savings association; and

(iv) the Commission in the case of all other clearing agencies and transfer agents.

(C) When used with respect to a participant or applicant to become a participant in a clearing agency or a person requesting or having access to services offered by a clearing agency:

(i) the Comptroller of the Currency, in the case of a national bank or a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation when the appropriate regulatory agency for such clearing agency is not the Commission;

(ii) the Board of Governors of the Federal Reserve System in the case of a State member bank of the Federal Reserve System, a bank holding company, or a subsidiary of a bank holding company, a subsidiary of a bank holding company that is a bank other than a bank specified in clause (i) or (iii) of this subparagraph, or a savings and loan holding company when

the appropriate regulatory agency for such clearing agency is not the Commission;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System) or a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation; and when the appropriate regulatory agency for such clearing agency is not the Commission;

(iv) the Commission in all other cases.

(D) When used with respect to an institutional investment manager which is a bank the deposits of which are insured in accordance with the Federal Deposit Insurance Act:

(i) the Comptroller of the Currency, in the case of a national bank or a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation;

(ii) the Board of Governors of the Federal Reserve System, in the case of any other member bank of the Federal Reserve System; and

(iii) the Federal Deposit Insurance Corporation, in the case of any other insured bank or a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation.

(E) When used with respect to a national securities exchange or registered securities association, member thereof, person associated with a member thereof, applicant to become a member thereof or to become associated with a member thereof, or person requesting or having access to services offered by such exchange or association or member thereof, or the Municipal Securities Rulemaking Board, the Commission.

(F) When used with respect to a person exercising investment discretion with respect to an account:

(i) the Comptroller of the Currency, in the case of a national bank or a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation;

(ii) the Board of Governors of the Federal Reserve System in the case of any other member bank of the Federal Reserve System;

(iii) the Federal Deposit Insurance Corporation, in the case of any other bank the deposits of which are insured in accordance with the Federal Deposit Insurance Act or a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act

(12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation; and

(iv) the Commission in the case of all other such persons.

(G) When used with respect to a government securities broker or government securities dealer, or person associated with a government securities broker or government securities dealer:

(i) the Comptroller of the Currency, in the case of a national bank, a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a Federal branch or Federal agency of a foreign bank (as such terms are used in the International Banking Act of 1978);

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a foreign bank, an uninsured State branch or State agency of a foreign bank, a commercial lending company owned or controlled by a foreign bank (as such terms are used in the International Banking Act of 1978), or a corporation organized or having an agreement with the Board of Governors of the Federal Reserve System pursuant to section 25 or section 25A of the Federal Reserve Act;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System or a Federal savings bank), a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act), the deposits of which are insured by the Federal Deposit Insurance Corporation, or an insured State branch of a foreign bank (as such terms are used in the International Banking Act of 1978); and

(iv) the Commission, in the case of all other government securities brokers and government securities dealers.

(H) When used with respect to an institution described in subparagraph (D), (F), or (G) of section 2(c)(2), or held under section 4(f), of the Bank Holding Company Act of 1956—

(i) the Comptroller of the Currency, in the case of a national bank;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System or any corporation chartered under section 25A of the Federal Reserve Act;

(iii) the Federal Deposit Insurance Corporation, in the case of any other bank the deposits of which are insured in accordance with the Federal Deposit Insurance Act; or

(iv) the Commission in the case of all other such institutions.

As used in this paragraph, the terms “bank holding company” and “subsidiary of a bank holding company” have the meanings given them in section 2 of the Bank Holding Company Act of 1956. As used in this paragraph, the term “savings and loan holding company” has the same meaning as in section 10(a) of the Home Owners’ Loan Act (12 U.S.C. 1467a(a)).

(35) A person exercises “investment discretion” with respect to an account if, directly or indirectly, such person (A) is authorized to determine what securities or other property shall be purchased or sold by or for the account, (B) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the Commission, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of this title and rules and regulations thereunder.

(36) A class of persons or markets is subject to “equal regulation” if no member of the class has a competitive advantage over any other member thereof resulting from a disparity in their regulation under this title which the Commission determines is unfair and not necessary or appropriate in furtherance of the purposes of this title.

(37) The term “records” means accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language.

(38) The term “market maker” means any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.

(39) A person is subject to a “statutory disqualification” with respect to membership or participation in, or association with a member of, a self-regulatory organization, if such person—

(A) has been and is expelled or suspended from membership or participation in, or barred or suspended from being associated with a member of, any self-regulatory organization, foreign equivalent of a self-regulatory organization, foreign or international securities exchange, contract market designated pursuant to section 5 of the Commodity Exchange Act (7 U.S.C. 7), or any substantially equivalent foreign statute or regulation, or futures association registered under section 17 of such Act (7 U.S.C. 21), or any substantially equivalent foreign statute or regulation, or has been and is denied trading privileges on any such contract market or foreign equivalent;

(B) is subject to—

(i) an order of the Commission, other appropriate regulatory agency, or foreign financial regulatory authority—

(I) denying, suspending for a period not exceeding 12 months, or revoking his registration as a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, security-based swap dealer, or major security-based swap participant or limiting his activities as a foreign person performing a function substantially equivalent to any of the above; or

(II) barring or suspending for a period not exceeding 12 months his being associated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, security-based swap dealer, major security-based swap participant, or foreign person performing a function substantially equivalent to any of the above;

(ii) an order of the Commodity Futures Trading Commission denying, suspending, or revoking his registration under the Commodity Exchange Act (7 U.S.C. 1 et seq.); or

(iii) an order by a foreign financial regulatory authority denying, suspending, or revoking the person's authority to engage in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof;

(C) by his conduct while associated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, security-based swap dealer, or major security-based swap participant, or while associated with an entity or person required to be registered under the Commodity Exchange Act, has been found to be a cause of any effective suspension, expulsion, or order of the character described in subparagraph (A) or (B) of this paragraph, and in entering such a suspension, expulsion, or order, the Commission, an appropriate regulatory agency, or any such self-regulatory organization shall have jurisdiction to find whether or not any person was a cause thereof;

(D) by his conduct while associated with any broker, dealer, municipal securities dealer, government securities broker, government securities dealer, security-based swap dealer, major security-based swap participant, or any other entity engaged in transactions in securities, or while associated with an entity engaged in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof, has been found to be a cause of any effective suspension, expulsion, or order by a foreign or international securities exchange or foreign financial regulatory authority empowered by a foreign government to administer or enforce its laws relating to financial transactions as described in subparagraph (A) or (B) of this paragraph;

(E) has associated with him any person who is known, or in the exercise of reasonable care should be known, to him to be a person described by subparagraph (A), (B), (C), or (D) of this paragraph; or

(F) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (D), (E), (H), or (G) of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) or any other felony within ten years of the date of the filing of an application for membership or participation in, or to become associated with a member of, such self-regulatory organization, is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4), has willfully made or caused to be made in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, report required to be filed with a self-regulatory organization, or proceeding before a self-regulatory organization, any statement which was at the time, and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application, report, or proceeding any material fact which is required to be stated therein.

(40) The term “financial responsibility rules” means the rules and regulations of the Commission or the rules and regulations prescribed by any self-regulatory organization relating to financial responsibility and related practices which are designated by the Commission, by rule or regulation, to be financial responsibility rules.

(41) The term “mortgage related security” means a security that meets standards of credit-worthiness as established by the Commission, and either:

(A) represents ownership of one or more promissory notes or certificates of interest or participation in such notes (including any rights designed to assure servicing of, or the receipt or timeliness of receipt by the holders of such notes, certificates, or participations of amounts payable under, such notes, certificates, or participations), which notes:

(i) are directly secured by a first lien on a single parcel of real estate, including stock allocated to a dwelling unit in a residential cooperative housing corporation, upon which is located a dwelling or mixed residential and commercial structure, on a residential manufactured home as defined in section 603(6) of the National Manufactured Housing Construction and Safety Standards Act of 1974, whether such manufactured home is considered real or personal property under the laws of the State in which it is to be located, or on one or more parcels of real estate upon which is located one or more commercial structures; and

(ii) were originated by a savings and loan association, savings bank, commercial bank, credit union, insurance company, or similar institution which is su-



pervised and examined by a Federal or State authority, or by a mortgage approved by the Secretary of Housing and Urban Development pursuant to sections 203 and 211 of the National Housing Act, or, where such notes involve a lien on the manufactured home, by any such institution or by any financial institution approved for insurance by the Secretary of Housing and Urban Development pursuant to section 2 of the National Housing Act; or

(B) is secured by one or more promissory notes or certificates of interest or participations in such notes (with or without recourse to the issuer thereof) and, by its terms, provides for payments of principal in relation to payments, or reasonable projections of payments, on notes meeting the requirements of subparagraphs (A) (i) and (ii) or certificates of interest or participations in promissory notes meeting such requirements.

For the purpose of this paragraph, the term “promissory note”, when used in connection with a manufactured home, shall also include a loan, advance, or credit sale as evidence by a retail installment sales contract or other instrument.

(42) The term “government securities” means—

(A) securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States;

(B) securities which are issued or guaranteed by the Tennessee Valley Authority or by corporations in which the United States has a direct or indirect interest and which are designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors;

(C) securities issued or guaranteed as to principal or interest by any corporation the securities of which are designated, by statute specifically naming such corporation, to constitute exempt securities within the meaning of the laws administered by the Commission;

(D) for purposes of sections 15C and 17A, any put, call, straddle, option, or privilege on a security described in subparagraph (A), (B), or (C) other than a put, call, straddle, option, or privilege—

(i) that is traded on one or more national securities exchanges; or

(ii) for which quotations are disseminated through an automated quotation system operated by a registered securities association; or

(E) for purposes of sections 15, 15C, and 17A as applied to a bank, a qualified Canadian government obligation as defined in section 5136 of the Revised Statutes of the United States.

(43) The term “government securities broker” means any person regularly engaged in the business of effecting transactions in government securities for the account of others, but does not include—

(A) any corporation the securities of which are government securities under subparagraph (B) or (C) of paragraph (42) of this subsection; or

(B) any person registered with the Commodity Futures Trading Commission, any contract market designated by the Commodity Futures Trading Commission, such contract market's affiliated clearing organization, or any floor trader on such contract market, solely because such person effects transactions in government securities that the Commission, after consultation with the Commodity Futures Trading Commission, has determined by rule or order to be incidental to such person's futures-related business.

(44) The term "government securities dealer" means any person engaged in the business of buying and selling government securities for his own account, through a broker or otherwise, but does not include—

(A) any person insofar as he buys or sells such securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business;

(B) any corporation the securities of which are government securities under subparagraph (B) or (C) of paragraph (42) of this subsection;

(C) any bank, unless the bank is engaged in the business of buying and selling government securities for its own account other than in a fiduciary capacity, through a broker or otherwise; or

(D) any person registered with the Commodity Futures Trading Commission, any contract market designated by the Commodity Futures Trading Commission, such contract market's affiliated clearing organization, or any floor trader on such contract market, solely because such person effects transactions in government securities that the Commission, after consultation with the Commodity Futures Trading Commission, has determined by rule or order to be incidental to such person's futures-related business.

(45) The term "person associated with a government securities broker or government securities dealer" means any partner, officer, director, or branch manager of such government securities broker or government securities dealer (or any person occupying a similar status or performing similar functions), and any other employee of such government securities broker or government securities dealer who is engaged in the management, direction, supervision, or performance of any activities relating to government securities, and any person directly or indirectly controlling, controlled by, or under common control with such government securities broker or government securities dealer.

(46) The term "financial institution" means—

(A) a bank (as defined in paragraph (6) of this subsection);

(B) a foreign bank (as such term is used in the International Banking Act of 1978); and

(C) a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act) the deposits of which are insured by the Federal Deposit Insurance Corporation.

(47) The term “securities laws” means the Securities Act of 1933 (15 U.S.C. 77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the Sarbanes-Oxley Act of 2002, the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.), the Investment Advisers Act of 1940 (15 U.S.C. 80b et seq.), and the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.).

(48) The term “registered broker or dealer” means a broker or dealer registered or required to register pursuant to section 15 or 15B of this title, except that in paragraph (3) of this subsection and sections 6 and 15A the term means such a broker or dealer and a government securities broker or government securities dealer registered or required to register pursuant to section 15C(a)(1)(A) of this title.

(49) The terms “person associated with a transfer agent” and “associated person of a transfer agent” mean any person (except an employee whose functions are solely clerical or ministerial) directly engaged in the management, direction, supervision, or performance of any of the transfer agent’s activities with respect to transfer agent functions, and any person directly or indirectly controlling such activities or controlled by the transfer agent in connection with such activities.

(50) The term “foreign securities authority” means any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.

(51)(A) The term “penny stock” means any equity security other than a security that is—

(i) registered or approved for registration and traded on a national securities exchange that meets such criteria as the Commission shall prescribe by rule or regulation for purposes of this paragraph;

(ii) authorized for quotation on an automated quotation system sponsored by a registered securities association, if such system (I) was established and in operation before January 1, 1990, and (II) meets such criteria as the Commission shall prescribe by rule or regulation for purposes of this paragraph;

(iii) issued by an investment company registered under the Investment Company Act of 1940;

(iv) excluded, on the basis of exceeding a minimum price, net tangible assets of the issuer, or other relevant criteria, from the definition of such term by rule or regulation which the Commission shall prescribe for purposes of this paragraph; or

(v) exempted, in whole or in part, conditionally or unconditionally, from the definition of such term by rule, regulation, or order prescribed by the Commission.

(B) The Commission may, by rule, regulation, or order, designate any equity security or class of equity securities described in clause (i) or (ii) of subparagraph (A) as within the meaning of the term “penny stock” if such security or class of securities is traded other than on a national securities ex-

change or through an automated quotation system described in clause (ii) of subparagraph (A).

(C) In exercising its authority under this paragraph to prescribe rules, regulations, and orders, the Commission shall determine that such rule, regulation, or order is consistent with the public interest and the protection of investors.

(52) The term “foreign financial regulatory authority” means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above.

(53)(A) The term “small business related security” means a security that meets standards of credit-worthiness as established by the Commission, and either—

(i) represents an interest in 1 or more promissory notes or leases of personal property evidencing the obligation of a small business concern and originated by an insured depository institution, insured credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or a finance company or leasing company; or

(ii) is secured by an interest in 1 or more promissory notes or leases of personal property (with or without recourse to the issuer or lessee) and provides for payments of principal in relation to payments, or reasonable projections of payments, on notes or leases described in clause (i).

(B) For purposes of this paragraph—

(i) an “interest in a promissory note or a lease of personal property” includes ownership rights, certificates of interest or participation in such notes or leases, and rights designed to assure servicing of such notes or leases, or the receipt or timely receipt of amounts payable under such notes or leases;

(ii) the term “small business concern” means a business that meets the criteria for a small business concern established by the Small Business Administration under section 3(a) of the Small Business Act;

(iii) the term “insured depository institution” has the same meaning as in section 3 of the Federal Deposit Insurance Act; and

(iv) the term “insured credit union” has the same meaning as in section 101 of the Federal Credit Union Act.

(54) QUALIFIED INVESTOR.—

(A) DEFINITION.—Except as provided in subparagraph (B), for purposes of this title, the term “qualified investor” means—

(i) any investment company registered with the Commission under section 8 of the Investment Company Act of 1940;

(ii) any issuer eligible for an exclusion from the definition of investment company pursuant to section 3(c)(7) of the Investment Company Act of 1940;

(iii) any bank (as defined in paragraph (6) of this subsection), savings association (as defined in section 3(b) of the Federal Deposit Insurance Act), broker, dealer, insurance company (as defined in section 2(a)(13) of the Securities Act of 1933), or business development company (as defined in section 2(a)(48) of the Investment Company Act of 1940);

(iv) any small business investment company licensed by the United States Small Business Administration under section 301 (c) or (d) of the Small Business Investment Act of 1958;

(v) any State sponsored employee benefit plan, or any other employee benefit plan, within the meaning of the Employee Retirement Income Security Act of 1974, other than an individual retirement account, if the investment decisions are made by a plan fiduciary, as defined in section 3(21) of that Act, which is either a bank, savings and loan association, insurance company, or registered investment adviser;

(vi) any trust whose purchases of securities are directed by a person described in clauses (i) through (v) of this subparagraph;

(vii) any market intermediary exempt under section 3(c)(2) of the Investment Company Act of 1940;

(viii) any associated person of a broker or dealer other than a natural person;

(ix) any foreign bank (as defined in section 1(b)(7) of the International Banking Act of 1978);

(x) the government of any foreign country;

(xi) any corporation, company, or partnership that owns and invests on a discretionary basis, not less than \$25,000,000 in investments;

(xii) any natural person who owns and invests on a discretionary basis, not less than \$25,000,000 in investments;

(xiii) any government or political subdivision, agency, or instrumentality of a government who owns and invests on a discretionary basis not less than \$50,000,000 in investments; or

(xiv) any multinational or supranational entity or any agency or instrumentality thereof.

(B) ALTERED THRESHOLDS FOR ASSET-BACKED SECURITIES AND LOAN PARTICIPATIONS.—For purposes of section 3(a)(5)(C)(iii) of this title and section 206(a)(5) of the Gramm-Leach-Bliley Act, the term “qualified investor” has the meaning given such term by subparagraph (A) of this paragraph except that clauses (xi) and (xii) shall be applied by substituting “\$10,000,000” for “\$25,000,000”.

(C) ADDITIONAL AUTHORITY.—The Commission may, by rule or order, define a “qualified investor” as any other person, taking into consideration such factors as the financial sophistication of the person, net worth, and knowledge and experience in financial matters.

(55)(A) The term “security future” means a contract of sale for future delivery of a single security or of a narrow-based security index, including any interest therein or based on the value thereof, except an exempted security under section 3(a)(12) of this title as in effect on the date of the enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) as in effect on the date of the enactment of the Futures Trading Act of 1982). The term “security future” does not include any agreement, contract, or transaction excluded from the Commodity Exchange Act under section 2(c), 2(d), 2(f), or 2(g) of the Commodity Exchange Act (as in effect on the date of the enactment of the Commodity Futures Modernization Act of 2000) or title IV of the Commodity Futures Modernization Act of 2000.

(B) The term “narrow-based security index” means an index—

- (i) that has 9 or fewer component securities;
- (ii) in which a component security comprises more than 30 percent of the index’s weighting;
- (iii) in which the five highest weighted component securities in the aggregate comprise more than 60 percent of the index’s weighting; or
- (iv) in which the lowest weighted component securities comprising, in the aggregate, 25 percent of the index’s weighting have an aggregate dollar value of average daily trading volume of less than \$50,000,000 (or in the case of an index with 15 or more component securities, \$30,000,000), except that if there are two or more securities with equal weighting that could be included in the calculation of the lowest weighted component securities comprising, in the aggregate, 25 percent of the index’s weighting, such securities shall be ranked from lowest to highest dollar value of average daily trading volume and shall be included in the calculation based on their ranking starting with the lowest ranked security.

(C) Notwithstanding subparagraph (B), an index is not a narrow-based security index if—

- (i)(I) it has at least nine component securities;
- (II) no component security comprises more than 30 percent of the index’s weighting; and
- (III) each component security is—
  - (aa) registered pursuant to section 12 of the Securities Exchange Act of 1934;
  - (bb) one of 750 securities with the largest market capitalization; and
  - (cc) one of 675 securities with the largest dollar value of average daily trading volume;
- (ii) a board of trade was designated as a contract market by the Commodity Futures Trading Commission with respect to a contract of sale for future delivery on the index,

before the date of the enactment of the Commodity Futures Modernization Act of 2000;

(iii)(I) a contract of sale for future delivery on the index traded on a designated contract market or registered derivatives transaction execution facility for at least 30 days as a contract of sale for future delivery on an index that was not a narrow-based security index; and

(II) it has been a narrow-based security index for no more than 45 business days over 3 consecutive calendar months;

(iv) a contract of sale for future delivery on the index is traded on or subject to the rules of a foreign board of trade and meets such requirements as are jointly established by rule or regulation by the Commission and the Commodity Futures Trading Commission;

(v) no more than 18 months have passed since the date of the enactment of the Commodity Futures Modernization Act of 2000 and—

(I) it is traded on or subject to the rules of a foreign board of trade;

(II) the offer and sale in the United States of a contract of sale for future delivery on the index was authorized before the date of the enactment of the Commodity Futures Modernization Act of 2000; and

(III) the conditions of such authorization continue to be met; or

(vi) a contract of sale for future delivery on the index is traded on or subject to the rules of a board of trade and meets such requirements as are jointly established by rule, regulation, or order by the Commission and the Commodity Futures Trading Commission.

(D) Within 1 year after the enactment of the Commodity Futures Modernization Act of 2000, the Commission and the Commodity Futures Trading Commission jointly shall adopt rules or regulations that set forth the requirements under clause (iv) of subparagraph (C).

(E) An index that is a narrow-based security index solely because it was a narrow-based security index for more than 45 business days over 3 consecutive calendar months pursuant to clause (iii) of subparagraph (C) shall not be a narrow-based security index for the 3 following calendar months.

(F) For purposes of subparagraphs (B) and (C) of this paragraph—

(i) the dollar value of average daily trading volume and the market capitalization shall be calculated as of the preceding 6 full calendar months; and

(ii) the Commission and the Commodity Futures Trading Commission shall, by rule or regulation, jointly specify the method to be used to determine market capitalization and dollar value of average daily trading volume.

(56) The term “security futures product” means a security future or any put, call, straddle, option, or privilege on any security future.

(57)(A) The term “margin”, when used with respect to a security futures product, means the amount, type, and form of col-

lateral required to secure any extension or maintenance of credit, or the amount, type, and form of collateral required as a performance bond related to the purchase, sale, or carrying of a security futures product.

(B) The terms “margin level” and “level of margin”, when used with respect to a security futures product, mean the amount of margin required to secure any extension or maintenance of credit, or the amount of margin required as a performance bond related to the purchase, sale, or carrying of a security futures product.

(C) The terms “higher margin level” and “higher level of margin”, when used with respect to a security futures product, mean a margin level established by a national securities exchange registered pursuant to section 6(g) that is higher than the minimum amount established and in effect pursuant to section 7(c)(2)(B).

(58) AUDIT COMMITTEE.—The term “audit committee” means—

(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and

(B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.

(59) REGISTERED PUBLIC ACCOUNTING FIRM.—The term “registered public accounting firm” has the same meaning as in section 2 of the Sarbanes-Oxley Act of 2002.

(60) CREDIT RATING.—The term “credit rating” means an assessment of the creditworthiness of an obligor as an entity or with respect to specific securities or money market instruments.

(61) CREDIT RATING AGENCY.—The term “credit rating agency” means any person—

(A) engaged in the business of issuing credit ratings on the Internet or through another readily accessible means, for free or for a reasonable fee, but does not include a commercial credit reporting company;

(B) employing either a quantitative or qualitative model, or both, to determine credit ratings; and

(C) receiving fees from either issuers, investors, or other market participants, or a combination thereof.

(62) NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION.—The term “nationally recognized statistical rating organization” means a credit rating agency that—

(A) issues credit ratings certified by qualified institutional buyers, in accordance with section 15E(a)(1)(B)(ix), with respect to—

(i) financial institutions, brokers, or dealers;

(ii) insurance companies;

(iii) corporate issuers;

(iv) issuers of asset-backed securities (as that term is defined in section 1101(c) of part 229 of title 17, Code of Federal Regulations, as in effect on the date of enactment of this paragraph);



(v) issuers of government securities, municipal securities, or securities issued by a foreign government; or

(vi) a combination of one or more categories of obligors described in any of clauses (i) through (v); and

(B) is registered under section 15E.

(63) PERSON ASSOCIATED WITH A NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION.—The term “person associated with” a nationally recognized statistical rating organization means any partner, officer, director, or branch manager of a nationally recognized statistical rating organization (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with a nationally recognized statistical rating organization, or any employee of a nationally recognized statistical rating organization.

(64) QUALIFIED INSTITUTIONAL BUYER.—The term “qualified institutional buyer” has the meaning given such term in section 230.144A(a) of title 17, Code of Federal Regulations, or any successor thereto.

(79) ASSET-BACKED SECURITY.—The term “asset-backed security”—

(A) means a fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset, including—

(i) a collateralized mortgage obligation;

(ii) a collateralized debt obligation;

(iii) a collateralized bond obligation;

(iv) a collateralized debt obligation of asset-backed securities;

(v) a collateralized debt obligation of collateralized debt obligations; and

(vi) a security that the Commission, by rule, determines to be an asset-backed security for purposes of this section; and

(B) does not include a security issued by a finance subsidiary held by the parent company or a company controlled by the parent company, if none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company.

(65) ELIGIBLE CONTRACT PARTICIPANT.—The term “eligible contract participant” has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(66) MAJOR SWAP PARTICIPANT.—The term “major swap participant” has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(67) MAJOR SECURITY-BASED SWAP PARTICIPANT.—

(A) IN GENERAL.—The term “major security-based swap participant” means any person—

(i) who is not a security-based swap dealer; and

(ii)(I) who maintains a substantial position in security-based swaps for any of the major security-based swap categories, as such categories are determined by

the Commission, excluding both positions held for hedging or mitigating commercial risk and positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;

(II) whose outstanding security-based swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or

(III) that is a financial entity that—

(aa) is highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency; and

(bb) maintains a substantial position in outstanding security-based swaps in any major security-based swap category, as such categories are determined by the Commission.

(B) DEFINITION OF SUBSTANTIAL POSITION.—For purposes of subparagraph (A), the Commission shall define, by rule or regulation, the term “substantial position” at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States. In setting the definition under this subparagraph, the Commission shall consider the person’s relative position in uncleared as opposed to cleared security-based swaps and may take into consideration the value and quality of collateral held against counterparty exposures.

(C) SCOPE OF DESIGNATION.—For purposes of subparagraph (A), a person may be designated as a major security-based swap participant for 1 or more categories of security-based swaps without being classified as a major security-based swap participant for all classes of security-based swaps.

(68) SECURITY-BASED SWAP.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the term “security-based swap” means any agreement, contract, or transaction that—

(i) is a swap, as that term is defined under section 1a of the Commodity Exchange Act (without regard to paragraph (47)(B)(x) of such section); and

(ii) is based on—

(I) an index that is a narrow-based security index, including any interest therein or on the value thereof;

(II) a single security or loan, including any interest therein or on the value thereof; or

(III) the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in

a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.

(B) RULE OF CONSTRUCTION REGARDING MASTER AGREEMENTS.—The term “security-based swap” shall be construed to include a master agreement that provides for an agreement, contract, or transaction that is a security-based swap pursuant to subparagraph (A), together with all supplements to any such master agreement, without regard to whether the master agreement contains an agreement, contract, or transaction that is not a security-based swap pursuant to subparagraph (A), except that the master agreement shall be considered to be a security-based swap only with respect to each agreement, contract, or transaction under the master agreement that is a security-based swap pursuant to subparagraph (A).

(C) EXCLUSIONS.—The term “security-based swap” does not include any agreement, contract, or transaction that meets the definition of a security-based swap only because such agreement, contract, or transaction references, is based upon, or settles through the transfer, delivery, or receipt of an exempted security under paragraph (12), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in paragraph (29) as in effect on the date of enactment of the Futures Trading Act of 1982), unless such agreement, contract, or transaction is of the character of, or is commonly known in the trade as, a put, call, or other option.

(D) MIXED SWAP.—The term “security-based swap” includes any agreement, contract, or transaction that is as described in subparagraph (A) and also is based on the value of 1 or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than an event described in subparagraph (A)(ii)(III)).

(E) RULE OF CONSTRUCTION REGARDING USE OF THE TERM INDEX.—The term “index” means an index or group of securities, including any interest therein or based on the value thereof.

(69) SWAP.—The term “swap” has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(70) PERSON ASSOCIATED WITH A SECURITY-BASED SWAP DEALER OR MAJOR SECURITY-BASED SWAP PARTICIPANT.—

(A) IN GENERAL.—The term “person associated with a security-based swap dealer or major security-based swap participant” or “associated person of a security-based swap dealer or major security-based swap participant” means—

(i) any partner, officer, director, or branch manager of such security-based swap dealer or major security-

based swap participant (or any person occupying a similar status or performing similar functions);

(ii) any person directly or indirectly controlling, controlled by, or under common control with such security-based swap dealer or major security-based swap participant; or

(iii) any employee of such security-based swap dealer or major security-based swap participant.

(B) EXCLUSION.—Other than for purposes of section 15F(1)(2), the term “person associated with a security-based swap dealer or major security-based swap participant” or “associated person of a security-based swap dealer or major security-based swap participant” does not include any person associated with a security-based swap dealer or major security-based swap participant whose functions are solely clerical or ministerial.

(71) SECURITY-BASED SWAP DEALER.—

(A) IN GENERAL.—The term “security-based swap dealer” means any person who—

(i) holds themselves out as a dealer in security-based swaps;

(ii) makes a market in security-based swaps;

(iii) regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or

(iv) engages in any activity causing it to be commonly known in the trade as a dealer or market maker in security-based swaps.

(B) DESIGNATION BY TYPE OR CLASS.—A person may be designated as a security-based swap dealer for a single type or single class or category of security-based swap or activities and considered not to be a security-based swap dealer for other types, classes, or categories of security-based swaps or activities.

(C) EXCEPTION.—The term “security-based swap dealer” does not include a person that enters into security-based swaps for such person’s own account, either individually or in a fiduciary capacity, but not as a part of regular business.

(D) DE MINIMIS EXCEPTION.—The Commission shall exempt from designation as a security-based swap dealer an entity that engages in a de minimis quantity of security-based swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of any determination to exempt.

(72) APPROPRIATE FEDERAL BANKING AGENCY.—The term “appropriate Federal banking agency” has the same meaning as in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

(73) BOARD.—The term “Board” means the Board of Governors of the Federal Reserve System.

(74) PRUDENTIAL REGULATOR.—The term “prudential regulator” has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(75) SECURITY-BASED SWAP DATA REPOSITORY.—The term “security-based swap data repository” means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps.

(76) SWAP DEALER.—The term “swap dealer” has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(77) SECURITY-BASED SWAP EXECUTION FACILITY.—The term “security-based swap execution facility” means a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that—

(A) facilitates the execution of security-based swaps between persons; and

(B) is not a national securities exchange.

(78) SECURITY-BASED SWAP AGREEMENT.—

(A) IN GENERAL.—For purposes of sections 9, 10, 16, 20, and 21A of this Act, and section 17 of the Securities Act of 1933 (15 U.S.C. 77q), the term “security-based swap agreement” means a swap agreement as defined in section 206A of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note) of which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein.

(B) EXCLUSIONS.—The term “security-based swap agreement” does not include any security-based swap.

(80) EMERGING GROWTH COMPANY.—The term “emerging growth company” means an issuer that had total annual gross revenues of less than \$1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of—

(A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of \$1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) or more;

(B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933;

(C) the date on which such issuer has, during the previous 3-year period, issued more than \$1,000,000,000 in non-convertible debt; or

(D) the date on which such issuer is deemed to be a “large accelerated filer”, as defined in section 240.12b-2 of title 17, Code of Federal Regulations, or any successor thereto.

(80) FUNDING PORTAL.—The term “funding portal” means any person acting as an intermediary in a transaction involving the offer or sale of securities for the account of others, solely pursuant to section 4(6) of the Securities Act of 1933 (15 U.S.C. 77d(6)), that does not—

(A) offer investment advice or recommendations;

(B) solicit purchases, sales, or offers to buy the securities offered or displayed on its website or portal;

(C) compensate employees, agents, or other persons for such solicitation or based on the sale of securities displayed or referenced on its website or portal;

(D) hold, manage, possess, or otherwise handle investor funds or securities; or

(E) engage in such other activities as the Commission, by rule, determines appropriate.

(b) The Commission and the Board of Governors of the Federal Reserve System, as to matters within their respective jurisdictions, shall have power by rules and regulations to define technical, trade, accounting, and other terms used in this title, consistently with the provisions and purposes of this title.

(c) No provision of this title shall apply to, or be deemed to include, any executive department or independent establishment of the United States, or any lending agency which is wholly owned, directly or indirectly, by the United States, or any officer, agent, or employee of any such department, establishment, or agency, acting in the course of his official duty as such, unless such provision makes specific reference to such department, establishment, or agency.

(d) No issuer of municipal securities or officer or employee thereof acting in the course of his official duties as such shall be deemed to be a “broker”, “dealer”, or “municipal securities dealer” solely by reason of buying, selling, or effecting transactions in the issuer’s securities.

(e) CHARITABLE ORGANIZATIONS.—

(1) EXEMPTION.—Notwithstanding any other provision of this title, but subject to paragraph (2) of this subsection, a charitable organization, as defined in section 3(c)(10)(D) of the Investment Company Act of 1940, or any trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of such person’s employment or duties with such organization, shall not be deemed to be a “broker”, “dealer”, “municipal securities broker”, “municipal securities dealer”, “government securities broker”, or “government securities dealer” for purposes of this title solely because such organization or person buys, holds, sells, or trades in securities for its own account in its capacity as trustee or administrator of, or otherwise on behalf of or for the account of—

(A) such a charitable organization;

(B) a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940; or

(C) a trust or other donative instrument described in section 3(c)(10)(B) of the Investment Company Act of 1940, or the settlors (or potential settlors) or beneficiaries of any such trust or other instrument.

(2) LIMITATION ON COMPENSATION.—The exemption provided under paragraph (1) shall not be available to any charitable organization, or any trustee, director, officer, employee, or volunteer of such a charitable organization, unless each person who, on or after 90 days after the date of enactment of this subsection, solicits donations on behalf of such charitable organization from any donor to a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940, is either a volunteer or is engaged in the overall fund raising activities of a charitable organization and receives no commission or other special compensation based on the number or the value of donations collected for the fund.

(f) CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION.—Whenever pursuant to this title the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

(g) CHURCH PLANS.—No church plan described in section 414(e) of the Internal Revenue Code of 1986, no person or entity eligible to establish and maintain such a plan under the Internal Revenue Code of 1986, no company or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940, and no trustee, director, officer or employee of or volunteer for such plan, company, account, person, or entity, acting within the scope of that person's employment or activities with respect to such plan, shall be deemed to be a "broker", "dealer", "municipal securities broker", "municipal securities dealer", "government securities broker", "government securities dealer", "clearing agency", or "transfer agent" for purposes of this title—

(1) solely because such plan, company, person, or entity buys, holds, sells, trades in, or transfers securities or acts as an intermediary in making payments in connection with transactions in securities for its own account in its capacity as trustee or administrator of, or otherwise on behalf of, or for the account of, any church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940; and

(2) if no such person or entity receives a commission or other transaction-related sales compensation in connection with any activities conducted in reliance on the exemption provided by this subsection.

(h) LIMITED EXEMPTION FOR FUNDING PORTALS.—

(1) IN GENERAL.—The Commission shall, by rule, exempt, conditionally or unconditionally, a registered funding portal from the requirement to register as a broker or dealer under section 15(a)(1), provided that such funding portal—

(A) remains subject to the examination, enforcement, and other rulemaking authority of the Commission;

(B) is a member of a national securities association registered under section 15A; and

(C) is subject to such other requirements under this title as the Commission determines appropriate under such rule.

(2) NATIONAL SECURITIES ASSOCIATION MEMBERSHIP.—For purposes of sections 15(b)(8) and 15A, the term “broker or dealer” includes a funding portal and the term “registered broker or dealer” includes a registered funding portal, except to the extent that the Commission, by rule, determines otherwise, provided that a national securities association shall only examine for and enforce against a registered funding portal rules of such national securities association written specifically for registered funding portals.

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## EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

### SHORT TITLE AND TABLE OF CONTENTS

SECTION 1. This Act may be cited as the “Employee Retirement Income Security Act of 1974”.

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## TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

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## DEFINITIONS

SEC. 3. For purposes of this title:

(1) The terms “employee welfare benefit plan” and “welfare plan” mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms “employee pension benefit plan” and “pension plan” mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan. An applicable voluntary early retirement incentive plan (as defined in section 457(e)(11)(D)(ii) of the Internal Revenue Code of 1986) making payments or supplements described in section 457(e)(11)(D)(i) of such Code, and an applicable employment retention plan (as defined in section 457(f)(4)(C) of such Code) making payments of benefits described in section 457(f)(4)(A) of such Code, shall, for purposes of this title, be treated as a welfare plan (and not a pension plan) with respect to such payments and supplements.

(C) A pooled employer plan shall be treated as—

(i) a single employee pension benefit plan or single pension plan; and

(ii) a plan to which section 210(a) applies.

(3) The term “employee benefit plan” or “plan” means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

(4) The term “employee organization” means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees’ beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

(5) The term “employer” means 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.

(6) The term “employee” means any individual employed by an employer.

(7) The term “participant” means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term “beneficiary” means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term “person” means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(10) The term “State” includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone. The term “United States” when used in the geographic sense means the States and the Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331–1343).

(11) The term “commerce” means trade, traffic, commerce, transportation, or communication between any State and any place outside thereof.

(12) The term “industry or activity affecting commerce” means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry “affecting commerce” within the meaning of the Labor Management Relations Act, 1947, or the Railway Labor Act.

(13) The term “Secretary” means the Secretary of Labor.

(14) The term “party in interest” means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of the Internal Revenue Code of 1986 is permitted to make payments under section 4223 shall be treated as a party in interest with respect to such trust.

(15) The term “relative” means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant.

(16)(A) The term “administrator” means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor;  
or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term “plan sponsor” means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, (iii) in the case of a plan established or 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 who establish or maintain the plan, or (iv) in the case of a pooled employer plan, the pooled plan provider.

(17) The term “separate account” means an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(18) The term “adequate consideration” when used in part 4 of subtitle B means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, or (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

(19) The term “nonforfeitable” when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant’s service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 203(a)(3).

(20) The term “security” has the same meaning as such term has under section 2(1) of the Securities Act of 1933 (15 U.S.C. 77b(1)).

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administra-

tion of such plan. Such term includes any person designated under section 405(c)(1)(B).

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940, such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this title, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

(22) The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to—

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 204(b)(1)(G).

(23) The term "accrued benefit" means—

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3), expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under section 204(c)(2)(B) with respect to the employee's accumulated contribution.

(24) The term "normal retirement age" means the earlier of—

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of—

(i) the time a plan participant attains age 65, or

(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

(25) The term "vested liabilities" means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable.

(26) The term "current value" means fair market value where available and otherwise the fair value as determined in good faith by a trustee or a named fiduciary (as defined in section 402(a)(2)) pursuant to the terms of the plan and in accordance with regula-

tions of the Secretary, assuming an orderly liquidation at the time of such determination.

(27) The term “present value”, with respect to a liability, means the value adjusted to reflect anticipated events. Such adjustments shall conform to such regulations as the Secretary of the Treasury may prescribe.

(28) The term “normal service cost” or “normal cost” means the annual cost of future pension benefits and administrative expenses assigned, under an actuarial cost method, to years subsequent to a particular valuation date of a pension plan. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(29) The term “accrued liability” means the excess of the present value, as of a particular valuation date of a pension plan, of the projected future benefit costs and administrative expenses for all plan participants and beneficiaries over the present value of future contributions for the normal cost of all applicable plan participants and beneficiaries. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(30) The term “unfunded accrued liability” means the excess of the accrued liability, under an actuarial cost method which so provides, over the present value of the assets of a pension plan. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(31) The term “advance funding actuarial cost method” or “actuarial cost method” means a recognized actuarial technique utilized for establishing the amount and incidence of the annual actuarial cost of pension plan benefits and expenses. Acceptable actuarial cost methods shall include the accrued benefit cost method (unit credit method), the entry age normal cost method, the individual level premium cost method, the aggregate cost method, the attained age normal cost method, and the frozen initial liability cost method. The terminal funding cost method and the current funding (pay-as-you-go) cost method are not acceptable actuarial cost methods. The Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods.

(32) The term “governmental plan” means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term “governmental plan” also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act (59 Stat. 669). The term “governmental plan” includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of the Internal Revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function)

(33)(A) The term “church plan” means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1986.

(B) The term “church plan” does not include a plan—

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of the Internal Revenue Code of 1986), or

(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph—

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, 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, if such organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes—

(I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of the Internal Revenue Code of 1986 and which is controlled by or associated with a church or a convention or association of churches; and

(III) an individual described in clause (v).

(iii) A church or a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1986 shall be deemed the employer of any individual included as an employee under clause (ii).

(iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(v) If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of the Internal Revenue Code of 1986 and which is controlled by or associated with a church or a convention or association of churches, the church plan shall not fail to meet the requirements of this paragraph merely because the plan—

(I) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(II) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7) of the Internal Revenue Code of 1986) at the time of such separation from service.

(D)(i) If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1986 fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

(ii) If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(iii) For purposes of this subparagraph, the term "correction period" means—

(I) the period ending 270 days after the date of mailing by the Secretary of the Treasury of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or

(II) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary of the Treasury on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(III) any additional period which the Secretary of the Treasury determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant—

(A) for the purposes of section 202, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 204, shall be treated as an individual account plan to the



extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

(36) The term “excess benefit plan” means a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of the Internal Revenue Code of 1986 on plans to which that section applies, without regard to whether the plan is funded. To the extent that a separable part of a plan (as determined by the Secretary of Labor) maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan.

(37)(A) The term “multiemployer plan” means a plan—

- (i) to which more than one employer is required to contribute,
- (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and
- (iii) which satisfies such other requirements as the Secretary may prescribe by regulation.

(B) For purposes of this paragraph, all trades or businesses (whether or not incorporated) which are under common control within the meaning of section 4001(b)(1) are considered a single employer.

(C) Notwithstanding subparagraph (A), a plan is a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding its termination date.

(D) For purposes of this title, notwithstanding the preceding provisions of this paragraph, for any plan year which began before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, the term “multiemployer plan” means a plan described in section 3(37) of this Act as in effect immediately before such date.

(E) Within one year after the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, a multiemployer plan may irrevocably elect, pursuant to procedures established by the corporation and subject to the provisions of sections 4403(b) and (c), that the plan shall not be treated as a multiemployer plan for all purposes under this Act or the Internal Revenue Code of 1954 if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980—

- (i) the plan was not a multiemployer plan because the plan was not a plan described in section 3(37)(A)(iii) of this Act and section 414(f)(1)(C) of the Internal Revenue Code of 1954 (as such provisions were in effect on the day before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980); and
- (ii) the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the corporation, the Secretary of Labor and the Secretary of the Treasury.

(F)(i) For purposes of this title a qualified football coaches plan—

- (I) shall be treated as a multiemployer plan to the extent not inconsistent with the purposes of this subparagraph; and

(II) notwithstanding section 401(k)(4)(B) of the Internal Revenue Code of 1986, may include a qualified cash and deferred arrangement.

(ii) For purposes of this subparagraph, the term “qualified football coaches plan” means any defined contribution plan which is established and maintained by an organization—

(I) which is described in section 501(c) of such Code;

(II) the membership of which consists entirely of individuals who primarily coach football as full-time employees of 4-year colleges or universities described in section 170(b)(1)(A)(ii) of such Code; and

(III) which was in existence on September 18, 1986.

(G)(i) Within 1 year after the enactment of the Pension Protection Act of 2006—

(I) an election under subparagraph (E) may be revoked, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, if, for each of the 3 plan years prior to the date of the enactment of that Act, the plan would have been a multiemployer plan but for the election under subparagraph (E), and

(II) a plan that meets the criteria in clauses (i) and (ii) of subparagraph (A) of this paragraph or that is described in clause (vi) may, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, elect to be a multiemployer plan, if—

(aa) for each of the 3 plan years immediately preceding the first plan year for which the election under this paragraph is effective with respect to the plan, the plan has met those criteria or is so described,

(bb) substantially all of the plan’s employer contributions for each of those plan years were made or required to be made by organizations that were exempt from tax under section 501 of the Internal Revenue Code of 1986, and

(cc) the plan was established prior to September 2, 1974.

(ii) An election under this subparagraph shall be effective for all purposes under this Act and under the Internal Revenue Code of 1986, starting with any plan year beginning on or after January 1, 1999, and ending before January 1, 2008, as designated by the plan in the election made under clause (i)(II).

(iii) Once made, an election under this subparagraph shall be irrevocable, except that a plan described in clause (i)(II) shall cease to be a multiemployer plan as of the plan year beginning immediately after the first plan year for which the majority of its employer contributions were made or required to be made by organizations that were not exempt from tax under section 501 of the Internal Revenue Code of 1986.

(iv) The fact that a plan makes an election under clause (i)(II) does not imply that the plan was not a multiemployer plan prior to the date of the election or would not be a multiemployer plan without regard to the election.

(v)(I) No later than 30 days before an election is made under this subparagraph, the plan administrator shall provide notice of the pending election to each plan participant and bene-

ficiary, each labor organization representing such participants or beneficiaries, and each employer that has an obligation to contribute to the plan, describing the principal differences between the guarantee programs under title IV and the benefit restrictions under this title for single employer and multiemployer plans, along with such other information as the plan administrator chooses to include.

(II) Within 180 days after the date of enactment of the Pension Protection Act of 2006, the Secretary shall prescribe a model notice under this clause.

(III) A plan administrator's failure to provide the notice required under this subparagraph shall be treated for purposes of section 502(c)(2) as a failure or refusal by the plan administrator to file the annual report required to be filed with the Secretary under section 101(b)(1).

(vi) A plan is described in this clause if it is a plan sponsored by an organization which is described in section 501(c)(5) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code and which was established in Chicago, Illinois, on August 12, 1881.

(vii) For purposes of this Act and the Internal Revenue Code of 1986, a plan making an election under this subparagraph shall be treated as maintained pursuant to a collective bargaining agreement if a collective bargaining agreement, expressly or otherwise, provides for or permits employer contributions to the plan by one or more employers that are signatory to such agreement, or participation in the plan by one or more employees of an employer that is signatory to such agreement, regardless of whether the plan was created, established, or maintained for such employees by virtue of another document that is not a collective bargaining agreement.

(38) The term "investment manager" means any fiduciary (other than a trustee or named fiduciary, as defined in section 402(a)(2))—

(A) who has the power to manage, acquire, or dispose of any asset of a plan;

(B) who (i) is registered as an investment adviser under the Investment Advisers Act of 1940; (ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary; (iii) is a bank, as defined in that Act; or (iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.

(39) The terms "plan year" and "fiscal year of the plan" mean, with respect to a plan, the calendar, policy, or fiscal year on which the records of the plan are kept.

(40)(A) The term "multiple employer welfare arrangement" means an employee welfare benefit plan, or any other arrangement

(other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained—

(i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements,

(ii) by a rural electric cooperative, or

(iii) by a rural telephone cooperative association.

(B) For purposes of this paragraph—

(i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,

(ii) the term “control group” means a group of trades or businesses under common control,

(iii) the determination of whether a trade or business is under “common control” with another trade or business shall be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether employees of two or more trades or businesses are treated as employed by a single employer under section 4001(b), except that, for purposes of this paragraph, common control shall not be based on an interest of less than 25 percent,

(iv) the term “rural electric cooperative” means—

(I) any organization which is exempt from tax under section 501(a) of the Internal Revenue Code of 1986 and which is engaged primarily in providing electric service on a mutual or cooperative basis, and

(II) any organization described in paragraph (4) or (6) of section 501(c) of the Internal Revenue Code of 1986 which is exempt from tax under section 501(a) of such Code and at least 80 percent of the members of which are organizations described in subclause (I), and

(v) the term “rural telephone cooperative association” means an organization described in paragraph (4) or (6) of section 501(c) of the Internal Revenue Code of 1986 which is exempt from tax under section 501(a) of such Code and at least 80 percent of the members of which are organizations engaged primarily in providing telephone service to rural areas of the United States on a mutual, cooperative, or other basis.

(41) SINGLE-EMPLOYER PLAN.—The term “single-employer plan” means an employee benefit plan other than a multiemployer plan.

(42) the term “plan assets” means plan assets as defined by such regulations as the Secretary may prescribe, except that under such regulations the assets of any entity shall not be treated as plan assets if, immediately after the most recent acquisition of any equity interest in the entity, less than 25 percent of the total value of each class of equity interest in the entity is held by benefit plan investors. For purposes of determinations pursuant to this paragraph, the value of any equity interest held by a person (other than such a benefit plan investor) who has discretionary authority or control with respect to the assets of the entity or any person who provides investment advice for a fee (direct or indirect) with respect to such

assets, or any affiliate of such a person, shall be disregarded for purposes of calculating the 25 percent threshold. An entity shall be considered to hold plan assets only to the extent of the percentage of the equity interest held by benefit plan investors. For purposes of this paragraph, the term “benefit plan investor” means an employee benefit plan subject to part 4, any plan to which section 4975 of the Internal Revenue Code of 1986 applies, and any entity whose underlying assets include plan assets by reason of a plan’s investment in such entity.

(43) POOLED EMPLOYER PLAN.—

(A) IN GENERAL.—The term “pooled employer plan” means a plan—

(i) which is an individual account plan established or maintained for the purpose of providing benefits to the employees of 2 or more employers;

(ii) which is a plan described in section 401(a) of the Internal Revenue Code of 1986 which includes a trust exempt from tax under [section 501(a) of such Code or] *501(a) of such Code, a plan that consists of contracts described in section 403(b) of such Code, or a plan that consists of individual retirement accounts described in section 408 of such Code (including by reason of subsection (c) thereof); and*

(iii) the terms of which meet the requirements of subparagraph (B).

Such term shall not include a plan maintained by employers which have a common interest other than having adopted [the plan.] *the plan, but such term shall include any program (other than a governmental plan) maintained for the benefit of the employees of more than 1 employer that consists of contracts described in section 403(b) of such Code and that meets the requirements of subparagraph (A) or (B) of section 413(e)(1) of such Code.*

(B) REQUIREMENTS FOR PLAN TERMS.—The requirements of this subparagraph are met with respect to any plan if the terms of the plan—

(i) designate a pooled plan provider and provide that the pooled plan provider is a named fiduciary of the plan;

(ii) designate one or more [trustees meeting the requirements of section 408(a)(2) of the Internal Revenue Code of 1986] *trustees (or other fiduciaries in the case of a plan that consists of contracts described in section 403(b) of the Internal Revenue Code of 1986) meeting the requirements of section 408(a)(2) of such Code (other than an employer in the plan) to be responsible for collecting contributions to, and [holding] holding (or causing to be held under the terms of a plan consisting of such contracts) the assets of, the plan and require such trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic;*

(iii) provide that each employer in the plan retains fiduciary responsibility for—

(I) the selection and monitoring in accordance with section 404(a) of the person designated as the pooled plan provider and any other person who, in addition to the pooled plan provider, is designated as a named fiduciary of the plan; and

(II) to the extent not otherwise delegated to another fiduciary by the pooled plan provider and subject to the provisions of section 404(c), the investment and management of the portion of the plan's assets attributable to the employees of the employer (or beneficiaries of such employees);

(iv) 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 section 208 or paragraph (44)(C)(i)(II);

(v) require—

(I) the pooled plan provider to provide to employers in the plan any disclosures or other information which the Secretary may require, including any disclosures or other information to facilitate the selection or any monitoring of the pooled plan provider by employers in the plan; and

(II) each employer in the plan to take such actions as the Secretary or the pooled plan provider determines are necessary to administer the plan or for the plan to meet any requirement applicable under this Act or the Internal Revenue Code of 1986 to a plan described in **section 401(a) of such Code or** *401(a) of such Code, a plan that consists of contracts described in section 403(b) of such Code, or to a plan that consists of individual retirement accounts described in section 408 of such Code (including by reason of subsection (c) thereof), whichever is applicable, including providing any disclosures or other information which the Secretary may require or which the pooled plan provider otherwise determines are necessary to administer the plan or to allow the plan to meet such requirements; and*

(vi) provide that any disclosure or other information required to be provided under clause (v) 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.

(C) EXCEPTIONS.—The term “pooled employer plan” does not include—

(i) a multiemployer plan; or

(ii) a plan established before the date of the enactment of the Setting Every Community Up for Retirement Enhancement Act of 2019 unless the plan administrator elects that the plan will be treated as a pooled employer plan and the plan meets the require-

ments of this title applicable to a pooled employer plan established on or after such date.

(D) TREATMENT OF EMPLOYERS AS PLAN SPONSORS.—Except with respect to the administrative duties of the pooled plan provider described in paragraph (44)(A)(i), each employer in a pooled employer plan shall be treated as the plan sponsor with respect to the portion of the plan attributable to employees of such employer (or beneficiaries of such employees).

(44) POOLED PLAN PROVIDER.—

(A) IN GENERAL.—The term “pooled plan provider” means a person who—

(i) is designated by the terms of a pooled employer plan as a named fiduciary, as the plan administrator, and as the person responsible for the performance of all administrative duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan) which are reasonably necessary to ensure that—

(I) the plan meets any requirement applicable under this Act or the Internal Revenue Code of 1986 to a plan described in [section 401(a) of such Code or] *401(a) of such Code, a plan that consists of contracts described in section 403(b) of such Code, or to a plan that consists of individual retirement accounts described in section 408 of such Code (including by reason of subsection (c) thereof), whichever is applicable; and*

(II) each employer in the plan takes such actions as the Secretary or pooled plan provider determines are necessary for the plan to meet the requirements described in subclause (I), including providing the disclosures and information described in paragraph (43)(B)(v)(II);

(ii) registers as a pooled plan provider with the Secretary, and provides to the Secretary such other information as the Secretary may require, before beginning operations as a pooled plan provider;

(iii) acknowledges in writing that such person is a named fiduciary, and the plan administrator, with respect to the pooled employer plan; and

(iv) is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the pooled employer plan are bonded in accordance with section 412.

(B) AUDITS, EXAMINATIONS AND INVESTIGATIONS.—The Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of this paragraph and paragraph (43).

(C) GUIDANCE.—The Secretary shall issue such guidance as the Secretary determines appropriate to carry out this paragraph and paragraph (43), including guidance—

(i) to identify the administrative duties and other actions required to be performed by a pooled plan provider under either such paragraph; and

(ii) which requires in appropriate cases that if an employer in the plan fails to take the actions required under subparagraph (A)(i)(II)—

(I) the assets of the plan attributable to employees of such employer (or beneficiaries of such employees) are transferred to a plan maintained only by such employer (or its successor), to an eligible retirement plan as defined in section 402(c)(8)(B) of the Internal Revenue Code of 1986 for each individual whose account is transferred, or to any other arrangement that the Secretary determines is appropriate in such guidance; and

(II) such employer (and not the plan with respect to which the failure occurred or any other employer in such plan) shall, except to the extent provided in such guidance, be liable for any liabilities with respect to such plan attributable to employees of such employer (or beneficiaries of such employees).

The Secretary shall take into account under clause (ii) 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 requirements described in subparagraph (A)(i)(II) has continued over a period of time that demonstrates a lack of commitment to compliance. The Secretary may waive the requirements of subclause (ii)(I) in appropriate circumstances if the Secretary determines it is in the best interests of the employees of the employer referred to in such clause (and the beneficiaries of such employees) to retain the assets in the plan with respect to which the employer's failure occurred.

(D) GOOD FAITH COMPLIANCE WITH LAW BEFORE GUIDANCE.—An employer or pooled plan provider shall not be treated as failing to meet a requirement of guidance issued by the Secretary under subparagraph (C) if, before the issuance of such guidance, the employer or pooled plan provider complies in good faith with a reasonable interpretation of the provisions of this paragraph, or paragraph (43), to which such guidance relates.

(E) AGGREGATION RULES.—For purposes of this paragraph, in determining whether a person meets the requirements of this paragraph 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 under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as one person.

\* \* \* \* \*



## SUBTITLE B—REGULATORY PROVISIONS

## PART 1—REPORTING AND DISCLOSURE

\* \* \* \* \*

## REPORTING OF PARTICIPANT'S BENEFIT RIGHTS

## SEC. 105. (a) REQUIREMENTS TO PROVIDE PENSION BENEFIT STATEMENTS.—

## (1) REQUIREMENTS.—

(A) INDIVIDUAL ACCOUNT PLAN.—The administrator of an individual account plan (other than a one-participant retirement plan described in section 101(i)(8)(B)) shall furnish a pension benefit statement—

(i) at least once each calendar quarter to a participant or beneficiary who has the right to direct the investment of assets in his or her account under the plan,

(ii) at least once each calendar year to a participant or beneficiary who has his or her own account under the plan but does not have the right to direct the investment of assets in that account, and

(iii) upon written request to a plan beneficiary not described in clause (i) or (ii).

(B) DEFINED BENEFIT PLAN.—The administrator of a defined benefit plan (other than a one-participant retirement plan described in section 101(i)(8)(B)) shall furnish a pension benefit statement—

(i) at least once every 3 years to each participant with a nonforfeitable accrued benefit and who is employed by the employer maintaining the plan at the time the statement is to be furnished, and

(ii) to a participant or beneficiary of the plan upon written request.

Information furnished under clause (i) to a participant may be based on reasonable estimates determined under regulations prescribed by the Secretary, in consultation with the Pension Benefit Guaranty Corporation.

## (2) STATEMENTS.—

(A) IN GENERAL.—A pension benefit statement under paragraph (1)—

(i) shall indicate, on the basis of the latest available information—

(I) the total benefits accrued, and

(II) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable,

(ii) shall include an explanation of any permitted disparity under section 401(l) of the Internal Revenue Code of 1986 or any floor-offset arrangement that may be applied in determining any accrued benefits described in clause (i),

(iii) shall be written in a manner calculated to be understood by the average plan participant, and

(iv) *subject to subparagraph (E)*, may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant or beneficiary.

(B) **ADDITIONAL INFORMATION.**—In the case of an individual account plan, any pension benefit statement under clause (i) or (ii) of paragraph (1)(A) shall include—

(i) the value of each investment to which assets in the individual account have been allocated, determined as of the most recent valuation date under the plan, including the value of any assets held in the form of employer securities, without regard to whether such securities were contributed by the plan sponsor or acquired at the direction of the plan or of the participant or beneficiary,

(ii) in the case of a pension benefit statement under paragraph (1)(A)(i)—

(I) an explanation of any limitations or restrictions on any right of the participant or beneficiary under the plan to direct an investment,

(II) an explanation, written in a manner calculated to be understood by the average plan participant, of the importance, for the long-term retirement security of participants and beneficiaries, of a well-balanced and diversified investment portfolio, including a statement of the risk that holding more than 20 percent of a portfolio in the security of one entity (such as employer securities) may not be adequately diversified, and

(III) a notice directing the participant or beneficiary to the Internet website of the Department of Labor for sources of information on individual investing and diversification, and

(iii) the lifetime income disclosure described in subparagraph (D)(i).

In the case of pension benefit statements described in clause (i) of paragraph (1)(A), a lifetime income disclosure under clause (iii) of this subparagraph shall be required to be included in only one pension benefit statement during any one 12-month period.

(C) **ALTERNATIVE NOTICE.**—The requirements of subparagraph (A)(i)(II) are met if, at least annually and in accordance with requirements of the Secretary, the plan—

(i) updates the information described in such paragraph which is provided in the pension benefit statement, or

(ii) provides in a separate statement such information as is necessary to enable a participant or beneficiary to determine their nonforfeitable vested benefits.

(D) **LIFETIME INCOME DISCLOSURE.**—

(i) **IN GENERAL.**—

(I) **DISCLOSURE.**—A lifetime income disclosure shall set forth the lifetime income stream equiva-

lent of the total benefits accrued with respect to the participant or beneficiary.

(II) LIFETIME INCOME STREAM EQUIVALENT OF THE TOTAL BENEFITS ACCRUED.—For purposes of this subparagraph, the term “lifetime income stream equivalent of the total benefits accrued” means the amount of monthly payments the participant or beneficiary would receive if the total accrued benefits of such participant or beneficiary were used to provide lifetime income streams described in subclause (III), based on assumptions specified in rules prescribed by the Secretary.

(III) LIFETIME INCOME STREAMS.—The lifetime income streams described in this subclause are a qualified joint and survivor annuity (as defined in section 205(d)), based on assumptions specified in rules prescribed by the Secretary, including the assumption that the participant or beneficiary has a spouse of equal age, and a single life annuity. Such lifetime income streams may have a term certain or other features to the extent permitted under rules prescribed by the Secretary.

(ii) MODEL DISCLOSURE.—Not later than 1 year after the date of the enactment of the Setting Every Community Up for Retirement Enhancement Act of 2019, the Secretary shall issue a model lifetime income disclosure, written in a manner so as to be understood by the average plan participant, which—

(I) explains that the lifetime income stream equivalent is only provided as an illustration;

(II) explains that the actual payments under the lifetime income stream described in clause (i)(III) which may be purchased with the total benefits accrued will depend on numerous factors and may vary substantially from the lifetime income stream equivalent in the disclosures;

(III) explains the assumptions upon which the lifetime income stream equivalent was determined; and

(IV) provides such other similar explanations as the Secretary considers appropriate.

(iii) ASSUMPTIONS AND RULES.—Not later than 1 year after the date of the enactment of the Setting Every Community Up for Retirement Enhancement Act of 2019, the Secretary shall—

(I) prescribe assumptions which administrators of individual account plans may use in converting total accrued benefits into lifetime income stream equivalents for purposes of this subparagraph; and

(II) issue interim final rules under clause (i).

In prescribing assumptions under subclause (I), the Secretary may prescribe a single set of specific assumptions (in which case the Secretary may issue tables or factors which facilitate such conversions), or

ranges of permissible assumptions. To the extent that an accrued benefit is or may be invested in a lifetime income stream described in clause (i)(III), the assumptions prescribed under subclause (I) shall, to the extent appropriate, permit administrators of individual account plans to use the amounts payable under such lifetime income stream as a lifetime income stream equivalent.

(iv) **LIMITATION ON LIABILITY.**—No plan fiduciary, plan sponsor, or other person shall have any liability under this title solely by reason of the provision of lifetime income stream equivalents which are derived in accordance with the assumptions and rules described in clause (iii) and which include the explanations contained in the model lifetime income disclosure described in clause (ii). This clause shall apply without regard to whether the provision of such lifetime income stream equivalent is required by subparagraph (B)(iii).

(v) **EFFECTIVE DATE.**—The requirement in subparagraph (B)(iii) shall apply to pension benefit statements furnished more than 12 months after the latest of the issuance by the Secretary of—

- (I) interim final rules under clause (i);
- (II) the model disclosure under clause (ii); or
- (III) the assumptions under clause (iii).

(E) **PROVISION OF PAPER STATEMENTS.**—*With respect to at least 1 pension benefit statement furnished for a calendar year with respect to an individual account plan under paragraph (1)(A), and with respect to at least 1 pension benefit statement furnished every 3 calendar years with respect to a defined benefit plan under paragraph (1)(B), such statement shall be furnished on paper in written form except—*

*(i) in the case of a plan that furnishes such statement in accordance with section 2520.104b-1(c) of title 29, Code of Federal Regulations; or*

*(ii) in the case of a plan that permits a participant or beneficiary to request that the statements referred to in the matter preceding clause (i) be furnished by electronic delivery, if the participant or beneficiary requests that such statements be delivered electronically and the statements are so delivered.*

(3) **DEFINED BENEFIT PLANS.**—

(A) **ALTERNATIVE NOTICE.**—In the case of a defined benefit plan, the requirements of paragraph (1)(B)(i) shall be treated as met with respect to a participant if at least once each year the administrator provides to the participant notice of the availability of the pension benefit statement and the ways in which the participant may obtain such statement. Such notice may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant.

(B) **YEARS IN WHICH NO BENEFITS ACCRUE.**—The Secretary may provide that years in which no employee or

former employee benefits (within the meaning of section 410(b) of the Internal Revenue Code of 1986) under the plan need not be taken into account in determining the 3-year period under paragraph (1)(B)(i).

(b) **LIMITATION ON NUMBER OF STATEMENTS.**—In no case shall a participant or beneficiary of a plan be entitled to more than 1 statement described in subparagraph (A)(iii) or (B)(ii) of subsection (a)(1), whichever is applicable, in any 12-month period.

(c) Each administrator required to register under section 6057 of the Internal Revenue Code of 1986 shall, before the expiration of the time prescribed for such registration, furnish to each participant described in subsection (a)(2)(C) of such section, an individual statement setting forth the information with respect to such participant required to be contained in the registration statement required by section 6057(a)(2) of such Code. Such statement shall also include a notice to the participant of any benefits which are forfeitable if the participant dies before a certain date.

\* \* \* \* \*

**SEC. 111. ELIMINATING UNNECESSARY PLAN REQUIREMENTS RELATED TO UNENROLLED PARTICIPANTS.**

(a) *IN GENERAL.*—Notwithstanding any other provision of this title, with respect to any individual account plan, no disclosure, notice, or other plan document (other than the notices and documents described in paragraphs (1) and (2)) shall be required to be furnished under this title to any unenrolled participant if the unenrolled participant receives—

(1) an annual reminder notice of such participant's eligibility to participate in such plan and any applicable election deadlines under the plan; and

(2) any document requested by such participant which the participant would be entitled to receive without regard to this section.

(b) *UNENROLLED PARTICIPANT.*—For purposes of this section, the term “unenrolled participant” means an employee who—

(1) is eligible to participate in an individual account plan;

(2) has received all required notices, disclosures, and other plan documents, including the summary plan description, required to be furnished under this title in connection with such participant's initial eligibility to participate in such plan;

(3) is not participating in such plan; and

(4) does not have a balance in the plan.

For purposes of this section, any eligibility to participate in the plan following any period for which such employee was not eligible to participate shall be treated as initial eligibility.

(c) *ANNUAL REMINDER NOTICE.*—For purposes of this section, the term “annual reminder notice” means a notice provided in accordance with section 2520.104b-1 of title 29, Code of Federal Regulations (or any successor regulation), which—

(1) is furnished in connection with the annual open season election period with respect to the plan or, if there is no such period, is furnished within a reasonable period prior to the beginning of each plan year;

(2) notifies the unenrolled participant of—

- (A) the unenrolled participant's eligibility to participate in the plan; and*
- (B) the key benefits under the plan and the key rights and features under the plan affecting such benefits; and*
- (3) provides such information in a prominent manner calculated to be understood by the average participant.*

#### REPEAL AND EFFECTIVE DATE

SEC. [111.] 112. (a)(1) The Welfare and Pension Plans Disclosure Act is repealed except that such Act shall continue to apply to any conduct and events which occurred before the effective date of this part.

(2)

(b)(1) Except as provided in paragraph (2), this part (including the amendments and repeals made by subsection (a)) shall take effect on January 1, 1975.

(2) In the case of a plan which has a plan year which begins before January 1, 1975, and ends after December 31, 1974, the Secretary may postpone by regulation the effective date of the repeal of any provision of the Welfare and Pension Plans Disclosure Act (and of any amendment made by subsection (a)(2)) and the effective date of any provision of this part, until the beginning of the first plan year of such plan which begins after January 1, 1975.

(c) The provisions of this title authorizing the Secretary to promulgate regulations shall take effect on the date of enactment of this Act.

(d) Subsections (b) and (c) shall not apply with respect to amendments made to this part in provisions enacted after the date of the enactment of this Act.

#### PART 2—PARTICIPATION AND VESTING

\* \* \* \* \*

#### MINIMUM VESTING STANDARDS

SEC. 203. (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2)(A)(i) In the case of a defined benefit plan, a plan satisfies the requirements of this paragraph if it satisfies the requirements of clause (ii) or (iii).

(ii) A plan satisfies the requirements of this clause if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(iii) A plan satisfies the requirements of this clause if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

<b>Years of service:</b>	<b>The nonforfeitable percentage is:</b>
3 .....	20
4 .....	40
5 .....	60
6 .....	80
7 or more .....	100.

(B)(i) In the case of an individual account plan, a plan satisfies the requirements of this paragraph if it satisfies the requirements of clause (ii) or (iii).

(ii) A plan satisfies the requirements of this clause if an employee who has completed at least 3 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(iii) A plan satisfies the requirements of this clause if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

<b>Years of service:</b>	<b>The nonforfeitable percentage is:</b>
2 .....	20
3 .....	40
4 .....	60
5 .....	80
6 or more .....	100.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 205).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 302(d)(2).

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit de-

rived from mandatory contributions (as defined in the last sentence of section 204(c)(2)(C)) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 204(c)(2)(C) (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). The plan provision required under this clause may provide that such repayment must be made (I) in the case of a withdrawal on account of separation from service, before the earlier of 5 years after the first date on which the participant is subsequently re-employed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (II) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before the date of the enactment of this Act, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before the date of the enactment of this Act if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after the date of the enactment of this Act. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) CROSS REFERENCE.—For nonforfeitable where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 206(c).

(E)(i) A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

(ii) A participant's right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because—

(I) the plan is amended to reduce benefits under section 4244A or 4281, or

(II) benefit payments under the plan may be suspended under section 4245 or 4281.



(F) A matching contribution (within the meaning of section 401(m) of the Internal Revenue Code of 1986) shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is treated as an excess contribution under section 401(k)(8)(B) of such Code, an excess deferral under section 402(g)(2)(A) of such Code, an erroneous automatic contribution under section 414(w) of such Code, or an excess aggregate contribution under section 401(m)(6)(B) of such Code.

(b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2), all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:

(A) years of service before age 18,

(B) years of service during a period for which the employee declined to contribute to a plan requiring employee contributions;

(C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury;

(D) service not required to be taken into account under paragraph (3);

(E) years of service before January 1, 1971, unless the employee has had at least 3 years of service after December 31, 1970;

(F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date; and

(G) in the case of a multiemployer plan, years of service—

(i) with an employer after—

(I) a complete withdrawal of such employer from the plan (within the meaning of section 4203), or

(II) to the extent permitted by regulations prescribed by the Secretary of the Treasury, a partial withdrawal described in section 4205(b)(2)(A)(i) of this title in connection with the decertification of the collective bargaining representative; and

(ii) with any employer under the plan after the termination date of the plan under section 4048.

(2)(A) For purposes of this section, except as provided in subparagraph (C), the term “year of service” means a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service.

(B) For purposes of this section, the term “hour of service” has the meaning provided by section 202(a)(3)(C).

(C) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term “year of service” shall be such period as determined under regulations of the Secretary.

(D) For purposes of this section, in the case of any maritime industry, 125 days of service shall be treated as 1,000 hours of serv-

ice. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(3)(A) For purposes of this paragraph, the term “1-year break in service” means a calendar year, plan year, or other 12-consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has not completed more than 500 hours of service.

(B) For purposes of paragraph (1), in the case of any employee who has any 1-year break in service, years of service before such break shall not be required to be taken into account until he has completed a year of service after his return.

(C) For purposes of paragraph (1), in the case of any participant in an individual account plan or an insured defined benefit plan which satisfies the requirements of subsection 204(b)(1)(F) who has 5 consecutive 1-year breaks in service, years of service after such 5-year period shall not be required to be taken into account for purposes of determining the nonforfeitable percentage of his accrued benefit derived from employer contributions which accrued before such break.

(D)(i) For purposes of paragraph (1), in the case of a nonvested participant, years of service with the employer or employers maintaining the plan before any period of consecutive 1-year breaks in service shall not be required to be taken into account if the number of consecutive 1-year breaks in service within such period equals or exceeds the greater of—

(I) 5, or

(II) the aggregate number of years of service before such period.

(ii) If any years of service are not required to be taken into account by reason of a period of breaks in service to which clause (i) applies, such years of service shall not be taken into account in applying clause (i) to a subsequent period of breaks in service.

(iii) For purposes of clause (i), the term “nonvested participant” means a participant who does not have any nonforfeitable right under the plan to an accrued benefit derived from employer contributions.

(E)(i) In the case of each individual who is absent from work for any period—

(I) by reason of the pregnancy of the individual,

(II) by reason of the birth of a child of the individual,

(III) by reason of the placement of a child with the individual in connection with the adoption of such child by such individual, or

(IV) for purposes of caring for such child for a period beginning immediately following such birth or placement, the plan shall treat as hours of service, solely for purposes of determining under this paragraph whether a 1-year break in service has occurred, the hours described in clause (ii).

(ii) The hours described in this clause are—

(I) the hours of service which otherwise would normally have been credited to such individual but for such absence, or

(II) in any case in which the plan is unable to determine the hours described in subclause (I), 8 hours of service per day of absence,

except that the total number of hours treated as hours of service under this clause by reason of such pregnancy or placement shall not exceed 501 hours.

(iii) The hours described in clause (ii) shall be treated as hours of service as provided in this subparagraph—

(I) only in the year in which the absence from work begins, if a participant would be prevented from incurring a 1-year break in service in such year solely because the period of absence is treated as hours of service as provided in clause (i); or

(II) in any other case, in the immediately following year.

(iv) For purposes of this subparagraph, the term “year” means the period used in computations pursuant to paragraph (2).

(v) A plan may provide that no credit will be given pursuant to this subparagraph unless the individual furnishes to the plan administrator such timely information as the plan may reasonably require to establish—

(I) that the absence from work is for reasons referred to in clause (i), and

(II) the number of days for which there was such an absence.

(4) CROSS REFERENCES.—

(A) For definitions of “accrued benefit” and “normal retirement age”, see sections 3(23) and (24).

(B) For effect of certain cash out distributions, see section 204(d)(1).

(c)(1)(A) A plan amendment changing any vesting schedule under this plan shall be treated as not satisfying the requirements of subsection (a)(2) if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

(B) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) unless each participant having not less than 3 years of service is permitted to elect, within a reasonable period after adoption of such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment.

(2) Subsection (a) shall not apply to benefits which may not be provided for designated employees in the event of early termination of the plan under provisions of the plan adopted pursuant to regulations prescribed by the Secretary of the Treasury to preclude the discrimination prohibited by section 401(a)(4) of the Internal Revenue Code of 1986.

(d) A pension plan may allow for nonforfeitable benefits after a lesser period and in greater amounts than are required by this part.

(e)(1) If the present value of any nonforfeitable benefit with respect to a participant in a plan exceeds ~~[\$5,000]~~ \$6,000, the plan shall provide that such benefit may not be immediately distributed without the consent of the participant.

(2) For purposes of paragraph (1), the present value shall be calculated in accordance with section 205(g)(3).

(3) This subsection shall not apply to any distribution of dividends to which section 404(k) of the Internal Revenue Code of 1986 applies.

(4) A plan shall not fail to meet the requirements of this subsection if, under the terms of the plan, the present value of the nonforfeitable accrued benefit is determined without regard to that portion of such benefit which is attributable to rollover contributions (and earnings allocable thereto). For purposes of this subparagraph, the term “rollover contributions” means any rollover contribution under sections 402(c), 403(a)(4), 403(b)(8), 408(d)(3)(A)(ii), and 457(e)(16) of the Internal Revenue Code of 1986.

(f) SPECIAL RULES FOR PLANS COMPUTING ACCRUED BENEFITS BY REFERENCE TO HYPOTHETICAL ACCOUNT BALANCE OR EQUIVALENT AMOUNTS.—

(1) IN GENERAL.—An applicable defined benefit plan shall not be treated as failing to meet—

(A) subject to paragraph (2), the requirements of subsection (a)(2), or

(B) the requirements of section 204(c) or 205(g), or the requirements of subsection (e), with respect to accrued benefits derived from employer contributions, solely because the present value of the accrued benefit (or any portion thereof) of any participant is, under the terms of the plan, equal to the amount expressed as the balance in the hypothetical account described in paragraph (3) or as an accumulated percentage of the participant’s final average compensation.

(2) 3-YEAR VESTING.—In the case of an applicable defined benefit plan, such plan shall be treated as meeting the requirements of subsection (a)(2) only if an employee who has completed at least 3 years of service has a nonforfeitable right to 100 percent of the employee’s accrued benefit derived from employer contributions.

(3) APPLICABLE DEFINED BENEFIT PLAN AND RELATED RULES.—For purposes of this subsection—

(A) IN GENERAL.—The term “applicable defined benefit plan” means a defined benefit plan under which the accrued benefit (or any portion thereof) is calculated as the balance of a hypothetical account maintained for the participant or as an accumulated percentage of the participant’s final average compensation.

(B) REGULATIONS TO INCLUDE SIMILAR PLANS.—The Secretary of the Treasury shall issue regulations which include in the definition of an applicable defined benefit plan any defined benefit plan (or any portion of such a plan) which has an effect similar to an applicable defined benefit plan.

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#### OTHER PROVISIONS RELATING TO FORM AND PAYMENT OF BENEFITS

SEC. 206. (a) Each pension plan shall provide that unless the participant otherwise elects, the payment of benefits under the plan to the participant shall begin not later than the 60th day after the latest of the close of the plan year in which—

(1) occurs the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,

(2) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or

(3) the participant terminates his service with the employer.

In the case of a plan which provides for the payment of an early retirement benefit, such plan shall provide that a participant who satisfied the service requirements for such early retirement benefit, but separated from the service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially reduced under regulations prescribed by the Secretary of the Treasury.

(b) If—

(1) a participant or beneficiary is receiving benefits under a pension plan, or

(2) a participant is separated from the service and has nonforfeitable rights to benefits,

a plan may not decrease benefits of such a participant by reason of any increase in the benefit levels payable under title II of the Social Security Act or the Railroad Retirement Act of 1937 or any increase in the wage base under such title II, if such increase takes place after the date of the enactment of this Act or (if later) the earlier of the date of first entitlement of such benefits or the date of such separation.

(c) No pension plan may provide that any part of a participant's accrued benefit derived from employer contributions (whether or not otherwise nonforfeitable) is forfeitable solely because of withdrawal by such participant of any amount attributable to the benefit derived from contributions made by such participant. The preceding sentence shall not apply (1) to the accrued benefit of any participant unless, at the time of such withdrawal, such participant has a nonforfeitable right to at least 50 percent of such accrued benefit, or (2) to the extent that an accrued benefit is permitted to be forfeited in accordance with section 203(a)(3)(D)(iii).

(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before the date of enactment of this Act. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of the Internal Revenue Code of 1986 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of such Code.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a par-

participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph—

(i) the term “qualified domestic relations order” means a domestic relations order—

(I) which creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term “domestic relations order” means any judgment, decree, or order (including approval of a property settlement agreement) which—

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies—

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant’s benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order—

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E)(i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee—

(I) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(II) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and

not taking into account the present value of any employer subsidy for early retirement), and

(III) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(ii) For purposes of this subparagraph, the term “earliest retirement age” means the earlier of—

(I) the date on which the participant is entitled to a distribution under the plan, or

(II) the later of the date of the participant attains age 50 or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(F) To the extent provided in any qualified domestic relations order—

(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 205 (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(ii) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 205(f).

(G)(i) In the case of any domestic relations order received by a plan—

(I) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan’s procedures for determining the qualified status of domestic relations orders, and

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures—

(I) shall be in writing,

(II) shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

(H)(i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this subparagraph referred to as the “segregated amounts”) which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(ii) If within the 18-month period described in clause (v) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(iii) If within the 18-month period described in clause (v)—

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.

(v) For purposes of this subparagraph, the 18-month period described in this clause is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle in—

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subparagraph (H),

then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such Act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this Act a beneficiary under the plan. Nothing in the preceding sentence shall permit a requirement under section 4001 of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(L) This paragraph shall not apply to any plan to which paragraph (1) does not apply.

(M) Payment of benefits by a pension plan in accordance with the applicable requirements of a qualified domestic relations order shall not be treated as garnishment for purposes of section 303(a) of the Consumer Credit Protection Act.

(N) In prescribing regulations under this paragraph, the Secretary shall consult with the Secretary of the Treasury.

(4) Paragraph (1) shall not apply to any offset of a participant's benefits provided under an employee pension benefit plan against an amount that the participant is ordered or required to pay to the plan if—

(A) the order or requirement to pay arises—

(i) under a judgment of conviction for a crime involving such plan,



(ii) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of this subtitle, or

(iii) pursuant to a settlement agreement between the Secretary and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of this subtitle by a fiduciary or any other person,

(B) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(C) in a case in which the survivor annuity requirements of section 205 apply with respect to distributions from the plan to the participant, if the participant has a spouse at the time at which the offset is to be made—

(i) either—

(I) such spouse has consented in writing to such offset and such consent is witnessed by a notary public or representative of the plan (or it is established to the satisfaction of a plan representative that such consent may not be obtained by reason of circumstances described in section 205(c)(2)(B)), or

(II) an election to waive the right of the spouse to a qualified joint and survivor annuity or a qualified preretirement survivor annuity is in effect in accordance with the requirements of section 205(c),

(ii) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of this subtitle, or

(iii) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity under a qualified joint and survivor annuity provided pursuant to section 205(a)(1) and under a qualified preretirement survivor annuity provided pursuant to section 205(a)(2), determined in accordance with paragraph (5).

A plan shall not be treated as failing to meet the requirements of section 205 solely by reason of an offset under this paragraph.

(5)(A) The survivor annuity described in paragraph (4)(C)(iii) shall be determined as if—

(i) the participant terminated employment on the date of the offset,

(ii) there was no offset,

(iii) the plan permitted commencement of benefits only on or after normal retirement age,

(iv) the plan provided only the minimum-required qualified joint and survivor annuity, and

(v) the amount of the qualified preretirement survivor annuity under the plan is equal to the amount of the survivor annuity payable under the minimum-required qualified joint and survivor annuity.

(B) For purposes of this paragraph, the term “minimum-required qualified joint and survivor annuity” means the qualified joint and

survivor annuity which is the actuarial equivalent of the participant's accrued benefit (within the meaning of section 3(23)) and under which the survivor annuity is 50 percent of the amount of the annuity which is payable during the joint lives of the participant and the spouse.

(e) LIMITATION ON DISTRIBUTIONS OTHER THAN LIFE ANNUITIES PAID BY THE PLAN.—

(1) IN GENERAL.—Notwithstanding any other provision of this part, the fiduciary of a pension plan that is subject to the additional funding requirements of section 303(j)(4) shall not permit a prohibited payment to be made from a plan during a period in which such plan has a liquidity shortfall (as defined in section 303(j)(4)(E)(i)).

(2) PROHIBITED PAYMENT.—For purposes of paragraph (1), the term “prohibited payment” means—

(A) any payment, in excess of the monthly amount paid under a single life annuity (plus any social security supplements described in the last sentence of section 204(b)(1)(G)), to a participant or beneficiary whose annuity starting date (as defined in section 205(h)(2)), that occurs during the period referred to in paragraph (1),

(B) any payment for the purchase of an irrevocable commitment from an insurer to pay benefits, and

(C) any other payment specified by the Secretary of the Treasury by regulations.

(3) PERIOD OF SHORTFALL.—For purposes of this subsection, a plan has a liquidity shortfall during the period that there is an underpayment of an installment under section 303(j)(3) by reason of section 303(j)(4)(A).

(4) COORDINATION WITH OTHER PROVISIONS.—Compliance with this subsection shall not constitute a violation of any other provision of this Act.

(f) MISSING PARTICIPANTS IN TERMINATED PLANS.—In the case of a plan covered by section 4050, upon termination of the plan, benefits of missing participants shall be treated in accordance with section 4050.

(g) FUNDING-BASED LIMITS ON BENEFITS AND BENEFIT ACCRUALS UNDER SINGLE-EMPLOYER PLANS.—

(1) FUNDING-BASED LIMITATION ON SHUTDOWN BENEFITS AND OTHER UNPREDICTABLE CONTINGENT EVENT BENEFITS UNDER SINGLE-EMPLOYER PLANS.—

(A) IN GENERAL.—If a participant of a defined benefit plan which is a single-employer plan is entitled to an unpredictable contingent event benefit payable with respect to any event occurring during any plan year, the plan shall provide that such benefit may not be provided if the adjusted funding target attainment percentage for such plan year—

(i) is less than 60 percent, or

(ii) would be less than 60 percent taking into account such occurrence.

(B) EXEMPTION.—Subparagraph (A) shall cease to apply with respect to any plan year, effective as of the first day of the plan year, upon payment by the plan sponsor of a

contribution (in addition to any minimum required contribution under section 303) equal to—

(i) in the case of subparagraph (A)(i), the amount of the increase in the funding target of the plan (under section 303) for the plan year attributable to the occurrence referred to in subparagraph (A), and

(ii) in the case of subparagraph (A)(ii), the amount sufficient to result in an adjusted funding target attainment percentage of 60 percent.

(C) UNPREDICTABLE CONTINGENT EVENT BENEFIT.—For purposes of this paragraph, the term “unpredictable contingent event benefit” means any benefit payable solely by reason of—

(i) a plant shutdown (or similar event, as determined by the Secretary of the Treasury), or

(ii) an event other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or occurrence of death or disability.

(2) LIMITATIONS ON PLAN AMENDMENTS INCREASING LIABILITY FOR BENEFITS.—

(A) IN GENERAL.—No amendment to a defined benefit plan which is a single-employer plan which has the effect of increasing liabilities of the plan by reason of increases in benefits, establishment of new benefits, changing the rate of benefit accrual, or changing the rate at which benefits become nonforfeitable may take effect during any plan year if the adjusted funding target attainment percentage for such plan year is—

(i) less than 80 percent, or

(ii) would be less than 80 percent taking into account such amendment.

(B) EXEMPTION.—Subparagraph (A) shall cease to apply with respect to any plan year, effective as of the first day of the plan year (or if later, the effective date of the amendment), upon payment by the plan sponsor of a contribution (in addition to any minimum required contribution under section 303) equal to—

(i) in the case of subparagraph (A)(i), the amount of the increase in the funding target of the plan (under section 303) for the plan year attributable to the amendment, and

(ii) in the case of subparagraph (A)(ii), the amount sufficient to result in an adjusted funding target attainment percentage of 80 percent.

(C) EXCEPTION FOR CERTAIN BENEFIT INCREASES.—Subparagraph (A) shall not apply to any amendment which provides for an increase in benefits under a formula which is not based on a participant’s compensation, but only if the rate of such increase is not in excess of the contemporaneous rate of increase in average wages of participants covered by the amendment.

(3) LIMITATIONS ON ACCELERATED BENEFIT DISTRIBUTIONS.—

(A) FUNDING PERCENTAGE LESS THAN 60 PERCENT.—A defined benefit plan which is a single-employer plan shall provide that, in any case in which the plan’s adjusted

funding target attainment percentage for a plan year is less than 60 percent, the plan may not pay any prohibited payment after the valuation date for the plan year.

(B) BANKRUPTCY.—A defined benefit plan which is a single-employer plan shall provide that, during any period in which the plan sponsor is a debtor in a case under title 11, United States Code, or similar Federal or State law, the plan may not pay any prohibited payment. The preceding sentence shall not apply on or after the date on which the enrolled actuary of the plan certifies that the adjusted funding target attainment percentage of such plan (determined by not taking into account any adjustment of segment rates under section 303(h)(2)(C)(iv)) is not less than 100 percent.

(C) LIMITED PAYMENT IF PERCENTAGE AT LEAST 60 PERCENT BUT LESS THAN 80 PERCENT.—

(i) IN GENERAL.—A defined benefit plan which is a single-employer plan shall provide that, in any case in which the plan's adjusted funding target attainment percentage for a plan year is 60 percent or greater but less than 80 percent, the plan may not pay any prohibited payment after the valuation date for the plan year to the extent the amount of the payment exceeds the lesser of—

(I) 50 percent of the amount of the payment which could be made without regard to this subsection, or

(II) the present value (determined under guidance prescribed by the Pension Benefit Guaranty Corporation, using the interest and mortality assumptions under section 205(g)) of the maximum guarantee with respect to the participant under section 4022.

(ii) ONE-TIME APPLICATION.—

(I) IN GENERAL.—The plan shall also provide that only 1 prohibited payment meeting the requirements of clause (i) may be made with respect to any participant during any period of consecutive plan years to which the limitations under either subparagraph (A) or (B) or this subparagraph applies.

(II) TREATMENT OF BENEFICIARIES.—For purposes of this clause, a participant and any beneficiary on his behalf (including an alternate payee, as defined in section 206(d)(3)(K)) shall be treated as 1 participant. If the accrued benefit of a participant is allocated to such an alternate payee and 1 or more other persons, the amount under clause (i) shall be allocated among such persons in the same manner as the accrued benefit is allocated unless the qualified domestic relations order (as defined in section 206(d)(3)(B)(i)) provides otherwise.

(D) EXCEPTION.—This paragraph shall not apply to any plan for any plan year if the terms of such plan (as in ef-

fect for the period beginning on September 1, 2005, and ending with such plan year) provide for no benefit accruals with respect to any participant during such period.

(E) PROHIBITED PAYMENT.—For purpose of this paragraph, the term “prohibited payment” means—

(i) any payment, in excess of the monthly amount paid under a single life annuity (plus any social security supplements described in the last sentence of section 204(b)(1)(G)), to a participant or beneficiary whose annuity starting date (as defined in section 205(h)(2)) occurs during any period a limitation under subparagraph (A) or (B) is in effect,

(ii) any payment for the purchase of an irrevocable commitment from an insurer to pay benefits, and

(iii) any other payment specified by the Secretary of the Treasury by regulations.

Such term shall not include the payment of a benefit which under section 203(e) may be immediately distributed without the consent of the participant.

(4) LIMITATION ON BENEFIT ACCRUALS FOR PLANS WITH SEVERE FUNDING SHORTFALLS.—

(A) IN GENERAL.—A defined benefit plan which is a single-employer plan shall provide that, in any case in which the plan’s adjusted funding target attainment percentage for a plan year is less than 60 percent, benefit accruals under the plan shall cease as of the valuation date for the plan year.

(B) EXEMPTION.—Subparagraph (A) shall cease to apply with respect to any plan year, effective as of the first day of the plan year, upon payment by the plan sponsor of a contribution (in addition to any minimum required contribution under section 303) equal to the amount sufficient to result in an adjusted funding target attainment percentage of 60 percent.

(5) RULES RELATING TO CONTRIBUTIONS REQUIRED TO AVOID BENEFIT LIMITATIONS.—

(A) SECURITY MAY BE PROVIDED.—

(i) IN GENERAL.—For purposes of this subsection, the adjusted funding target attainment percentage shall be determined by treating as an asset of the plan any security provided by a plan sponsor in a form meeting the requirements of clause (ii).

(ii) FORM OF SECURITY.—The security required under clause (i) shall consist of—

(I) a bond issued by a corporate surety company that is an acceptable surety for purposes of section 412 of this Act,

(II) cash, or United States obligations which mature in 3 years or less, held in escrow by a bank or similar financial institution, or

(III) such other form of security as is satisfactory to the Secretary of the Treasury and the parties involved.

(iii) ENFORCEMENT.—Any security provided under clause (i) may be perfected and enforced at any time after the earlier of—

(I) the date on which the plan terminates,

(II) if there is a failure to make a payment of the minimum required contribution for any plan year beginning after the security is provided, the due date for the payment under section 303(j), or

(III) if the adjusted funding target attainment percentage is less than 60 percent for a consecutive period of 7 years, the valuation date for the last year in the period.

(iv) RELEASE OF SECURITY.—The security shall be released (and any amounts thereunder shall be refunded together with any interest accrued thereon) at such time as the Secretary of the Treasury may prescribe in regulations, including regulations for partial releases of the security by reason of increases in the adjusted funding target attainment percentage.

(B) PREFUNDING BALANCE OR FUNDING STANDARD CARRY-OVER BALANCE MAY NOT BE USED.—No prefunding balance or funding standard carryover balance under section 303(f) may be used under paragraph (1), (2), or (4) to satisfy any payment an employer may make under any such paragraph to avoid or terminate the application of any limitation under such paragraph.

(C) DEEMED REDUCTION OF FUNDING BALANCES.—

(i) IN GENERAL.—Subject to clause (iii), in any case in which a benefit limitation under paragraph (1), (2), (3), or (4) would (but for this subparagraph and determined without regard to paragraph (1)(B), (2)(B), or (4)(B)) apply to such plan for the plan year, the plan sponsor of such plan shall be treated for purposes of this Act as having made an election under section 303(f) to reduce the prefunding balance or funding standard carryover balance by such amount as is necessary for such benefit limitation to not apply to the plan for such plan year.

(ii) EXCEPTION FOR INSUFFICIENT FUNDING BALANCES.—Clause (i) shall not apply with respect to a benefit limitation for any plan year if the application of clause (i) would not result in the benefit limitation not applying for such plan year.

(iii) RESTRICTIONS OF CERTAIN RULES TO COLLECTIVELY BARGAINED PLANS.—With respect to any benefit limitation under paragraph (1), (2), or (4), clause (i) shall only apply in the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers.

(6) NEW PLANS.—Paragraphs (1), (2), and (4) shall not apply to a plan for the first 5 plan years of the plan. For purposes of this paragraph, the reference in this paragraph to a plan shall include a reference to any predecessor plan.

(7) PRESUMED UNDERFUNDING FOR PURPOSES OF BENEFIT LIMITATIONS.—

(A) PRESUMPTION OF CONTINUED UNDERFUNDING.—In any case in which a benefit limitation under paragraph (1), (2), (3), or (4) has been applied to a plan with respect to the plan year preceding the current plan year, the adjusted funding target attainment percentage of the plan for the current plan year shall be presumed to be equal to the adjusted funding target attainment percentage of the plan for the preceding plan year until the enrolled actuary of the plan certifies the actual adjusted funding target attainment percentage of the plan for the current plan year.

(B) PRESUMPTION OF UNDERFUNDING AFTER 10TH MONTH.—In any case in which no certification of the adjusted funding target attainment percentage for the current plan year is made with respect to the plan before the first day of the 10th month of such year, for purposes of paragraphs (1), (2), (3), and (4), such first day shall be deemed, for purposes of such paragraph, to be the valuation date of the plan for the current plan year and the plan's adjusted funding target attainment percentage shall be conclusively presumed to be less than 60 percent as of such first day.

(C) PRESUMPTION OF UNDERFUNDING AFTER 4TH MONTH FOR NEARLY UNDERFUNDED PLANS.—In any case in which—

(i) a benefit limitation under paragraph (1), (2), (3), or (4) did not apply to a plan with respect to the plan year preceding the current plan year, but the adjusted funding target attainment percentage of the plan for such preceding plan year was not more than 10 percentage points greater than the percentage which would have caused such paragraph to apply to the plan with respect to such preceding plan year, and

(ii) as of the first day of the 4th month of the current plan year, the enrolled actuary of the plan has not certified the actual adjusted funding target attainment percentage of the plan for the current plan year, until the enrolled actuary so certifies, such first day shall be deemed, for purposes of such paragraph, to be the valuation date of the plan for the current plan year and the adjusted funding target attainment percentage of the plan as of such first day shall, for purposes of such paragraph, be presumed to be equal to 10 percentage points less than the adjusted funding target attainment percentage of the plan for such preceding plan year.

(8) TREATMENT OF PLAN AS OF CLOSE OF PROHIBITED OR CESSATION PERIOD.—For purposes of applying this part—

(A) OPERATION OF PLAN AFTER PERIOD.—Unless the plan provides otherwise, payments and accruals will resume effective as of the day following the close of the period for which any limitation of payment or accrual of benefits under paragraph (3) or (4) applies.

(B) TREATMENT OF AFFECTED BENEFITS.—Nothing in this paragraph shall be construed as affecting the plan's treat-

ment of benefits which would have been paid or accrued but for this subsection.

(9) TERMS RELATING TO FUNDING TARGET ATTAINMENT PERCENTAGE.—For purposes of this subsection—

(A) IN GENERAL.—The term “funding target attainment percentage” has the same meaning given such term by section 303(d)(2).

(B) ADJUSTED FUNDING TARGET ATTAINMENT PERCENTAGE.—The term “adjusted funding target attainment percentage” means the funding target attainment percentage which is determined under subparagraph (A) by increasing each of the amounts under subparagraphs (A) and (B) of section 303(d)(2) by the aggregate amount of purchases of annuities for employees other than highly compensated employees (as defined in section 414(q) of the Internal Revenue Code of 1986) which were made by the plan during the preceding 2 plan years.

(C) APPLICATION TO PLANS WHICH ARE FULLY FUNDED WITHOUT REGARD TO REDUCTIONS FOR FUNDING BALANCES.—In the case of a plan for any plan year, if the funding target attainment percentage is 100 percent or more (determined without regard to the reduction in the value of assets under section 303(f)(4)), the funding target attainment percentage for purposes of subparagraphs (A) and (B) shall be determined without regard to such reduction.

(10) SECRETARIAL AUTHORITY FOR PLANS WITH ALTERNATE VALUATION DATE.—In the case of a plan which has designated a valuation date other than the first day of the plan year, the Secretary of the Treasury may prescribe rules for the application of this subsection which are necessary to reflect the alternate valuation date.

(12) CSEC PLANS.—This subsection shall not apply to a CSEC plan (as defined in section 210(f)).

(h) SPECIAL RULES APPLICABLE TO BENEFIT OVERPAYMENTS.—

(1) GENERAL RULE.—*In the case of an inadvertent benefit overpayment by any pension plan, the responsible plan fiduciary shall not be considered to have failed to comply with the requirements of this title merely because such fiduciary determines, in the exercise of its fiduciary discretion, not to seek recovery of all or part of such overpayment from—*

(A) *any participant or beneficiary,*

(B) *any plan sponsor of, or contributing employer to—*

*(i) an individual account plan, provided that the amount needed to prevent or restore any impermissible forfeiture from any participant’s or beneficiary’s account arising in connection with the overpayment is, separately from and independently of the overpayment, allocated to such account pursuant to the nonforfeiture requirements of section 203 (for example, out of the plan’s forfeiture account, additional employer contributions, or recoveries from those responsible for the overpayment), or*

*(ii) a defined benefit pension plan subject to the funding rules in part 3 of this subtitle B, unless the re-*



*sponsible plan fiduciary determines, in the exercise of its fiduciary discretion, that failure to recover all or part of the overpayment faster than required under such funding rules would materially affect the plan's ability to pay benefits due to other participants and beneficiaries, or*

*(C) any fiduciary of the plan, other than a fiduciary (including a plan sponsor or contributing employer acting in a fiduciary capacity) whose breach of its fiduciary duties resulted in such overpayment, provided that if the plan has established prudent procedures to prevent and minimize overpayment of benefits and the relevant plan fiduciaries have followed such procedures, an inadvertent benefit overpayment will not give rise to a breach of fiduciary duty.*

**(2) REDUCTION IN FUTURE BENEFIT PAYMENTS AND RECOVERY FROM RESPONSIBLE PARTY.**—Paragraph (1) shall not fail to apply with respect to any inadvertent benefit overpayment merely because, after discovering such overpayment, the responsible plan fiduciary—

*(A) reduces future benefit payments to the correct amount provided for under the terms of the plan, or*

*(B) seeks recovery from the person or persons responsible for the overpayment.*

**(3) EMPLOYER FUNDING OBLIGATIONS.**—Nothing in this subsection shall relieve an employer of any obligation imposed on it to make contributions to a plan to meet the minimum funding standards under part 3 of this subtitle B or to prevent or restore an impermissible forfeiture in accordance with section 203.

**(4) RECOUPMENT FROM PARTICIPANTS AND BENEFICIARIES.**—If the responsible plan fiduciary, in the exercise of its fiduciary discretion, decides to seek recoupment from a participant or beneficiary of all or part of an inadvertent benefit overpayment made by the plan to such participant or beneficiary, it may do so, subject to the following conditions:

*(A) No interest or other additional amounts (such as collection costs or fees) are sought on overpaid amounts.*

*(B) If the plan seeks to recoup past overpayments of a non-decreasing periodic benefit by reducing future benefit payments—*

*(i) the reduction ceases after the plan has recovered the full dollar amount of the overpayment,*

*(ii) the amount recouped each calendar year does not exceed 10 percent of the full dollar amount of the overpayment, and*

*(iii) future benefit payments are not reduced to below 90 percent of the periodic amount otherwise payable under the terms of the plan.*

*Alternatively, if the plan seeks to recoup past overpayments of a non-decreasing periodic benefit through one or more installment payments, the sum of such installment payments in any calendar year does not exceed the sum of the reductions that would be permitted in such year under the preceding sentence.*

(C) *If the plan seeks to recoup past overpayments of a benefit other than a non-decreasing periodic benefit, the plan satisfies requirements developed by the Secretary of the Treasury for purposes of this subparagraph.*

(D) *Efforts to recoup overpayments are not made through a collection agency or similar third party and such efforts are not accompanied by threats of litigation, unless the responsible plan fiduciary reasonably believes it could prevail in a civil action brought in Federal or State court to recoup the overpayments.*

(E) *Recoupment of past overpayments to a participant is not sought from any beneficiary of the participant, including a spouse, surviving spouse, former spouse, or other beneficiary.*

(F) *Recoupment may not be sought if the first overpayment occurred more than 3 years before the participant or beneficiary is first notified in writing of the error.*

(G) *A participant or beneficiary from whom recoupment is sought is entitled to contest all or part of the recoupment pursuant to the plan's claims and appeals procedures.*

(H) *In determining the amount of recoupment to seek, the responsible plan fiduciary may take into account the hardship that recoupment likely would impose on the participant or beneficiary.*

(5) *EFFECT OF CULPABILITY.—Subparagraphs (A) through (F) of paragraph (4) shall not apply to protect a participant or beneficiary who is culpable. For purposes of this paragraph, a participant or beneficiary is culpable if the individual bears responsibility for the overpayment (such as through misrepresentations or omissions that led to the overpayment), or if the individual knew, or had good reason to know under the circumstances, that the benefit payment or payments were materially in excess of the correct amount. Notwithstanding the preceding sentence, an individual is not culpable merely because the individual believed the benefit payment or payments were or might be in excess of the correct amount, if the individual raised that question with an authorized plan representative and was told the payment or payments were not in excess of the correct amount. With respect to a culpable participant or beneficiary, efforts to recoup overpayments shall not be made through threats of litigation, unless a lawyer for the plan could make the representations required under Rule 11 of the Federal Rules of Civil Procedure if the litigation were brought in Federal court.*

\* \* \* \* \*

#### PART 4—FIDUCIARY RESPONSIBILITY

\* \* \* \* \*

##### FIDUCIARY DUTIES

SEC. 404. (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

- (i) providing benefits to participants and their beneficiaries; and
  - (ii) defraying reasonable expenses of administering the plan;
  - (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
  - (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
  - (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.
- (2) In the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5)).
- (b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.
- (c)(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—
- (i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
  - (ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.
- (B) If a person referred to in subparagraph (A)(ii) meets the requirements of this title in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this title for any loss occurring during such period.
- (C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 101(i)(7).
- (2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of the Internal Revenue Code of 1986, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—
- (A) an affirmative election among investment options with respect to the initial investment of any contribution,
  - (B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 101(g), shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon—

(A) the earlier of—

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary<sup>[1]</sup>, and, to the extent the Secretary provides in guidance or regulations issued after the enactment of the Securing a Strong Retirement Act of 2021, is made to—

(i) a target date or life cycle fund held under such account;

(ii) as described in section 2550.404a-2 of title 29, Code of Federal Regulations, an investment product held under such account designed to preserve principal and provide a reasonable rate of return;

(iii) the Office of the Retirement Savings Lost and Found in accordance with section 401(a)(31)(B)(iv) of the Internal Revenue Code of 1986 and section 306(c)(2)(A)(ii) of the Securing a Strong Retirement Act of 2020; or

(iv) such other option as the Secretary may so provide.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term “qualified change in investment options” means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which—

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of

the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if—

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) DEFAULT INVESTMENT ARRANGEMENTS.—

(A) IN GENERAL.—For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) NOTICE REQUIREMENTS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if each participant or beneficiary—

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) FORM OF NOTICE.—The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of the Internal Revenue Code of 1986 shall apply with respect to the notices described in this subparagraph.

(d)(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or

maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of the Internal Revenue Code of 1986, a fiduciary shall discharge the fiduciary's duties under this title and title IV in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement—

(i) under section 4980(d)(2)(B) of such Code with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of such Code with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement—

(i) under section 4980(d)(2)(A) of such Code with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of such Code with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of such Code with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection—

(A) any term used in this subsection which is also used in section 4980(d) of the Internal Revenue Code of 1986 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to the Internal Revenue Code of 1986 shall be a reference to such Code as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

(e) SAFE HARBOR FOR ANNUITY SELECTION.—

(1) IN GENERAL.—With respect to the selection of an insurer for a guaranteed retirement income contract, the requirements of subsection (a)(1)(B) will be deemed to be satisfied if a fiduciary—

(A) engages in an objective, thorough, and analytical search for the purpose of identifying insurers from which to purchase such contracts;

(B) with respect to each insurer identified under subparagraph (A)—

(i) considers the financial capability of such insurer to satisfy its obligations under the guaranteed retirement income contract; and

(ii) considers the cost (including fees and commissions) of the guaranteed retirement income contract offered by the insurer in relation to the benefits and product features of the contract and administrative services to be provided under such contract; and

(C) on the basis of such consideration, concludes that—

(i) at the time of the selection, the insurer is financially capable of satisfying its obligations under the guaranteed retirement income contract; and

(ii) the relative cost of the selected guaranteed retirement income contract as described in subparagraph (B)(ii) is reasonable.

(2) FINANCIAL CAPABILITY OF THE INSURER.—A fiduciary will be deemed to satisfy the requirements of paragraphs (1)(B)(i) and (1)(C)(i) if—

(A) the fiduciary obtains written representations from the insurer that—

(i) the insurer is licensed to offer guaranteed retirement income contracts;

(ii) the insurer, at the time of selection and for each of the immediately preceding 7 plan years—

(I) operates under a certificate of authority from the insurance commissioner of its domiciliary State which has not been revoked or suspended;

(II) has filed audited financial statements in accordance with the laws of its domiciliary State under applicable statutory accounting principles;

(III) maintains (and has maintained) reserves which satisfies all the statutory requirements of all States where the insurer does business; and

(IV) is not operating under an order of supervision, rehabilitation, or liquidation;

(iii) the insurer undergoes, at least every 5 years, a financial examination (within the meaning of the law of its domiciliary State) by the insurance commissioner of the domiciliary State (or representative, designee, or other party approved by such commissioner); and

(iv) the insurer will notify the fiduciary of any change in circumstances occurring after the provision of the representations in clauses (i), (ii), and (iii) which would preclude the insurer from making such representations at the time of issuance of the guaranteed retirement income contract; and

(B) after receiving such representations and as of the time of selection, the fiduciary has not received any notice described in subparagraph (A)(iv) and is in possession of no other information which would cause the fiduciary to question the representations provided.

(3) NO REQUIREMENT TO SELECT LOWEST COST.—Nothing in this subsection shall be construed to require a fiduciary to select the lowest cost contract. A fiduciary may consider the value of a contract, including features and benefits of the contract and attributes of the insurer (including, without limitation, the insurer's financial strength) in conjunction with the cost of the contract.

(4) TIME OF SELECTION.—

(A) IN GENERAL.—For purposes of this subsection, the time of selection is—

(i) the time that the insurer and the contract are selected for distribution of benefits to a specific participant or beneficiary; or

(ii) if the fiduciary periodically reviews the continuing appropriateness of the conclusion described in paragraph (1)(C) with respect to a selected insurer, taking into account the considerations described in such paragraph, the time that the insurer and the con-

tract are selected to provide benefits at future dates to participants or beneficiaries under the plan.

Nothing in the preceding sentence shall be construed to require the fiduciary to review the appropriateness of a selection after the purchase of a contract for a participant or beneficiary.

(B) PERIODIC REVIEW.—A fiduciary will be deemed to have conducted the periodic review described in subparagraph (A)(ii) if the fiduciary obtains the written representations described in clauses (i), (ii), and (iii) of paragraph (2)(A) from the insurer on an annual basis, unless the fiduciary receives any notice described in paragraph (2)(A)(iv) or otherwise becomes aware of facts that would cause the fiduciary to question such representations.

(5) LIMITED LIABILITY.—A fiduciary which satisfies the requirements of this subsection shall not be liable following the distribution of any benefit, or the investment by or on behalf of a participant or beneficiary pursuant to the selected guaranteed retirement income contract, for any losses that may result to the participant or beneficiary due to an insurer's inability to satisfy its financial obligations under the terms of such contract.

(6) DEFINITIONS.—For purposes of this subsection—

(A) INSURER.—The term “insurer” means an insurance company, insurance service, or insurance organization, including affiliates of such companies.

(B) GUARANTEED RETIREMENT INCOME CONTRACT.—The term “guaranteed retirement income contract” means an annuity contract for a fixed term or a contract (or provision or feature thereof) which provides guaranteed benefits annually (or more frequently) for at least the remainder of the life of the participant or the joint lives of the participant and the participant's designated beneficiary as part of an individual account plan.

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#### EXEMPTIONS FROM PROHIBITED TRANSACTIONS

SEC. 408. (a) The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 and 407(a). Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this Act. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

- (1) administratively feasible,
- (2) in the interests of the plan and of its participants and beneficiaries, and
- (3) protective of the rights of participants and beneficiaries of such plan.



Before granting an exemption under this subsection from section 406(a) or 407(a), the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 406(b) unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) The prohibitions provided in section 406 shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of the Internal Revenue Code of 1986) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of the Internal Revenue Code of 1986.

(2)(A) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(B)(i) No contract or arrangement for services between a covered plan and a covered service provider, and no extension or renewal of such a contract or arrangement, is reasonable within the meaning of this paragraph unless the requirements of this clause are met.

(ii)(I) For purposes of this subparagraph:

(aa) The term “covered plan” means a group health plan as defined section 733(a).

(bb) The term “covered service provider” means a service provider that enters into a contract or arrangement with the covered plan and reasonably expects \$1,000 (or such amount as the Secretary may establish in regulations to account for inflation since the date of enactment of the Consolidated Appropriations Act, 2021, as appropriate) or more in compensation, direct or indirect, to be received in connection with providing one or more of the following services, pursuant to the contract or arrangement, regardless of whether such services will be performed, or such compensation received, by the covered service provider, an affiliate, or a subcontractor:

(AA) Brokerage services, for which the covered service provider, an affiliate, or a subcontractor reasonably expects to receive indirect compensation or direct compensation described in item (dd), provided to a covered plan with respect to selection of insurance products (including vision and dental), recordkeeping services,

medical management vendor, benefits administration (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness services, transparency tools and vendors, group purchasing organization preferred vendor panels, disease management vendors and products, compliance services, employee assistance programs, or third party administration services.

(BB) Consulting, for which the covered service provider, an affiliate, or a subcontractor reasonably expects to receive indirect compensation or direct compensation described in item (dd), related to the development or implementation of plan design, insurance or insurance product selection (including vision and dental), recordkeeping, medical management, benefits administration selection (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness design and management services, transparency tools, group purchasing organization agreements and services, participation in and services from preferred vendor panels, disease management, compliance services, employee assistance programs, or third party administration services.

(cc) The term “affiliate”, with respect to a covered service provider, means an entity that directly or indirectly (through one or more intermediaries) controls, is controlled by, or is under common control with, such provider, or is an officer, director, or employee of, or partner in, such provider.

(dd)(AA) The term “compensation” means anything of monetary value, but does not include non-monetary compensation valued at \$250 (or such amount as the Secretary may establish in regulations to account for inflation since the date of enactment of the Consolidated Appropriations Act, 2021, as appropriate) or less, in the aggregate, during the term of the contract or arrangement.

(BB) The term “direct compensation” means compensation received directly from a covered plan.

(CC) The term “indirect compensation” means compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, or an affiliate. Compensation received from a subcontractor is indirect compensation, unless it is received in connection with services performed under a contract or arrangement with a subcontractor.

(ee) The term “responsible plan fiduciary” means a fiduciary with authority to cause the covered plan to enter into, or extend or renew, the contract or arrangement.

(ff) The term “subcontractor” means any person or entity (or an affiliate of such person or entity) that is not an affiliate of the covered service provider and that, pursuant to a contract or arrangement with the covered service provider or an affiliate, reasonably expects to receive \$1,000 (or such amount as the Secretary may establish in regulations to account for inflation since the date of enactment

of the Consolidated Appropriations Act, 2021, as appropriate) or more in compensation for performing one or more services described in item (bb) under a contract or arrangement with the covered plan.

(II) For purposes of this subparagraph, a description of compensation or cost may be expressed as a monetary amount, formula, or a per capita charge for each enrollee or, if the compensation or cost cannot reasonably be expressed in such terms, by any other reasonable method, including a disclosure that additional compensation may be earned but may not be calculated at the time of contract if such a disclosure includes a description of the circumstances under which the additional compensation may be earned and a reasonable and good faith estimate if the covered service provider cannot otherwise readily describe compensation or cost and explains the methodology and assumptions used to prepare such estimate. Any such description shall contain sufficient information to permit evaluation of the reasonableness of the compensation or cost.

(III) No person or entity is a “covered service provider” within the meaning of subclause (I)(bb) solely on the basis of providing services as an affiliate or a subcontractor that is performing one or more of the services described in subitem (AA) or (BB) of such subclause under the contract or arrangement with the covered plan.

(iii) A covered service provider shall disclose to a responsible plan fiduciary, in writing, the following:

(I) A description of the services to be provided to the covered plan pursuant to the contract or arrangement.

(II) If applicable, a statement that the covered service provider, an affiliate, or a subcontractor will provide, or reasonably expects to provide, services pursuant to the contract or arrangement directly to the covered plan as a fiduciary (within the meaning of section 3(21)).

(III) A description of all direct compensation, either in the aggregate or by service, that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described in subclause (I).

(IV)(aa) A description of all indirect compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with the services described in subclause (I)—

(AA) including compensation from a vendor to a brokerage firm based on a structure of incentives not solely related to the contract with the covered plan; and

(BB) not including compensation received by an employee from an employer on account of work performed by the employee.

(bb) A description of the arrangement between the payer and the covered service provider, an affiliate, or a subcontractor, as applicable, pursuant to which such indirect compensation is paid.

(cc) Identification of the services for which the indirect compensation will be received, if applicable.

(dd) Identification of the payer of the indirect compensation.

(V) A description of any compensation that will be paid among the covered service provider, an affiliate, or a subcontractor, in connection with the services described in subclause (I) if such compensation is set on a transaction basis (such as commissions, finder's fees, or other similar incentive compensation based on business placed or retained), including identification of the services for which such compensation will be paid and identification of the payers and recipients of such compensation (including the status of a payer or recipient as an affiliate or a subcontractor), regardless of whether such compensation also is disclosed pursuant to subclause (III) or (IV).

(VI) A description of any compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination.

(iv) A covered service provider shall disclose to a responsible plan fiduciary, in writing a description of the manner in which the compensation described in clause (iii), as applicable, will be received.

(v)(I) A covered service provider shall disclose the information required under clauses (iii) and (iv) to the responsible plan fiduciary not later than the date that is reasonably in advance of the date on which the contract or arrangement is entered into, and extended or renewed.

(II) A covered service provider shall disclose any change to the information required under clause (iii) and (iv) as soon as practicable, but not later than 60 days from the date on which the covered service provider is informed of such change, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information shall be disclosed as soon as practicable.

(vi)(I) Upon the written request of the responsible plan fiduciary or covered plan administrator, a covered service provider shall furnish any other information relating to the compensation received in connection with the contract or arrangement that is required for the covered plan to comply with the reporting and disclosure requirements under this Act.

(II) The covered service provider shall disclose the information required under clause (iii)(I) reasonably in advance of the date upon which such responsible plan fiduciary or covered plan administrator states that it is required to comply with the applicable reporting or disclosure requirement, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information shall be disclosed as soon as practicable.

(vii) No contract or arrangement will fail to be reasonable under this subparagraph solely because the covered service provider, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information required pursuant to clause (iii) (or a change to such information

disclosed pursuant to clause (v)(II) or clause (vi), provided that the covered service provider discloses the correct information to the responsible plan fiduciary as soon as practicable, but not later than 30 days from the date on which the covered service provider knows of such error or omission.

(viii)(I) Pursuant to subsection (a), subparagraphs (C) and (D) of section 406(a)(1) shall not apply to a responsible plan fiduciary, notwithstanding any failure by a covered service provider to disclose information required under clause (iii), if the following conditions are met:

(aa) The responsible plan fiduciary did not know that the covered service provider failed or would fail to make required disclosures and reasonably believed that the covered service provider disclosed the information required to be disclosed.

(bb) The responsible plan fiduciary, upon discovering that the covered service provider failed to disclose the required information, requests in writing that the covered service provider furnish such information.

(cc) If the covered service provider fails to comply with a written request described in subclause (II) within 90 days of the request, the responsible plan fiduciary notifies the Secretary of the covered service provider's failure, in accordance with subclauses (II) and (III).

(II) A notice described in subclause (I)(cc) shall contain—

(aa) the name of the covered plan;

(bb) the plan number used for the annual report on the covered plan;

(cc) the plan sponsor's name, address, and employer identification number;

(dd) the name, address, and telephone number of the responsible plan fiduciary;

(ee) the name, address, phone number, and, if known, employer identification number of the covered service provider;

(ff) a description of the services provided to the covered plan;

(gg) a description of the information that the covered service provider failed to disclose;

(hh) the date on which such information was requested in writing from the covered service provider; and

(ii) a statement as to whether the covered service provider continues to provide services to the plan.

(III) A notice described in subclause (I)(cc) shall be filed with the Department not later than 30 days following the earlier of—

(aa) The covered service provider's refusal to furnish the information requested by the written request described in subclause (I)(bb); or

(bb) 90 days after the written request referred to in subclause (I)(cc) is made.

(IV) If the covered service provider fails to comply with the written request under subclause (I)(bb) within 90 days of such request, the responsible plan fiduciary shall determine whether to terminate or continue the contract or arrangement under

section 404. If the requested information relates to future services and is not disclosed promptly after the end of the 90-day period, the responsible plan fiduciary shall terminate the contract or arrangement as expeditiously as possible, consistent with such duty of prudence.

(ix) Nothing in this subparagraph shall be construed to supersede any provision of State law that governs disclosures by parties that provide the services described in this section, except to the extent that such law prevents the application of a requirement of this section.

(3) A loan to an employee stock ownership plan (as defined in section 407(d)(6)), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 407(d)(5)).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of this Act (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of title IV.

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231.

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if—

(A) the requirements of paragraphs (1) and (2) of subsection (e) are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 407(d)(5) as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section 407(d)(5) as in effect at the time of the sale).

(13) Any transfer made before January 1, 2026, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015).

(14) Any transaction in connection with the provision of investment advice described in section 3(21)(A)(ii) to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account, if—

(A) the transaction is—

(i) the provision of the investment advice to the participant or beneficiary of the plan with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice; and

(B) the requirements of subsection (g) are met.

(15)(A) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest (other than a fiduciary described in section 3(21)(A)) with respect to a plan if—

(i) the transaction involves a block trade,

(ii) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

(iii) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length transaction, and

(iv) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length transaction with an unrelated party.

(B) For purposes of this paragraph, the term "block trade" means any trade of at least 10,000 shares or with a market value of at least \$200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(16) Any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary), between a plan and a party in interest if—

(A) the transaction is executed through an electronic communication network, alternative trading system, or



similar execution system or trading venue subject to regulation and oversight by—

- (i) the applicable Federal regulating entity, or
  - (ii) such foreign regulatory entity as the Secretary may determine by regulation,
- (B) either—

- (i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

- (ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the price and compensation associated with an arm's length transaction with an unrelated party,

(D) if the party in interest has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue.

(17)(A) Transactions described in subparagraphs (A), (B), and (D) of section 406(a)(1) between a plan and a person that is a party in interest other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of section 3(21)(A)(ii)) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of section 3(14), or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration.

(B) For purposes of this paragraph, the term "adequate consideration" means—

- (i) in the case of a security for which there is a generally recognized market—

- (I) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, taking into account factors such as the size of the transaction and marketability of the security, or

- (II) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in

interest, taking into account factors such as the size of the transaction and marketability of the security, and

(ii) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary.

(18) FOREIGN EXCHANGE TRANSACTIONS.—Any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either), and a plan (as defined in section 3(3)) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other party in interest, if—

(A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

(B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

(D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or provide investment advice, with respect to the transaction.

(19) CROSS TRADING.—Any transaction described in sections 406(a)(1)(A) and 406(b)(2) involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if—

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a-7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any

other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least \$100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 407(d)(7)), the master trust has assets of at least \$100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross-trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report under subparagraph (I) shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time.

(20)(A) Except as provided in subparagraphs (B) and (C), a transaction described in section 406(a) in connection with the acquisition, holding, or disposition of any security or com-

modity, if the transaction is corrected before the end of the correction period.

(B) Subparagraph (A) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 407(d)(1)) or the acquisition, sale, or lease of employer real property (as defined in section 407(d)(2)).

(C) In the case of any fiduciary or other party in interest (or any other person knowingly participating in such transaction), subparagraph (A) does not apply to any transaction if, at the time the transaction occurs, such fiduciary or party in interest (or other person) knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a violation of section 406(a).

(D) For purposes of this paragraph, the term “correction period” means, in connection with a fiduciary or party in interest (or other person knowingly participating in the transaction), the 14-day period beginning on the date on which such fiduciary or party in interest (or other person) discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph) constitute a violation of section 406(a).

(E) For purposes of this paragraph—

(i) The term “security” has the meaning given such term by section 475(c)(2) of the Internal Revenue Code of 1986 (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) The term “commodity” has the meaning given such term by section 475(e)(2) of such Code (without regard to subparagraph (D)(iii) thereof).

(iii) The term “correct” means, with respect to a transaction—

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

(21) *The provision of a de minimis financial incentive described in section 401(k)(4)(A) or 403(b)(12)(A) of the Internal Revenue Code of 1986.*

(c) Nothing in section 406 shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan

shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

(d)(1) Section 407(b) and subsections (b), (c), and (e) of this section shall not apply to a transaction in which a plan directly or indirectly—

(A) lends any part of the corpus or income of the plan to,

(B) pays any compensation for personal services rendered to the plan to, or

(C) acquires for the plan any property from, or sells any property to,

any person who is with respect to the plan an owner-employee (as defined in section 401(c)(3) of the Internal Revenue Code of 1986), a member of the family (as defined in section 267(c)(4) of such Code) of any such owner-employee, or any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(2)(A) For purposes of paragraph (1), the following shall be treated as owner-employees:

(i) A shareholder-employee.

(ii) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37) of the Internal Revenue Code of 1986).

(iii) An employer or association of employees which establishes such an individual retirement plan under section 408(c) of such Code.

(B) Paragraph (1)(C) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in section 407(d)(6)) by a shareholder-employee, a member of the family (as defined in section 267(c)(4) of such Code) of any such owner-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in paragraph (1).

(C) For purposes of paragraph (1)(A), the term “owner-employee” shall only include a person described in clause (ii) or (iii) of subparagraph (A).

(3) For purposes of paragraph (2), the term “shareholder-employee” means an employee or officer of an S corporation (as defined in section 1361(a)(1) of such Code) who owns (or is considered as owning within the meaning of section 318(a)(1) of such Code) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(e) Sections 406 and 407 shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5)) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 407(d)(4))—

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 407(e)(1)),

(2) if no commission is charged with respect thereto, and

(3) if—

(A) the plan is an eligible individual account plan (as defined in section 407(d)(3)), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 407(a).

(f) Section 406(b)(2) shall not apply to any merger or transfer described in subsection (b)(11).

(g) PROVISION OF INVESTMENT ADVICE TO PARTICIPANT AND BENEFICIARIES.—

(1) IN GENERAL.—The prohibitions provided in section 406 shall not apply to transactions described in subsection (b)(14) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

(2) ELIGIBLE INVESTMENT ADVICE ARRANGEMENT.—For purposes of this subsection, the term “eligible investment advice arrangement” means an arrangement—

(A) which either—

(i) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

(ii) uses a computer model under an investment advice program meeting the requirements of paragraph (3) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(B) with respect to which the requirements of paragraph (4), (5), (6), (7), (8), and (9) are met.

(3) INVESTMENT ADVICE PROGRAM USING COMPUTER MODEL.—

(A) IN GENERAL.—An investment advice program meets the requirements of this paragraph if the requirements of subparagraphs (B), (C), and (D) are met.

(B) COMPUTER MODEL.—The requirements of this subparagraph are met if the investment advice provided under the investment advice program is provided pursuant to a computer model that—

(i) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

(ii) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

(iii) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(iv) operates in a manner that is not biased in favor of investments offered by the fiduciary adviser or a

person with a material affiliation or contractual relationship with the fiduciary adviser, and

(v) takes into account all investment options under the plan in specifying how a participant's account balance should be invested and is not inappropriately weighted with respect to any investment option.

(C) CERTIFICATION.—

(i) IN GENERAL.—The requirements of this subparagraph are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary, that the computer model meets the requirements of subparagraph (B).

(ii) RENEWAL OF CERTIFICATIONS.—If, as determined under regulations prescribed by the Secretary, there are material modifications to a computer model, the requirements of this subparagraph are met only if a certification described in clause (i) is obtained with respect to the computer model as so modified.

(iii) ELIGIBLE INVESTMENT EXPERT.—The term “eligible investment expert” means any person—

(I) which meets such requirements as the Secretary may provide, and

(II) does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee, agent, or registered representative of the investment adviser or related person).

(D) EXCLUSIVITY OF RECOMMENDATION.—The requirements of this subparagraph are met with respect to any investment advice program if—

(i) the only investment advice provided under the program is the advice generated by the computer model described in subparagraph (B), and

(ii) any transaction described in subsection (b)(14)(A)(ii) occurs solely at the direction of the participant or beneficiary.

Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in subparagraph (A), but only if such request has not been solicited by any person connected with carrying out the arrangement.

(4) EXPRESS AUTHORIZATION BY SEPARATE FIDUCIARY.—The requirements of this paragraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

(5) ANNUAL AUDIT.—The requirements of this paragraph are met if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing—

(A) conducts an annual audit of the arrangement for compliance with the requirements of this subsection, and

(B) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this subsection.

For purposes of this paragraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

(6) DISCLOSURE.—The requirements of this paragraph are met if—

(A) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)—

(i) of the role of any party that has a material affiliation or contractual relationship with the fiduciary adviser in the development of the investment advice program and in the selection of investment options available under the plan,

(ii) of the past performance and historical rates of return of the investment options available under the plan,

(iii) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

(iv) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

(v) the manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed,

(vi) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

(vii) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

(viii) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property, and

(B) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser—

(i) maintains the information described in subparagraph (A) in accurate form and in the manner described in paragraph (8),



(ii) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

(iii) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(iv) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

(7) OTHER CONDITIONS.—The requirements of this paragraph are met if—

(A) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

(B) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

(C) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

(D) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

(8) STANDARDS FOR PRESENTATION OF INFORMATION.—

(A) IN GENERAL.—The requirements of this paragraph are met if the notification required to be provided to participants and beneficiaries under paragraph (6)(A) is written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

(B) MODEL FORM FOR DISCLOSURE OF FEES AND OTHER COMPENSATION.—The Secretary shall issue a model form for the disclosure of fees and other compensation required in paragraph (6)(A)(iii) which meets the requirements of subparagraph (A).

(9) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—The requirements of this paragraph are met if a fiduciary adviser who has provided advice referred to in paragraph (1) maintains, for a period of not less than 6 years after the provision of the advice, any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) have been met. A transaction prohibited under section 406 shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(10) EXEMPTION FOR PLAN SPONSOR AND CERTAIN OTHER FIDUCIARIES.—

(A) IN GENERAL.—Subject to subparagraph (B), a plan sponsor or other person who is a fiduciary (other than a

fiduciary adviser) shall not be treated as failing to meet the requirements of this part solely by reason of the provision of investment advice referred to in section 3(21)(A)(ii) (or solely by reason of contracting for or otherwise arranging for the provision of the advice), if—

(i) the advice is provided by a fiduciary adviser pursuant to an eligible investment advice arrangement between the plan sponsor or other fiduciary and the fiduciary adviser for the provision by the fiduciary adviser of investment advice referred to in such section,

(ii) the terms of the eligible investment advice arrangement require compliance by the fiduciary adviser with the requirements of this subsection, and

(iii) the terms of the eligible investment advice arrangement include a written acknowledgment by the fiduciary adviser that the fiduciary adviser is a fiduciary of the plan with respect to the provision of the advice.

(B) CONTINUED DUTY OF PRUDENT SELECTION OF ADVISER AND PERIODIC REVIEW.—Nothing in subparagraph (A) shall be construed to exempt a plan sponsor or other person who is a fiduciary from any requirement of this part for the prudent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an eligible investment advice arrangement for the provision of investment advice referred to in section 3(21)(A)(ii). The plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of the advice.

(C) AVAILABILITY OF PLAN ASSETS FOR PAYMENT FOR ADVICE.—Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing investment advice referred to in section 3(21)(A)(ii).

(11) DEFINITIONS.—For purposes of this subsection and subsection (b)(14)—

(A) FIDUCIARY ADVISER.—The term “fiduciary adviser” means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 3(21)(A)(ii) by the person to a participant or beneficiary of the plan and who is—

(i) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(ii) a bank or similar financial institution referred to in subsection (b)(4) or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

(iii) an insurance company qualified to do business under the laws of a State,

(iv) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(v) an affiliate of a person described in any of clauses (i) through (iv), or

(vi) an employee, agent, or registered representative of a person described in clauses (i) through (v) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

For purposes of this part, a person who develops the computer model described in paragraph (3)(B) or markets the investment advice program or computer model shall be treated as a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in section 3(21)(A)(ii) to a participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this subsection and subsection (b)(14), except that the Secretary may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

(B) AFFILIATE.—The term “affiliate” of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(3))).

(C) REGISTERED REPRESENTATIVE.—The term “registered representative” of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

(h) PROVISION OF PHARMACY BENEFIT SERVICES.—

(1) IN GENERAL.—Provided that all of the conditions described in paragraph (2) are met, the restrictions imposed by subsections (a), (b)(1), and (b)(2) of section 406 shall not apply to—

(A) the offering of pharmacy benefit services to a group health plan that is sponsored by an entity described in section 3(37)(G)(vi) or to any other group health plan that is sponsored by a regional council, local union, or other labor organization affiliated with such entity;

(B) the purchase of pharmacy benefit services by plan participants and beneficiaries of a group health plan that is sponsored by an entity described in section 3(37)(G)(vi) or of any other group health plan that is sponsored by a regional council, local union, or other labor organization affiliated with such entity; or

(C) the operation or implementation of pharmacy benefit services by an entity described in section 3(37)(G)(vi) or by any other group health plan that is sponsored by a re-

gional council, local union, or other labor organization affiliated with such entity, in any arrangement where such entity described in section 3(37)(G)(vi) or any related organization or subsidiary of such entity provides pharmacy benefit services that include prior authorization and appeals, a retail pharmacy network, pharmacy benefit administration, mail order fulfillment, formulary support, manufacturer payments, audits, and specialty pharmacy and goods, to any such group health plan.

(2) CONDITIONS.—The conditions described in this paragraph are the following:

(A) The terms of the arrangement are at least as favorable to the group health plan as such group health plan could obtain in a similar arm's length arrangement with an unrelated third party.

(B) At least 50 percent of the providers participating in the pharmacy benefit services offered by the arrangement are unrelated to the contributing employers or any other party in interest with respect to the group health plan.

(C) The group health plan retains an independent fiduciary who will be responsible for monitoring the group health plan's consultants, contractors, subcontractors, and other service providers for purposes of pharmacy benefit services described in paragraph (1) offered by such entity or any of its related organizations or subsidiaries and monitors the transactions of such entity and any of its related organizations or subsidiaries to ensure that all conditions of this exemption are satisfied during each plan year.

(D) Any decisions regarding the provision of pharmacy benefit services described in paragraph (1) are made by the group health plan's independent fiduciary, based on objective standards developed by the independent fiduciary in reliance on information provided by the arrangement.

(E) The independent fiduciary of the group health plan provides an annual report to the Secretary and the congressional committees of jurisdiction attesting that the conditions described in subparagraphs (C) and (D) have been met for the applicable plan year, together with a statement that use of the arrangement's services are in the best interest of the participants and beneficiaries in the aggregate for that plan year compared to other similar arrangements the group health plan could have obtained in transactions with an unrelated third party.

(F) The arrangement is not designed to benefit any party in interest with respect to the group health plan.

(3) VIOLATIONS.—In the event an entity described in section 3(37)(G)(vi) or any affiliate of such entity violates any of the conditions of such exemption, such exemption shall not apply with respect to such entity or affiliate and all enforcement and claims available under this Act shall apply with respect to such entity or affiliate.

(4) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to modify any obligation of a group health plan otherwise set forth in this Act.

(5) GROUP HEALTH PLAN.—In this subsection, the term “group health plan” has the meaning given such term in section 733(a).

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#### TITLE IV—PLAN TERMINATION INSURANCE

##### SUBTITLE A—PENSION BENEFIT GUARANTY CORPORATION

\* \* \* \* \*

##### ESTABLISHMENT OF PENSION BENEFIT GUARANTY FUNDS

SEC. 4005. (a) There are established on the books of the Treasury of the United States four revolving funds to be used by the corporation in carrying out its duties under this title. One of the funds shall be used with respect to basic benefits guaranteed under section 4022, one of the funds shall be used with respect to basic benefits guaranteed under section 4022A, one of the funds shall be used with respect to nonbasic benefits guaranteed under section 4022 (if any), and the remaining fund shall be used with respect to nonbasic benefits guaranteed under section 4022A (if any), other than subsection (g)(2) thereof (if any). Whenever in this title reference is made to the term “fund” the reference shall be considered to refer to the appropriate fund established under this subsection.

(b)(1) Each fund established under this section shall be credited with the appropriate portion of—

(A) premiums, penalties, interest, and charges collected under this title,

(B) the value of the assets of a plan administered under section 4042 by a trustee to the extent that they exceed the liabilities of such plan,

(C) the amount of any employer liability payments under subtitle D, to the extent that such payments exceed liabilities of the plan (taking into account all other plan assets),

(D) earnings on investments of the fund or on assets credited to the fund under this subsection,

(E) attorney’s fees awarded to the corporation, and

(F) receipts from any other operations under this title.

(2) Subject to the provisions of subsection (a), each fund shall be available—

(A) for making such payments as the corporation determines are necessary to pay benefits guaranteed under section 4022 or 4022A,

(B) to purchase assets from a plan being terminated by the corporation when the corporation determines such purchase will best protect the interests of the corporation, participants in the plan being terminated, and other insured plans,

(C) to pay the operational and administrative expenses of the corporation, including reimbursement of the expenses incurred by the Department of the Treasury in maintaining the funds, and the Comptroller General in auditing the corporation, and

(D) to pay to participants and beneficiaries the estimated amount of benefits which are guaranteed by the corporation under this title and the estimated amount of other benefits to which plan assets are allocated under section 4044, under sin-

gle-employer plans which are unable to pay benefits when due or which are abandoned.

(3)(A) Whenever the corporation determines that the moneys of any fund are in excess of current needs, it may request the investment of such amounts as it determines advisable by the Secretary of the Treasury in obligations issued or guaranteed by the United States.

(B) Notwithstanding subparagraph (A)—

(i) the amounts of premiums received under section 4006 with respect to the fund to be used for basic benefits under section 4022A in a fiscal year in the period beginning with fiscal year 2016 and ending with fiscal year 2020 shall be placed in a noninterest-bearing account within such fund in the following amounts:

- (I) for fiscal year 2016, \$108,000,000;
- (II) for fiscal year 2017, \$111,000,000;
- (III) for fiscal year 2018, \$113,000,000;
- (IV) for fiscal year 2019, \$149,000,000; and
- (V) for fiscal year 2020, \$296,000,000;

(ii) premiums received in fiscal years specified in subclauses (I) through (V) of clause (i) shall be allocated in order first to the noninterest-bearing account in the amount specified and second to any other accounts within such fund; and

(iii) financial assistance, as provided under section 4261, shall be withdrawn proportionately from the noninterest-bearing and other accounts within the fund.

(d)(1) A fifth fund shall be established for the reimbursement of uncollectible withdrawal liability under section 4222, and shall be credited with the appropriate—

(A) premiums, penalties, and interest charges collected under this title, and

(B) earnings on investments of the fund or on assets credited to the fund.

The fund shall be available to make payments pursuant to the supplemental program established under section 4222, including those expenses and other charges determined to be appropriate by the corporation.

(2) The corporation may invest amounts of the fund in such obligations as the corporation considers appropriate.

(e)(1) A sixth fund shall be established for the supplemental benefit guarantee program provided under section 4022A(g)(2).

(2) Such fund shall be credited with the appropriate—

(A) premiums, penalties, and interest charges collected under section 4022A(g)(2), and

(B) earnings on investments of the fund or on assets credited to the fund.

The fund shall be available for making payments pursuant to the supplemental benefit guarantee program established under section 4022A(g)(2), including those expenses and other charges determined to be appropriate by the corporation.

(3) The corporation may invest amounts of the fund in such obligations as the corporation considers appropriate.

(f)(1) A seventh fund shall be established and credited with—

(A) premiums, penalties, and interest charges collected under section 4006(a)(3)(A)(i) (not described in subparagraph (B)) to

the extent attributable to the amount of the premium in excess of \$8.50,

(B) premiums, penalties, and interest charges collected under section 4006(a)(3)(E), and

(C) earnings on investments of the fund or on assets credited to the fund.

(2) Amounts in the fund shall be available for transfer to other funds established under this section with respect to a single-employer plan but shall not be available to pay—

(A) administrative costs of the corporation, or

(B) benefits under any plan which was terminated before October 1, 1988,

unless no other amounts are available for such payment.

(3) The corporation may invest amounts of the fund in such obligations as the corporation considers appropriate.

(g)(1) Amounts in any fund established under this section may be used only for the purposes for which such fund was established and may not be used to make loans to (or on behalf of) any other fund or to finance any other activity of the corporation.

(2) Any repayment to the corporation of any amount paid out of any fund in connection with a multiemployer plan shall be deposited in such fund.

(h) Any stock in a person liable to the corporation under this title which is paid to the corporation by such person or a member of such person's controlled group in satisfaction of such person's liability under this title may be voted only by the custodial trustees or outside money managers of the corporation.

(i)(1) An eighth fund shall be established for special financial assistance to multiemployer pension plans, as provided under section 4262, and to pay for necessary administrative and operating expenses of the corporation relating to such assistance.

(2) There is appropriated from the general fund such amounts as are necessary for the costs of providing financial assistance under section 4262 and necessary administrative and operating expenses of the corporation. The eighth fund established under this subsection shall be credited with amounts from time to time as the Secretary of the Treasury, in conjunction with the Director of the Pension Benefit Guaranty Corporation, determines appropriate, from the general fund of the Treasury, but in no case shall such transfers occur after September 30, 2030.

(j)(1) *A ninth fund shall be established for the payment of benefits under section 4051(b)(1)(D).*

(2) *Such fund shall be credited with the appropriate—*

*(A) amounts transferred to the Office of the Retirement Savings Lost and Found under section 4051(b)(1)(A); and*

*(B) earnings on investments of the fund or on assets credited to the fund.*

(3) *Whenever the corporation determines that the moneys of any fund are in excess of current needs, it may request the investment of such amounts as it determines advisable by the Secretary of the Treasury in obligations issued or guaranteed by the United States.*

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## Subtitle C—Terminations

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### **SEC. 4051. OFFICE OF THE RETIREMENT SAVINGS LOST AND FOUND.**

#### **(a) ESTABLISHMENT; RESPONSIBILITIES OF OFFICE.—**

(1) *IN GENERAL.*—Not later than 2 years after the date of the enactment of this section, the Secretary of Labor, the Secretary of Treasury, and the Secretary of Commerce shall establish within the corporation an Office of the Retirement Savings Lost and Found (in this section referred to as the “Office”).

#### **(2) RESPONSIBILITIES OF OFFICE.—**

##### **(A) IN GENERAL.—The Office shall—**

- (i) carry out subsection (b) of this section;
- (ii) maintain the Retirement Savings Lost and Found established under section 306(a) of the Securing a Strong Retirement Act of 2021; and
- (iii) perform an annual audit of plan information contained in the Retirement Savings Lost and Found and ensure that such information is current and accurate.

##### **(B) OPTION TO CONTRACT.—**

(i) *IN GENERAL.*—Not later than 2 years after the date of enactment of this section, the corporation shall conduct an analysis of the cost effectiveness of contracting with a third party to carry out the responsibilities under subparagraph (A)(iii) and, upon a determination that such contracting would be more cost effective than carrying out such responsibilities within the Office, the corporation may enter into such contracts as merited by such analysis.

(ii) *REPORT.*—The corporation shall report on the results of the analysis under clause (i) to the Committees on Finance and Health, Education, Labor, and Pensions of the Senate and the Committees on Ways and Means and Education and Labor of the House of Representatives.

#### **(b) CERTAIN NON-RESPONSIVE PARTICIPANTS ENTITLED TO SMALL BENEFITS.—**

##### **(1) GENERAL RULE.—**

(A) *TRANSFER TO THE OFFICE OF THE RETIREMENT SAVINGS LOST AND FOUND.*—The administrator of a plan that is not terminated and to which section 401(a)(31)(B) of the Internal Revenue Code of 1986 applies shall transfer to the Office the amount required to be transferred under section 401(a)(31)(B)(iv) of such Code for a non-responsive participant.

(B) *INFORMATION AND PAYMENT TO THE OFFICE.*—Upon making a transfer under subparagraph (A), the plan administrator shall provide such information and certifications as the Office shall specify, including with respect to the transferred amount and the non-responsive participant.

(C) *INFORMATION REQUIREMENTS AFTER TRANSFER.*—In the event that, after a transfer is made under subparagraph (A), the relevant non-responsive participant contacts



*the plan administrator or the plan administrator discovers information that may assist the Office in locating the non-responsive participant, the plan administrator shall notify and provide such information as the Office shall specify to the Office.*

*(D) SEARCH AND PAYMENT BY THE OFFICE FOLLOWING TRANSFER.—The Office shall periodically, and upon receiving information described in subparagraph (C), conduct a search for the non-responsive participant for whom the Office has received a transfer under subparagraph (A). Upon location of a non-responsive participant who claims benefits, the Office shall make a single payment to the non-responsive participant in an amount equal to the sum of—*

*(i) the amount transferred to the Office under subparagraph (A) for such participant; and*

*(ii) the return on the investment attributable to such amount under section 4005(j)(3).*

*(2) DEFINITION.—For purposes of this subsection, the term “non-responsive participant” means a participant or beneficiary of a plan described in paragraph (1)(A)—*

*(A) who is entitled to a benefit subject to a mandatory transfer under section 401(a)(31)(B)(iii) of the Internal Revenue Code of 1986; and*

*(B) for whom the plan has satisfied the conditions in section 401(a)(31)(B)(iv) of such Code.*

*(3) REGULATORY AUTHORITY.—The Office shall prescribe such regulations as are necessary to carry out the purposes of this section, including rules relating to the amount payable to the Office and the amount to be paid by the Office.*

*(c) INFORMATION COLLECTION.—Within such period after the end of a plan year as the Office may by regulations prescribe, the administrator of a plan to which the vesting standards of section 203 apply shall submit the following information, and such other information as the corporation may require, to the corporation in such form as the corporation may require:*

*(1) The information described in paragraphs (1) through (4) of section 6057(b) of the Internal Revenue Code of 1986.*

*(2) The information described in subparagraphs (A), (B), (E), and (F) of section 6057(a)(2) of the Internal Revenue Code of 1986.*

*(d) EFFECTIVE DATE.—The requirements of subsections (b) and (c) shall apply with respect to plan years beginning after the second December 31 occurring after the date of the enactment of this section.*

*(e) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to carry out this section.*

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## SETTING EVERY COMMUNITY UP FOR RETIREMENT ENHANCEMENT ACT OF 2019

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## TITLE I—EXPANDING AND PRESERVING RETIREMENT SAVINGS

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### SEC. 112. QUALIFIED CASH OR DEFERRED ARRANGEMENTS MUST ALLOW LONG-TERM EMPLOYEES WORKING MORE THAN 500 BUT LESS THAN 1,000 HOURS PER YEAR TO PARTICI- PATE.

(a) PARTICIPATION REQUIREMENT.—

(1) IN GENERAL.—Section 401(k)(2)(D) of the Internal Revenue Code of 1986 is amended to read as follows:

“(D) which does not require, as a condition of participation in the arrangement, that an employee complete a period of service with the employer (or employers) maintaining the plan extending beyond the close of the earlier of—

“(i) the period permitted under section 410(a)(1) (determined without regard to subparagraph (B)(i) thereof), or

“(ii) subject to the provisions of paragraph (15), the first period of 3 consecutive 12-month periods during each of which the employee has at least 500 hours of service.”.

(2) SPECIAL RULES.—Section 401(k) of such Code is amended by adding at the end the following new paragraph:

“(15) SPECIAL RULES FOR PARTICIPATION REQUIREMENT FOR LONG-TERM, PART-TIME WORKERS.—For purposes of paragraph (2)(D)(ii)—

“(A) AGE REQUIREMENT MUST BE MET.—Paragraph (2)(D)(ii) shall not apply to an employee unless the employee has met the requirement of section 410(a)(1)(A)(i) by the close of the last of the 12-month periods described in such paragraph.

“(B) NONDISCRIMINATION AND TOP-HEAVY RULES NOT TO APPLY.—

“(i) NONDISCRIMINATION RULES.—In the case of employees who are eligible to participate in the arrangement solely by reason of paragraph (2)(D)(ii)—

“(I) notwithstanding subsection (a)(4), an employer shall not be required to make nonelective or matching contributions on behalf of such employees even if such contributions are made on behalf of other employees eligible to participate in the arrangement, and

“(II) an employer may elect to exclude such employees from the application of subsection (a)(4), paragraphs (3), (12), and (13), subsection (m)(2), and section 410(b).

“(ii) TOP-HEAVY RULES.—An employer may elect to exclude all employees who are eligible to participate in a plan maintained by the employer solely by reason of paragraph (2)(D)(ii) from the application of the vesting and benefit requirements under subsections (b) and (c) of section 416.

“(iii) VESTING.—For purposes of determining whether an employee described in clause (i) has a nonforfeitable right to employer contributions (other than contributions described in paragraph (3)(D)(i)) under the arrangement, each 12-month period for which the employee has at least 500 hours of service shall be treated as a year of service, and section 411(a)(6) shall be applied by substituting ‘at least 500 hours of service’ for ‘more than 500 hours of service’ in subparagraph (A) thereof.

“(iv) EMPLOYEES WHO BECOME FULL-TIME EMPLOYEES.—This subparagraph (other than clause (iii)) shall cease to apply to any employee as of the first plan year beginning after the plan year in which the employee meets the requirements of section 410(a)(1)(A)(ii) without regard to paragraph (2)(D)(ii).

“(C) EXCEPTION FOR EMPLOYEES UNDER COLLECTIVELY BARGAINED PLANS, ETC.—Paragraph (2)(D)(ii) shall not apply to employees described in section 410(b)(3).

“(D) SPECIAL RULES.—

“(i) TIME OF PARTICIPATION.—The rules of section 410(a)(4) shall apply to an employee eligible to participate in an arrangement solely by reason of paragraph (2)(D)(ii).

“(ii) 12-MONTH PERIODS.—12-month periods shall be determined in the same manner as under the last sentence of section 410(a)(3)(A).”

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2020, except that, for purposes of [section 401(k)(2)(D)(ii)] *paragraphs (2)(D)(ii) and (15)(B)(iii) of section 401(k)* of the Internal Revenue Code of 1986 (as added by such amendments), 12-month periods beginning before January 1, 2021, shall not be taken into account.

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## TITLE VI—ADMINISTRATIVE PROVISIONS

### SEC. 601. PROVISIONS RELATING TO PLAN AMENDMENTS.

(a) IN GENERAL.—If this section applies to any retirement plan or contract amendment—

(1) such retirement plan or contract shall be treated as being operated in accordance with the terms of the plan during the period described in subsection (b)(2)(A); and

(2) except as provided by the Secretary of the Treasury (or the Secretary’s delegate), such retirement plan shall not fail to meet the requirements of section 411(d)(6) of the Internal Revenue Code of 1986 and section 204(g) of the Employee Retirement Income Security Act of 1974 by reason of such amendment.

(b) AMENDMENTS TO WHICH SECTION APPLIES.—

(1) IN GENERAL.—This section shall apply to any amendment to any retirement plan or annuity contract which is made—

(A) pursuant to any amendment made by this Act or pursuant to any regulation issued by the Secretary of the Treasury or the Secretary of Labor (or a delegate of either such Secretary) under this Act; and

(B) on or before the last day of the first plan year beginning on or after **January 1, 2022** *January 1, 2023*, or such later date as the Secretary of the Treasury may prescribe. In the case of a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986), or an applicable collectively bargained plan in the case of section 401 (and the amendments made thereby), this paragraph shall be applied by **substituting “2024” for “2022”.** *substituting “2025” for “2023”.* For purposes of the preceding sentence, the term “applicable collectively bargained plan” means a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified before the date of enactment of this Act.

(2) CONDITIONS.—This section shall not apply to any amendment unless—

(A) during the period—

(i) beginning on the date the legislative or regulatory amendment described in paragraph (1)(A) takes effect (or in the case of a plan or contract amendment not required by such legislative or regulatory amendment, the effective date specified by the plan); and

(ii) ending on the date described in paragraph (1)(B) (as modified by the second sentence of paragraph (1)) (or, if earlier, the date the plan or contract amendment is adopted), the plan or contract is operated as if such plan or contract amendment were in effect; and

(B) such plan or contract amendment applies retroactively for such period.

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## CARES ACT

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## DIVISION A—KEEPING WORKERS PAID AND EMPLOYED, HEALTH CARE SYSTEM ENHANCEMENTS, AND ECONOMIC STABILIZATION

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## TITLE II—ASSISTANCE FOR AMERICAN WORKERS, FAMILIES, AND BUSINESSES

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## Subtitle B—Rebates and Other Individual Provisions

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### SEC. 2202. SPECIAL RULES FOR USE OF RETIREMENT FUNDS.

#### (a) TAX-FAVORED WITHDRAWALS FROM RETIREMENT PLANS.—

(1) IN GENERAL.—Section 72(t) of the Internal Revenue Code of 1986 shall not apply to any coronavirus-related distribution.

#### (2) AGGREGATE DOLLAR LIMITATION.—

(A) IN GENERAL.—For purposes of this subsection, the aggregate amount of distributions received by an individual which may be treated as coronavirus-related distributions for any taxable year shall not exceed \$100,000.

(B) TREATMENT OF PLAN DISTRIBUTIONS.—If a distribution to an individual would (without regard to subparagraph (A)) be a coronavirus-related distribution, a plan shall not be treated as violating any requirement of the Internal Revenue Code of 1986 merely because the plan treats such distribution as a coronavirus-related distribution, unless the aggregate amount of such distributions from all plans maintained by the employer (and any member of any controlled group which includes the employer) to such individual exceeds \$100,000.

(C) CONTROLLED GROUP.—For purposes of subparagraph (B), the term “controlled group” means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986.

#### (3) AMOUNT DISTRIBUTED MAY BE REPAID.—

(A) IN GENERAL.—Any individual who receives a coronavirus-related distribution may, at any time during the 3-year period beginning on the day after the date on which such distribution was received, make 1 or more contributions in an aggregate amount not to exceed the amount of such distribution to an eligible retirement plan of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made under section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), of the Internal Revenue Code of 1986, as the case may be.

(B) TREATMENT OF REPAYMENTS OF DISTRIBUTIONS FROM ELIGIBLE RETIREMENT PLANS OTHER THAN IRAS.—For purposes of the Internal Revenue Code of 1986, if a contribution is made pursuant to subparagraph (A) with respect to a coronavirus-related distribution from an eligible retirement plan other than an individual retirement plan, then the taxpayer shall, to the extent of the amount of the contribution, be treated as having received the coronavirus-related distribution in an eligible rollover distribution (as defined in section 402(c)(4) of such Code) and as having transferred the amount to the eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.

(C) TREATMENT OF REPAYMENTS OF DISTRIBUTIONS FROM IRAS.—For purposes of the Internal Revenue Code of 1986,

if a contribution is made pursuant to subparagraph (A) with respect to a coronavirus-related distribution from an individual retirement plan (as defined by section 7701(a)(37) of such Code), then, to the extent of the amount of the contribution, the coronavirus-related distribution shall be treated as a distribution described in section 408(d)(3) of such Code and as having been transferred to the eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.

(4) DEFINITIONS.—For purposes of this subsection—

(A) CORONAVIRUS-RELATED DISTRIBUTION.—Except as provided in paragraph (2), the term “coronavirus-related distribution” means any distribution from an eligible retirement plan made—

(i) on or after January 1, 2020, and before December 31, 2020,

(ii) to an individual—

(I) who is diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention,

(II) whose spouse or dependent (as defined in section 152 of the Internal Revenue Code of 1986) is diagnosed with such virus or disease by such a test, or

(III) who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors as determined by the Secretary of the Treasury (or the Secretary’s delegate).

(B) EMPLOYEE CERTIFICATION.—The administrator of an eligible retirement plan may rely on an employee’s certification that the employee satisfies the conditions of subparagraph (A)(ii) in determining whether any distribution is a coronavirus-related distribution.

(C) ELIGIBLE RETIREMENT PLAN.—The term “eligible retirement plan” has the meaning given such term by section 402(c)(8)(B) of the Internal Revenue Code of 1986.

(5) INCOME INCLUSION SPREAD OVER 3-YEAR PERIOD.—

(A) IN GENERAL.—In the case of any coronavirus-related distribution, unless the taxpayer elects not to have this paragraph apply for any taxable year, any amount required to be included in gross income for such taxable year shall be so included ratably over the 3-taxable-year period beginning with such taxable year.

(B) SPECIAL RULE.—For purposes of subparagraph (A), rules similar to the rules of subparagraph (E) of section 408A(d)(3) of the Internal Revenue Code of 1986 shall apply.

(6) SPECIAL RULES.—

(A) EXEMPTION OF DISTRIBUTIONS FROM TRUSTEE TO TRUSTEE TRANSFER AND WITHHOLDING RULES.—For purposes of sections 401(a)(31), 402(f), and 3405 of the Internal Revenue Code of 1986, coronavirus-related distributions shall not be treated as eligible rollover distributions.

(B) CORONAVIRUS-RELATED DISTRIBUTIONS TREATED AS MEETING PLAN DISTRIBUTION REQUIREMENTS.—For purposes of the Internal Revenue Code of 1986, a coronavirus-related distribution shall be treated as meeting the requirements of sections 401(k)(2)(B)(i), 403(b)(7)(A)(i), 403(b)(11), and 457(d)(1)(A) of such Code and section 8433(h)(1) of title 5, United States Code, and, in the case of a money purchase pension plan, a coronavirus-related distribution which is an in-service withdrawal shall be treated as meeting the distribution rules of section 401(a) of the Internal Revenue Code of 1986.

(b) LOANS FROM QUALIFIED PLANS.—

(1) INCREASE IN LIMIT ON LOANS NOT TREATED AS DISTRIBUTIONS.—In the case of any loan from a qualified employer plan (as defined under section 72(p)(4) of the Internal Revenue Code of 1986) to a qualified individual made during the 180-day period beginning on the date of the enactment of this Act—

(A) clause (i) of section 72(p)(2)(A) of such Code shall be applied by substituting “\$100,000” for “\$50,000”, and

(B) clause (ii) of such section shall be applied by substituting “the present value of the nonforfeitable accrued benefit of the employee under the plan” for “one-half of the present value of the nonforfeitable accrued benefit of the employee under the plan”.

(2) DELAY OF REPAYMENT.—In the case of a qualified individual with an outstanding loan (on or after the date of the enactment of this Act) from a qualified employer plan (as defined in section 72(p)(4) of the Internal Revenue Code of 1986)—

(A) if the due date pursuant to subparagraph (B) or (C) of section 72(p)(2) of such Code for any repayment with respect to such loan occurs during the period beginning on the date of the enactment of this Act and ending on December 31, 2020, such due date shall be delayed for 1 year,

(B) any subsequent repayments with respect to any such loan shall be appropriately adjusted to reflect the delay in the due date under subparagraph (A) and any interest accruing during such delay, and

(C) in determining the 5-year period and the term of a loan under subparagraph (B) or (C) of section 72(p)(2) of such Code, the period described in subparagraph (A) of this paragraph shall be disregarded.

(3) QUALIFIED INDIVIDUAL.—For purposes of this subsection, the term “qualified individual” means any individual who is described in subsection (a)(4)(A)(ii).

(c) PROVISIONS RELATING TO PLAN AMENDMENTS.—

(1) IN GENERAL.—If this subsection applies to any amendment to any plan or annuity contract—

(A) such plan or contract shall be treated as being operated in accordance with the terms of the plan during the period described in paragraph (2)(B)(i), and

(B) except as provided by the Secretary of the Treasury (or the Secretary's delegate), such plan or contract shall not fail to meet the requirements of section 411(d)(6) of the Internal Revenue Code of 1986 and section 204(g) of the Employee Retirement Income Security Act of 1974 by reason of such amendment.

(2) AMENDMENTS TO WHICH SUBSECTION APPLIES.—

(A) IN GENERAL.—This subsection shall apply to any amendment to any plan or annuity contract which is made—

(i) pursuant to any provision of this section, or pursuant to any regulation issued by the Secretary of the Treasury or the Secretary of Labor (or the delegate of either such Secretary) under any provision of this section, and

(ii) on or before the last day of the first plan year beginning on or after **January 1, 2022** *January 1, 2023*, or such later date as the Secretary of the Treasury (or the Secretary's delegate) may prescribe. In the case of a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986), clause (ii) shall be applied by substituting the date which is 2 years after the date otherwise applied under clause (ii).

(B) CONDITIONS.—This subsection shall not apply to any amendment unless—

(i) during the period—

(I) beginning on the date that this section or the regulation described in subparagraph (A)(i) takes effect (or in the case of a plan or contract amendment not required by this section or such regulation, the effective date specified by the plan), and

(II) ending on the date described in subparagraph (A)(ii) (or, if earlier, the date the plan or contract amendment is adopted), the plan or contract is operated as if such plan or contract amendment were in effect, and

(ii) such plan or contract amendment applies retroactively for such period.

**SEC. 2203. TEMPORARY WAIVER OF REQUIRED MINIMUM DISTRIBUTION RULES FOR CERTAIN RETIREMENT PLANS AND ACCOUNTS.**

(a) IN GENERAL.—Section 401(a)(9) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraph:

“(I) TEMPORARY WAIVER OF MINIMUM REQUIRED DISTRIBUTION.—

“(i) IN GENERAL.—The requirements of this paragraph shall not apply for calendar year 2020 to—

“(I) a defined contribution plan which is described in this subsection or in section 403(a) or 403(b),

“(II) a defined contribution plan which is an eligible deferred compensation plan described in sec-



tion 457(b) but only if such plan is maintained by an employer described in section 457(e)(1)(A), or  
 “(III) an individual retirement plan.

“(ii) SPECIAL RULE FOR REQUIRED BEGINNING DATES IN 2020.—Clause (i) shall apply to any distribution which is required to be made in calendar year 2020 by reason of—

“(I) a required beginning date occurring in such calendar year, and

“(II) such distribution not having been made before January 1, 2020.

“(iii) SPECIAL RULES REGARDING WAIVER PERIOD.—For purposes of this paragraph—

“(I) the required beginning date with respect to any individual shall be determined without regard to this subparagraph for purposes of applying this paragraph for calendar years after 2020, and

“(II) if clause (ii) of subparagraph (B) applies, the 5-year period described in such clause shall be determined without regard to calendar year 2020.”

(b) ELIGIBLE ROLLOVER DISTRIBUTIONS.—Section 402(c)(4) of the Internal Revenue Code of 1986 is amended by striking “2009” each place it appears in the last sentence and inserting “2020”.

(c) EFFECTIVE DATES.—

(1) IN GENERAL.—The amendments made by this section shall apply for calendar years beginning after December 31, 2019.

(2) PROVISIONS RELATING TO PLAN OR CONTRACT AMENDMENTS.—

(A) IN GENERAL.—If this paragraph applies to any plan or contract amendment—

(i) such plan or contract shall not fail to be treated as being operated in accordance with the terms of the plan during the period described in subparagraph (B)(ii) solely because the plan operates in accordance with this section, and

(ii) except as provided by the Secretary of the Treasury (or the Secretary’s delegate), such plan or contract shall not fail to meet the requirements of section 411(d)(6) of the Internal Revenue Code of 1986 and section 204(g) of the Employee Retirement Income Security Act of 1974 by reason of such amendment.

(B) AMENDMENTS TO WHICH PARAGRAPH APPLIES.—

(i) IN GENERAL.—This paragraph shall apply to any amendment to any plan or annuity contract which—

(I) is made pursuant to the amendments made by this section, and

(II) is made on or before the last day of the first plan year beginning on or after **January 1, 2022**  
*January 1, 2023.*

In the case of a governmental plan, subclause (II) shall be applied by **substituting “2024” for “2022”.**  
*substituting “2025” for “2023”.*

(ii) CONDITIONS.—This paragraph shall not apply to any amendment unless during the period beginning on the effective date of the amendment and ending on December 31, 2020, the plan or contract is operated as if such plan or contract amendment were in effect.

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## SECTION 302 OF THE TAXPAYER CERTAINTY AND DISASTER TAX RELIEF ACT OF 2020

### SEC. 302. SPECIAL DISASTER-RELATED RULES FOR USE OF RETIREMENT FUNDS.

#### (a) TAX-FAVORED WITHDRAWALS FROM RETIREMENT PLANS.—

(1) IN GENERAL.—Section 72(t) of the Internal Revenue Code of 1986 shall not apply to any qualified disaster distribution.

#### (2) AGGREGATE DOLLAR LIMITATION.—

(A) IN GENERAL.—For purposes of this subsection, the aggregate amount of distributions received by an individual which may be treated as qualified disaster distributions for any taxable year shall not exceed the excess (if any) of—

(i) \$100,000, over

(ii) the aggregate amounts treated as qualified disaster distributions received by such individual for all prior taxable years.

(B) TREATMENT OF PLAN DISTRIBUTIONS.—If a distribution to an individual would (without regard to subparagraph (A)) be a qualified disaster distribution, a plan shall not be treated as violating any requirement of the Internal Revenue Code of 1986 merely because the plan treats such distribution as a qualified disaster distribution, unless the aggregate amount of such distributions from all plans maintained by the employer (and any member of any controlled group which includes the employer) to such individual exceeds \$100,000.

(C) CONTROLLED GROUP.—For purposes of subparagraph (B), the term “controlled group” means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986.

(D) SPECIAL RULE FOR INDIVIDUALS AFFECTED BY MORE THAN ONE DISASTER.—The limitation of subparagraph (A) shall be applied separately with respect to distributions made with respect to each qualified disaster.

#### (3) AMOUNT DISTRIBUTED MAY BE REPAID.—

(A) IN GENERAL.—Any individual who receives a qualified disaster distribution may, at any time during the 3-year period beginning on the day after the date on which such distribution was received, make 1 or more contributions in an aggregate amount not to exceed the amount of such distribution to an eligible retirement plan of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made under section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), of the Internal Revenue Code of 1986, as the case may be.

(B) TREATMENT OF REPAYMENTS OF DISTRIBUTIONS FROM ELIGIBLE RETIREMENT PLANS OTHER THAN IRAS.—For purposes of the Internal Revenue Code of 1986, if a contribution is made pursuant to subparagraph (A) with respect to a qualified disaster distribution from an eligible retirement plan other than an individual retirement plan, then the taxpayer shall, to the extent of the amount of the contribution, be treated as having received the qualified disaster distribution in an eligible rollover distribution (as defined in section 402(c)(4) of such Code) and as having transferred the amount to the eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.

(C) TREATMENT OF REPAYMENTS OF DISTRIBUTIONS FROM IRAS.—For purposes of the Internal Revenue Code of 1986, if a contribution is made pursuant to subparagraph (A) with respect to a qualified disaster distribution from an individual retirement plan (as defined by section 7701(a)(37) of such Code), then, to the extent of the amount of the contribution, the qualified disaster distribution shall be treated as a distribution described in section 408(d)(3) of such Code and as having been transferred to the eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.

(4) DEFINITIONS.—For purposes of this subsection—

(A) QUALIFIED DISASTER DISTRIBUTION.—Except as provided in paragraph (2), the term “qualified disaster distribution” means any distribution from an eligible retirement plan made—

(i) on or after the first day of the incident period of a qualified disaster and before the date which is 180 days after the date of the enactment of this Act, and

(ii) to an individual whose principal place of abode at any time during the incident period of such qualified disaster is located in the qualified disaster area with respect to such qualified disaster and who has sustained an economic loss by reason of such qualified disaster.

(B) ELIGIBLE RETIREMENT PLAN.—The term “eligible retirement plan” shall have the meaning given such term by section 402(c)(8)(B) of the Internal Revenue Code of 1986.

(5) INCOME INCLUSION SPREAD OVER 3-YEAR PERIOD

(A) IN GENERAL.—In the case of any qualified disaster distribution, unless the taxpayer elects not to have this paragraph apply for any taxable year, any amount required to be included in gross income for such taxable year shall be so included ratably over the 3-taxable-year period beginning with such taxable year.

(B) SPECIAL RULE.—For purposes of subparagraph (A), rules similar to the rules of subparagraph (E) of section 408A(d)(3) of the Internal Revenue Code of 1986 shall apply.

(6) SPECIAL RULES.—

(A) EXEMPTION OF DISTRIBUTIONS FROM TRUSTEE TO TRUSTEE TRANSFER AND WITHHOLDING RULES.—For pur-

poses of sections 401(a)(31), 402(f), and 3405 of the Internal Revenue Code of 1986, qualified disaster distributions shall not be treated as eligible rollover distributions.

(B) QUALIFIED DISASTER DISTRIBUTIONS TREATED AS MEETING PLAN DISTRIBUTION REQUIREMENTS.—For purposes of the Internal Revenue Code of 1986, a qualified disaster distribution shall be treated as meeting the requirements of sections 401(k)(2)(B)(i), 403(b)(7)(A)(i), 403(b)(11), and 457(d)(1)(A) of such Code and section 8433(h)(1) of title 5, United States Code, and, in the case of a money purchase pension plan, a qualified disaster distribution which is an in-service withdrawal shall be treated as meeting the distribution rules of section 401(a) of such Code.

(b) RECONTRIBUTIONS OF WITHDRAWALS FOR HOME PURCHASES.—

(1) RECONTRIBUTIONS.—

(A) IN GENERAL.—Any individual who received a qualified distribution may, during the applicable period, make 1 or more contributions in an aggregate amount not to exceed the amount of such qualified distribution to an eligible retirement plan (as defined in section 402(c)(8)(B) of the Internal Revenue Code of 1986) of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made under section 402(c), 403(a)(4), 403(b)(8), or 408(d)(3), of such Code, as the case may be.

(B) TREATMENT OF REPAYMENTS.—Rules similar to the rules of subparagraphs (B) and (C) of subsection (a)(3) shall apply for purposes of this subsection.

(2) QUALIFIED DISTRIBUTION.—For purposes of this subsection, the term “qualified distribution” means any distribution—

(A) described in section 401(k)(2)(B)(i)(IV), 403(b)(7)(A)(i)(V), 403(b)(11)(B), or 72(t)(2)(F), of the Internal Revenue Code of 1986,

(B) which was to be used to purchase or construct a principal residence in a qualified disaster area, but which was not so used on account of the qualified disaster with respect to such area, and

(C) which was received during the period beginning on the date which is 180 days before the first day of the incident period of such qualified disaster and ending on the date which is 30 days after the last day of such incident period.

(3) APPLICABLE PERIOD.—For purposes of this subsection, the term “applicable period” means, in the case of a principal residence in a qualified disaster area with respect to any qualified disaster, the period beginning on the first day of the incident period of such qualified disaster and ending on the date which is 180 days after the date of the enactment of this Act.

(c) LOANS FROM QUALIFIED PLANS.—

(1) INCREASE IN LIMIT ON LOANS NOT TREATED AS DISTRIBUTIONS.—In the case of any loan from a qualified employer plan (as defined under section 72(p)(4) of the Internal Revenue Code

of 1986) to a qualified individual made during the 180-day period beginning on the date of the enactment of this Act—

(A) clause (i) of section 72(p)(2)(A) of such Code shall be applied by substituting “\$100,000” for “\$50,000”, and

(B) clause (ii) of such section shall be applied by substituting “the present value of the nonforfeitable accrued benefit of the employee under the plan” for “one-half of the present value of the nonforfeitable accrued benefit of the employee under the plan”.

(2) DELAY OF REPAYMENT.—In the case of a qualified individual (with respect to any qualified disaster) with an outstanding loan (on or after the first day of the incident period of such qualified disaster) from a qualified employer plan (as defined in section 72(p)(4) of the Internal Revenue Code of 1986)—

(A) if the due date pursuant to subparagraph (B) or (C) of section 72(p)(2) of such Code for any repayment with respect to such loan occurs during the period beginning on the first day of the incident period of such qualified disaster and ending on the date which is 180 days after the last day of such incident period, such due date shall be delayed for 1 year (or, if later, until the date which is 180 days after the date of the enactment of this Act),

(B) any subsequent repayments with respect to any such loan shall be appropriately adjusted to reflect the delay in the due date under subparagraph (A) and any interest accruing during such delay, and

(C) in determining the 5-year period and the term of a loan under subparagraph (B) or (C) of section 72(p)(2) of such Code, the period described in subparagraph (A) of this paragraph shall be disregarded.

(3) QUALIFIED INDIVIDUAL.—For purposes of this subsection, the term “qualified individual” means any individual—

(A) whose principal place of abode at any time during the incident period of any qualified disaster is located in the qualified disaster area with respect to such qualified disaster, and

(B) who has sustained an economic loss by reason of such qualified disaster.

(d) PROVISIONS RELATING TO PLAN AMENDMENTS.—

(1) IN GENERAL.—If this subsection applies to any amendment to any plan or annuity contract, such plan or contract shall be treated as being operated in accordance with the terms of the plan during the period described in paragraph (2)(B)(i).

(2) AMENDMENTS TO WHICH SUBSECTION APPLIES.—

(A) IN GENERAL.—This subsection shall apply to any amendment to any plan or annuity contract which is made—

(i) pursuant to any provision of this section, or pursuant to any regulation issued by the Secretary or the Secretary of Labor under any provision of this section, and

(ii) on or before the last day of the first plan year beginning on or after **[January 1, 2022]** *January 1,*

2023, or such later date as the Secretary may prescribe.

In the case of a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986), clause (ii) shall be applied by substituting the date which is 2 years after the date otherwise applied under clause (ii).

(B) CONDITIONS.—This subsection shall not apply to any amendment unless—

(i) during the period—

(I) beginning on the date that this section or the regulation described in subparagraph (A)(i) takes effect (or in the case of a plan or contract amendment not required by this section or such regulation, the effective date specified by the plan), and

(II) ending on the date described in subparagraph (A)(ii) (or, if earlier, the date the plan or contract amendment is adopted), the plan or contract is operated as if such plan or contract amendment were in effect, and

(ii) such plan or contract amendment applies retroactively for such period.

