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Miscellaneous Changes Under the Setting Every Community Up for Retirement Enhancement Act of 2019 and the Bipartisan American Miners Act of 2019

Notice 2020-68

I. PURPOSE

This notice provides guidance in the form of questions and answers with respect to certain provisions of Division O of the Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, 133 Stat. 2534 (2019), known as the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), and with respect to § 104 of Division M of the Further Consolidated Appropriations Act, 2020, known as the Bipartisan American Miners Act of 2019 (Miners Act). Specifically, this notice addresses issues under the following sections of the SECURE Act: § 105 (small employer automatic enrollment credit), § 107 (repeal of maximum age for traditional IRA contributions), § 112 (participation of long-term, part-time employees in § 401(k) plans), § 113 (qualified birth or adoption distributions), and § 116 (permitting excluded difficulty of care payments to be taken into account as compensation for purposes of determining certain retirement contribution limitations). This notice also addresses issues under § 104 of the Miners Act (reduction in minimum age for in-service distributions) and provides guidance on deadlines for plan amendments.

This notice is not intended to provide comprehensive guidance as to the specific provisions of the SECURE Act and the Miners Act it addresses, but rather is intended to provide guidance on particular issues to assist in the implementation of these provisions. The Department of the Treasury (Treasury Department) and the Internal

Revenue Service (IRS) continue to analyze the various provisions of the SECURE Act and the Miners Act and anticipate issuing further guidance, including regulations, as appropriate.

II. PROVISIONS OF THE SECURE ACT AND THE MINERS ACT

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A. SECTION 105 OF THE SECURE ACT

Section 105 of the SECURE Act amends the Internal Revenue Code (Code) to add new § 45T, which provides a business credit under § 38 of the Code for an eligible employer that establishes an eligible automatic contribution arrangement under a qualified employer plan. The credit is equal to $500 for any taxable year of an eligible employer that occurs during a credit period. Under § 45T(b)(2), a taxable year is not treated as occurring during a credit period unless the arrangement is included in the plan for the taxable year. Under § 105(d) of the SECURE Act, the new credit applies to taxable years beginning after December 31, 2019.

Section 45T(c) provides that the term “eligible employer” has the meaning given that term in § 408(p)(2)(C)(i), which requires that an employer have had no more than

100 employees who received at least $5,000 of compensation from the employer for the preceding year. Section B of IRS Notice 98-4, 1998-2 I.R.B. 25, 1998-1 C.B. 269, provides guidance regarding this eligible employer definition, including rules under which certain related employers (trades or businesses under common control) are treated as a single employer.

Section 45T(b)(1) provides that: (i) an “eligible automatic contribution arrangement” (EACA) under a plan is an arrangement defined in § 414(w)(3), which requires that the plan include a cash or deferred arrangement under which participants are treated as having made an election to make elective contributions at a uniform percentage of compensation and that also satisfies certain notice requirements; (ii) a “qualified employer plan” is a plan defined in § 4972(d), which includes § 401(a) plans, § 403(a) plans, simplified employee pensions under § 408(k) (SEPs), and SIMPLE retirement accounts under § 408(p), but excludes governmental plans under § 414(d) and plans maintained by tax-exempt employers; and (iii) a “credit period” is the period of 3 taxable years beginning with the first taxable year for which an eligible employer includes an EACA in a qualified employer plan that it sponsors (3-year credit period).

Q. A-1: May an eligible employer receive a credit with respect to taxable years in more than one 3-year credit period?

A. A-1: No. An eligible employer may receive a credit for taxable years only during a single 3-year credit period that begins when the employer first includes an EACA in any qualified employer plan. For example, if an eligible employer, Employer W, first includes an EACA in one of its qualified employer plans, Plan A, during Employer W’s 2021 taxable year (so that the 2021, 2022, and 2023 taxable years

included in Employer W's 3-year credit period are all taxable years after § 45T is applicable), and also includes an EACA in a second qualified employer plan, Plan B, during the 2022, 2023, and 2024 taxable years, Employer W may receive no more than a $500 credit for each taxable year during the 3-year credit period that begins with the 2021 taxable year and is not permitted to receive the credit for the 2024 taxable year. As another example, if a different eligible employer, Employer X, first included an EACA in one of its qualified employer plans, Plan C, during Employer X's 2018 taxable year (so that the only taxable year included in Employer X's 3-year credit period after § 45T is applicable is 2020) and also includes an EACA in a second qualified employer plan, Plan D, during the 2020, 2021, and 2022 taxable years, Employer X may receive only a $500 credit for the 2020 taxable year and no credit for subsequent taxable years.

Q. A-2: To be eligible for the § 45T credit for the second or third taxable years of an eligible employer's 3-year credit period that begins when the eligible employer first includes an EACA in a qualified employer plan, must the eligible employer include the same EACA in the same plan in that second or third taxable year?

A. A-2: Yes. For example, if an eligible employer, Employer Y, first includes an EACA in one of its qualified employer plans, Plan E, for its 2021 taxable year, amends Plan E to remove the EACA from Plan E during its 2022 taxable year, and includes an EACA in another qualified employer plan, Plan F, during its 2023 taxable year, Employer Y will not be eligible for the § 45T credit for its 2023 taxable year. If, however, rather than amending Plan E to remove the EACA during the 2022 taxable year, Employer Y spun-off a portion of Plan E and continued to include the EACA in the spun-off portion of Plan E during its 2022 and 2023 taxable years, Employer Y would be

treated as continuing to maintain the same EACA in the same plan for those taxable years and would be eligible for the credit for those taxable years.

Q. A-3: Does the § 45T credit apply separately to each eligible employer that participates in a multiple employer plan (MEP) under § 413(c)?

A. A-3: Yes. The § 45T credit applies to an eligible employer that participates in a MEP in the same way that the credit would apply if each employer participating in the MEP were the sponsor of a single-employer plan maintained by the eligible employer. Thus, each employer that is an eligible employer (after application of the rules in Notice 98-4 under which certain related employers are treated as a single employer) generally would be eligible for the credit for the 3-year credit period beginning with the first taxable year in which the eligible employer's participating employees are first covered by an EACA under the MEP. For example, if an eligible employer, Employer Z, had not previously maintained a plan that included an EACA, and a MEP, Plan G, first includes an EACA that covers Employer Z's participating employees during the 2020 taxable year, the 3-year credit period consisting of the 2020, 2021, and 2022 taxable years would apply to Employer Z. In addition, Employer Z would continue to be eligible for the credit for the 2021 and 2022 taxable years if Plan G spun off the assets attributable to Employer Z to Plan H, a single-employer plan maintained by Employer Z, and Employer Z continued to include an EACA in Plan H for the 2021 and 2022 taxable years.

B. SECTION 107 OF THE SECURE ACT

Section 107(a) of the SECURE Act repeals § 219(d)(1) of the Code. Prior to the repeal of § 219(d)(1), an individual was not permitted to make contributions to the

individual's traditional Individual Retirement Arrangement (IRA) for a taxable year if the individual had attained age 70½ by the last day of the year.

Section 107(b) of the SECURE Act amends § 408(d)(8)(A) of the Code, which provides for exclusion from an individual's gross income of up to $100,000 in qualified charitable distributions. Section 408(d)(8)(B) defines qualified charitable distributions as distributions from an individual's IRA, made directly to certain organizations described in § 170(b)(1)(A) on or after the date the individual has attained age 70½. The amendment to § 408(d)(8)(A) provides that the excludable amount of qualified charitable distributions for a taxable year is reduced by the aggregate amount of IRA contributions deducted for the taxable year and any earlier taxable years in which the individual was age 70½ or older by the last day of the year (post-age 70½ contributions). The amendment further provides that the excludable amount of qualified charitable distributions for a taxable year is not reduced by the amount of post-age 70½ contributions that caused a reduction in the excludable amount of qualified charitable distributions for earlier taxable years.

Section 107(d) of the SECURE Act provides that these changes apply to contributions and distributions made for taxable years beginning after December 31, 2019.

Q. B-1: Is a financial institution that serves as trustee, issuer, or custodian for an IRA (financial institution) required to accept post-age 70½ contributions in 2020 or subsequent taxable years?

A. B-1: No. A financial institution is not required to accept post-age 70½ contributions. However, a financial institution may choose to accept post-age 70½

contributions beginning on a date after December 31, 2019, as selected by the financial institution.

Q. B-2: If a financial institution chooses to accept post-age 70½ contributions, must the financial institution amend its IRA contracts to provide for those contributions, and if so, what is the deadline for the amendment?

A. B-2: Yes. A financial institution that chooses to accept post-age 70½ contributions must amend its IRA contracts to provide for those contributions. See Q&A G-1 of this notice for the deadline for a financial institution to amend its IRA contracts. The IRS expects to issue revised model IRAs and prototype language addressing changes made to the relevant Code provisions under the SECURE Act.

Q. B-3: If a financial institution chooses to amend an IRA contract to accept post-age 70½ contributions, must the financial institution distribute a copy of the amendment and a new disclosure statement to each benefited individual?

A. B-3: Yes. If a financial institution chooses to amend an IRA contract to accept post-age 70½ contributions, the financial institution must update the disclosure statement that is required under § 408(i) to reflect the contents of the amended IRA and must distribute copies of the amendment and the amended disclosure statement to each benefited individual. Section 1.408-6(d)(4)(ii)(C) provides that the financial institution must deliver or mail the copies to the last known address of the benefited individual not later than the 30th day after the later of the date on which the amendment is adopted or the date it becomes effective.

Q. B-4: May an individual offset the amount of required minimum distributions for a taxable year from the individual's IRA by the amount of post-age 70½ contributions for the same taxable year?

A. B-4: No. An individual may not offset the amount of required minimum distributions from the individual's IRA by the amount of post-age 70½ contributions for the same taxable year. Contributions and distributions are each separate transactions and are independently reported by the financial institution to the IRS.

Q. B-5: Is there an example to illustrate the rules on the reduction of the excludable amount of qualified charitable distributions caused by a deduction of post-age 70½ contributions?

A. B-5: Yes. The following example illustrates the rules:

Example: An individual who turned age 70½ before 2020 deducts $5,000 for contributions for each of 2020 and 2021 but makes no contribution for 2022. The individual makes no qualified charitable distributions for 2020 and makes qualified charitable distributions of $6,000 for 2021 and $6,500 for 2022.

(a) The excludable amount of qualified charitable distributions for 2021 is the $6,000 of qualified charitable distributions reduced by the $10,000 aggregate amount of post-age 70½ contributions for 2021 and earlier taxable years. For this individual, these amounts are $5,000 for each of 2020 and 2021, resulting in no excludable amount of qualified charitable distributions for 2021 (that is, $6,000 - $10,000 = ($4,000)).

(b) The excludable amount of the qualified charitable distributions for 2022 is the $6,500 of qualified charitable distributions reduced by the portion of the $10,000 aggregate amount of post-age 70½ contributions deducted that did not reduce the

excludable portion of the qualified charitable distributions for earlier taxable years. Thus, $6,000 of the aggregate amount of post-age 70½ contributions deducted does not apply for 2022 because that amount has reduced the excludable amount of qualified charitable distributions for 2021. The remaining $4,000 of the aggregate amount of post-age 70½ contributions deducted reduces the excludable amount of any qualified charitable distributions for subsequent taxable years. Accordingly, the excludable amount of the qualified charitable distributions for 2022 is $2,500 ($6,500 - $4,000 = $2,500).

(c) As described above, because the $4,000 amount reduced the excludable amount of qualified charitable distributions for 2022, that $4,000 amount does not apply again in later years, and no amount of post-age 70½ contributions remains to reduce the excludable amount of qualified charitable distributions for subsequent taxable years.

C. SECTION 112 OF THE SECURE ACT

Section 401(k)(2)(D) limits the period of service with the employer (or employers) maintaining the plan that a qualified cash or deferred arrangement (CODA) may require an employee to complete as a condition to participate. Prior to the enactment of the SECURE Act, § 401(k)(2)(D) provided that a CODA was not permitted to require an employee to complete a period of service that extended beyond the period permitted under § 410(a)(1) (disregarding § 410(a)(1)(B)(i)[1]). In general, the period permitted under § 410(a)(1) is the later of attainment of age 21 or completion of a 12-month period during which the employee has at least 1,000 hours of service.

[1] Section 410(a)(1)(B)(i) provides that a plan may require employees to complete two years of service (rather than one) if accrued benefits under the plan are 100% nonforfeitable after not more than two years of service.

Section 112(a) of the SECURE Act amended § 401(k)(2)(D) of the Code to provide that a CODA may not require an employee to complete a period of service that extends beyond the close of the earlier of: (i) the period permitted under § 410(a)(1) (disregarding § 410(a)(1)(B)(i)); or (ii) subject to § 401(k)(15), the first period of three consecutive 12-month periods during each of which the employee has completed at least 500 hours of service.

Section 112(a) of the SECURE Act also amended the Code to add § 401(k)(15), which sets forth additional provisions related to § 401(k)(2)(D)(ii) (the new rule regarding three consecutive 12-month periods for eligibility purposes). Section 401(k)(15)(A) provides that § 401(k)(2)(D)(ii) will not apply to an employee unless the employee has attained age 21 by the close of the three consecutive 12-month periods.

Section 401(k)(15)(B)(iii) provides special vesting rules for an employee who becomes eligible to participate in a CODA solely by reason of having completed three consecutive 12-month periods during each of which the employee completed at least 500 hours of service (long-term, part-time employee). Under § 401(k)(15)(B)(iii), a long-term, part-time employee must be credited with a year of service for purposes of determining whether the employee has a nonforfeitable right to employer contributions (other than elective deferrals) for each 12-month period during which the employee completes at least 500 hours of service. In addition, § 401(k)(15)(B)(iii) modifies the break-in-service rules of § 411(a)(6) for a long-term, part-time employee. Under § 401(k)(15)(B)(iv), the special vesting rules of § 401(k)(15)(B)(iii) continue to apply to a long-term, part-time employee even if the long-term, part-time employee subsequently

completes a 12-month period during which the employee completes at least 1,000 hours of service.

Section 112(b) of the SECURE Act provides that the amendments made by § 112 of the SECURE Act apply to plan years beginning after December 31, 2020, except that, for purposes of § 401(k)(2)(D)(ii) of the Code, 12-month periods beginning before January 1, 2021, are not taken into account.

Q. C-1: Does the exception in § 112(b) of the SECURE Act that excludes 12-month periods beginning before January 1, 2021, from being taken into account for purposes of the special eligibility rule in § 401(k)(2)(D)(ii) of the Code also apply for purposes of the special vesting rules in § 401(k)(15)(B)(iii) of the Code?

A. C-1: No. Generally, all years of service with the employer or employers maintaining the plan must be taken into account for purposes of determining a long-term, part-time employee's nonforfeitable right to employer contributions under the special vesting rules in § 401(k)(15)(B)(iii).

Section 401(k)(15)(B)(iii) provides that, for purposes of determining whether a long-term, part-time employee has a nonforfeitable right to employer contributions (other than elective deferrals) under the arrangement, each 12-month period for which the employee has at least 500 hours of service is treated as a year of service.
Section 411(a)(4) generally requires that all years of service with the employer or employers maintaining the plan be taken into account for purposes of determining an employee's nonforfeitable right to employer contributions, subject to certain exceptions. Those exceptions include, for example, years of service before the employee attains age 18 (see § 411(a)(4)(A)).

Section 112(b) of the SECURE Act excludes 12-month periods beginning before January 1, 2021, for purposes of determining a long-term, part-time employee's eligibility to participate under § 401(k)(2)(D)(ii) of the Code. However, § 112(b) of the SECURE Act does not exclude 12-month periods beginning before January 1, 2021, for purposes of determining a long-term, part-time employee's nonforfeitable right to employer contributions under § 401(k)(15)(B)(iii) of the Code. Therefore, unless a long-term, part-time employee's years of service may be disregarded under § 411(a)(4), all years of service with the employer or employers maintaining the plan must be taken into account for purposes of determining the long-term, part-time employee's nonforfeitable right to employer contributions under § 401(k)(15)(B)(iii), including 12-month periods beginning before January 1, 2021.

D. SECTION 113 OF THE SECURE ACT

Section 72(t)(1) generally imposes a 10% additional tax on an early distribution from a qualified retirement plan (including an IRA or Roth IRA), unless the distribution qualifies for one of the exceptions listed in § 72(t)(2).

Section 113 of the SECURE Act amended § 72(t)(2) of the Code to add a new exception to the 10% additional tax for any qualified birth or adoption distribution. Section 72(t)(2)(H) permits an individual to receive a distribution from an applicable eligible retirement plan of up to $5,000 without application of the 10% additional tax if the distribution meets the requirements to be a qualified birth or adoption distribution. An applicable retirement plan is defined in § 72(t)(2)(H)(vi)(I) as an eligible retirement plan described in § 402(c)(8)(B) other than a defined benefit plan. A qualified birth or adoption distribution is includible in gross income, but is not subject to the 10%

additional tax under § 72(t)(1). A qualified birth or adoption distribution is defined as any distribution from an applicable eligible retirement plan to an individual if made during the 1-year period beginning on the date on which the child of the individual is born or the legal adoption by the individual of an eligible adoptee is finalized.

An individual generally may recontribute a qualified birth or adoption distribution (not to exceed the aggregate amount of all qualified birth and adoption distributions made to the individual from the plan) to an applicable eligible retirement plan in which the individual is a beneficiary and to which a rollover can be made. However, a qualified birth or adoption distribution is not treated as an eligible rollover distribution for purposes of the direct rollover rules of § 401(a)(31), the notice requirement under § 402(f), or the mandatory withholding rules under § 3405. The Treasury Department and the IRS intend to issue regulations under § 72(t) that will address the recontribution rules, including rules related to the timing of recontributions.

Questions and Answers Relating to Individuals Receiving Distributions

Q. D-1: What is a qualified birth or adoption distribution?

A. D-1: A qualified birth or adoption distribution, as defined in § 72(t)(2)(H)(iii)(I), is any distribution of up to $5,000 from an applicable eligible retirement plan to an individual if made during the 1-year period beginning on the date on which the child of the individual is born or the legal adoption by the individual of an eligible adoptee is finalized.

Q. D-2: Are there any additional requirements for a distribution to be a qualified birth or adoption distribution?

A. D-2: Yes. Section 72(t)(2)(H)(vi)(III) provides that a distribution to an individual will not be treated as a qualified birth or adoption distribution with respect to any child or eligible adoptee unless the individual includes the name, age, and the Taxpayer Identification Number (TIN) of the child or eligible adoptee on the individual's tax return for the taxable year in which the distribution is made.

Q. D-3: Which types of plans are eligible to permit a qualified birth or adoption distribution?

A. D-3: A qualified birth or adoption distribution may be made from an applicable eligible retirement plan, which is defined in § 72(t)(2)(H)(vi)(I) as an eligible retirement plan described in § 402(c)(8)(B), other than a defined benefit plan. Therefore, a § 401(a) qualified defined contribution plan, a § 403(a) annuity plan, a § 403(b) annuity contract, a governmental § 457(b) plan, or an IRA is eligible to permit a qualified birth or adoption distribution.

Q. D-4: Is a qualified birth or adoption distribution subject to the 10% additional tax under § 72(t)?

A. D-4: No. While a qualified birth or adoption distribution is includible in gross income, it is not subject to the 10% additional tax under § 72(t)(1).

Q. D-5: Who is an eligible adoptee?

A. D-5: Section 72(t)(2)(H)(iii)(II) defines the term "eligible adoptee" as any individual who has not attained age 18 or is physically or mentally incapable of self-support. However, an eligible adoptee does not include an individual who is the child of the taxpayer's spouse.

Q. D-6: For purposes of determining who is an eligible adoptee, when is an individual considered "physically or mentally incapable of self-support?"

A. D-6: For purposes of § 72(t)(2)(H)(iii)(II), the determination of whether an individual is physically or mentally incapable of self-support is made in the same manner as the determination of whether an individual is disabled under § 72(m)(7), which defines when an individual is disabled for purposes of the exception to the 10% additional tax under § 72(t)(2)(A)(iii). Section 72(m)(7) provides that an individual is considered to be disabled if that individual is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration.

Q. D-7: May each parent receive a qualified birth or adoption distribution up to $5,000 with respect to the same child or eligible adoptee?

A. D-7: Yes. Each parent may receive a qualified birth or adoption distribution of up to $5,000 with respect to the same child or eligible adoptee.

Q. D-8: May an individual receive qualified birth or adoption distributions with respect to multiple births of children or adoptions of eligible adoptees (for example, twins or triplets)?

A. D-8: Yes. An individual is permitted to receive qualified birth or adoption distributions with respect to the birth of more than one child or the adoption of more than one eligible adoptee if the distributions are made during the 1-year period following the date on which the children are born or the legal adoption for the eligible adoptees is finalized. For example, Employee A gives birth to twins in October 2020. Employee A takes a $10,000 distribution from her § 401(k) plan in January 2021. The entire $10,000

distribution is a qualified birth or adoption distribution, assuming that Employee A includes the TINs of her twins and other required information on her 2021 tax return.

Q. D-9: May an individual recontribute a qualified birth or adoption distribution to an applicable eligible retirement plan?

A. D-9: Yes. An individual may recontribute any portion of a qualified birth or adoption distribution (up to the entire amount of the qualified birth or adoption distribution) to an applicable eligible retirement plan in which the individual is a beneficiary and to which a rollover can be made under § 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), as applicable.

Questions and Answers Relating to Applicable Eligible Retirement Plans Permitting Qualified Birth or Adoption Distributions

Q. D-10: Is an applicable eligible retirement plan required to permit in-service distributions for qualified birth or adoption distributions under § 72(t)(2)(H)?

A. D-10: No. It is optional for an applicable eligible retirement plan to permit in-service distributions for qualified birth or adoption distributions pursuant to § 72(t)(2)(H). Plan amendments adopted to permit qualified birth or adoption distributions are discretionary amendments for purposes of the plan amendment rules discussed in Q&A G-1 of this notice.

Q. D-11: If an employer chooses to amend its applicable eligible retirement plan to permit in-service distributions for qualified birth or adoption distributions, what is the deadline for adopting that amendment?

A. D-11: For information relating to the deadline for adopting plan amendments, see Q&A G-1 of this notice.

Q. D-12: May a plan sponsor or plan administrator rely on a reasonable representation from an individual that the individual is eligible for a qualified birth or adoption distribution?

A. D-12: Yes. In making a determination whether an individual is eligible for a qualified birth or adoption distribution, a plan sponsor or plan administrator of an applicable eligible retirement plan is permitted to rely on reasonable representations from the individual, unless the plan sponsor or plan administrator has actual knowledge to the contrary.

Q. D-13: If an applicable eligible retirement plan permits qualified birth or adoption distributions, is the plan required to accept a recontribution of that distribution to the plan?

A. D-13: Yes. An applicable eligible retirement plan must accept the recontribution of a qualified birth or adoption distribution from an individual if the following apply:

(a) the plan permits qualified birth or adoption distributions;

(b) the individual received a qualified birth or adoption distribution from that plan; and

(c) the individual is eligible to make a rollover contribution to that plan at the time the individual wishes to recontribute the qualified birth or adoption distribution to the plan.

Q. D-14: Do qualified birth or adoption distributions from an applicable eligible retirement plan meet the distribution restriction requirements in §§ 401(k)(2)(B)(i), 403(b)(7)(A)(i), 403(b)(11), and 457(d)(1)(A)?

A. D-14: Qualified birth or adoption distributions are treated as meeting the distribution restrictions for qualified cash or deferred arrangements under § 401(k)(2)(B)(i), custodial accounts under § 403(b)(7)(A)(i), annuity contracts under § 403(b)(11), and governmental deferred compensation plans under § 457(d)(1)(A). Thus, for example, an employer may expand the distribution options under its plan to allow an amount attributable to an elective, qualified nonelective, qualified matching, or safe harbor contribution under a § 401(k) plan to be distributed as a qualified birth or adoption distribution even though it is distributed before an otherwise permitted distributable event, such as severance from employment, disability, or attainment of age 59½.

Q. D-15: Is a qualified birth or adoption distribution treated by an applicable eligible retirement plan as an eligible rollover distribution for purposes of the direct rollover rules, § 402(f) notice requirements, and the mandatory withholding rules?

A. D-15: No. A qualified birth or adoption distribution is not treated as an eligible rollover distribution for purposes of the direct rollover rules of § 401(a)(31), the notice requirement under § 402(f), and the mandatory withholding rules under § 3405. Thus, the plan is not required to offer an individual a direct rollover with respect to a qualified birth or adoption distribution. In addition, the plan administrator is not required to provide a § 402(f) notice. Finally, the plan administrator or payor of the qualified birth or adoption distribution is not required to withhold an amount equal to 20% of the distribution, as generally is required in § 3405(c)(1). However, a qualified birth or adoption distribution is subject to the voluntary withholding requirements of § 3405(b) and § 35.3405-1T.

Q. D-16: Is a recontribution made with respect to a qualified birth or adoption distribution from an applicable eligible retirement plan other than an IRA treated as the direct transfer of an eligible rollover distribution as defined in § 402(c)(4)?

A. D-16: Yes. Section 72(t)(2)(H)(v)(III) provides that, in the case of a recontribution made with respect to a qualified birth or adoption distribution from an applicable eligible retirement plan other than an IRA, an individual is treated as having received the distribution as an eligible rollover distribution (as defined in § 402(c)(4)) and as having transferred the amount to an applicable eligible retirement plan in a direct trustee-to-trustee transfer within 60 days of the distribution.

Q. D-17: Is a recontribution made with respect to a qualified birth or adoption distribution from an IRA treated as the direct transfer of an eligible rollover distribution as defined in § 408(d)(3)?

A. D-17: Yes. Section 72(t)(2)(H)(v)(IV) provides that, in the case of a recontribution made with respect to a qualified birth or adoption distribution from an IRA, an individual is treated as having received the distribution as an eligible rollover distribution (as defined in § 408(d)(3)) and as having transferred the amount to an applicable eligible retirement plan in a direct trustee-to-trustee transfer within 60 days of the distribution.

Q. D-18: If an applicable eligible retirement plan does not permit qualified birth or adoption distributions, may an individual treat an otherwise permissible in-service distribution as a qualified birth or adoption distribution?

A. D-18: Yes. If an applicable eligible retirement plan does not permit qualified birth or adoption distributions and an individual receives an otherwise permissible in-

service distribution that meets the requirements of a qualified birth or adoption distribution, the individual may treat the distribution as a qualified birth or adoption distribution on the individual's federal income tax return. The distribution, while includible in gross income, is not subject to the 10% additional tax under § 72(t)(1). If the individual decides to recontribute the amount to an eligible retirement plan, the individual may recontribute the amount to an IRA.

E. SECTION 116 OF THE SECURE ACT

Section 408(o) provides that designated nondeductible contributions may be made on behalf of an individual to an IRA. Nondeductible contributions may not exceed the excess of the amount allowable as a deduction under § 219(b) (determined without regard to the § 219(g) reduction in the deductible amount for active participants in certain pension plans) over the amount allowable as a deduction under § 219(b) (determined with regard to § 219(g)).

Section 415(c) provides limitations on annual additions under a defined contribution plan. Under § 415(c)(1), annual additions may not exceed the lesser of (A) $40,000 (increased by cost-of-living adjustments under § 415(d)(1)(C)), or (B) 100% of the participant’s compensation as defined in § 415(c)(3). Section 415(c)(2) provides that annual additions are the sum of employer contributions, employee contributions, and forfeitures.

A difficulty of care payment is a type of qualified foster care payment that is excludable from gross income under § 131. Because a difficulty of care payment is excludable from gross income, it was not, prior to the SECURE Act, included in a participant’s compensation for purposes of calculating the annual additions limit of

§ 415(c)(1). Accordingly, an employee who received difficulty of care payments from an employer was not permitted to make contributions to, or receive allocations under, the employer's plan based on the difficulty of care payments.

Section 116(a) of the SECURE Act adds § 408(o)(5) to the Code to allow a taxpayer to elect to increase the nondeductible contribution limit by the amount of excludable difficulty of care payments in a situation in which the taxpayer does not have sufficient compensation that is includible in the taxpayer's gross income to equal the deductible amount under § 219(b)(5) of the Code. The addition of § 408(o)(5) applies to contributions made after December 20, 2019.

Section 116(b) of the SECURE Act adds § 415(c)(8) to the Code to increase the annual additions limit for retirement plans to include difficulty of care payments. Section 415(c)(8)(A), as amended, provides that a participant's compensation for purposes of § 415(c)(1) is increased by the amount of excludable difficulty of care payments. Accordingly, a participant may make contributions to, or receive allocations under, the plan that are based on the participant receiving difficulty of care payments, even if the participant has no other compensation. Section 415(c)(8)(B), as amended, provides that if a contribution is made based on difficulty of care payments, the contribution is treated as investment in the contract and will not cause a plan to be treated as failing any requirements of §§ 1 through 1400Z-2 solely by reason of allowing the contribution. The addition of § 415(c)(8) applies to plan years beginning after December 31, 2015.

Q. E-1: Are difficulty of care payments received by an employee from a person other than his or her employer includible in the definition of compensation under that employer's plan?

A. E-1: No. Compensation under § 415(c)(3) only includes compensation from an individual's employer. Thus, difficulty of care payments received by an employee from a person other than his or her employer are not includible in the definition of compensation under that employer's plan.

Q. E-2: If an employer does not make difficulty of care payments to its employees that are eligible to participate in the employer's plan, must the plan be amended to include difficulty of care payments in the plan's definition of § 415(c)(1) compensation?

A. E-2: No. If an employer does not make difficulty of care payments to its employees that are eligible to participate in the employer's plan, then the plan does not need to be amended to include difficulty of care payments in the plan's definition of § 415(c)(1) compensation. However, if the employer changes its practice and begins to make difficulty of care payments to its employees, the plan must be amended timely to include difficulty of care payments in that definition.

Q. E-3: Does the excise tax on excess IRA contributions under § 4973 apply to nondeductible IRA contributions that are based on difficulty of care payments?

A. E-3: The applicability of the excise tax on excess IRA contributions under § 4973 to nondeductible IRA contributions that are based on difficulty of care payments will be addressed in future guidance.

F. SECTION 104 OF THE MINERS ACT

Under § 401(a)(36), a pension plan does not fail to be qualified solely because the plan provides that a distribution may be made from the plan to an employee who has attained a minimum age and who is not separated from employment at the time of the distribution (generally referred to as an in-service distribution). Prior to the effective date of the Miners Act, the minimum age for allowable in-service distributions under § 401(a)(36) was age 62. Section 104(a) of the Miners Act lowers the minimum age from age 62 to age 59½.

In order to be an eligible deferred compensation plan under § 457(b), a plan must satisfy the distribution requirements of § 457(d). Section 457(d)(1)(A) provides that amounts under the plan may not be made available earlier than the occurrence of certain events. Prior to the enactment of the Miners Act, § 457(d)(1)(A)(i) provided, in general, that amounts may not be made available to participants earlier than the calendar year in which a participant attains age 70½ or when a participant has a severance from employment with the employer. Section 104(b) of the Miners Act amended § 457(d)(1)(A)(i) of the Code to provide that, in the case of a governmental plan under § 457(b) of the Code (that is, a plan maintained by an employer that is a State, a political subdivision of a State, or any agency or instrumentality of a State or political subdivision of a State, as provided in § 457(e)(1)(A) of the Code), amounts may be made available as early as the calendar year in which a participant attains age 59½.

Pursuant to § 104(c) of the Miners Act, the amendments made by paragraphs (a) and (b) of § 104 of the Miners Act apply to plan years beginning after December 31, 2019.

Q. F-1: Is a plan qualified under § 401(a) of the Code (qualified plan) or a governmental plan under § 457(b) of the Code required to implement the changes made by § 104 of the Miners Act?

A. F-1: No. In general, neither a qualified plan nor a § 457(b) governmental plan is required to provide for in-service distributions. Thus, if a plan does not provide for in-service distributions, or provides for in-service distributions at an age that is later than age 59½ (the minimum age permitted by § 104(a) or (b) of the Miners Act), the plan is not required to be amended to permit in-service distributions to commence at age 59½. For example, a qualified plan that provides for in-service distributions commencing at age 62 is not required to be amended to provide for in-service distributions commencing at age 59½.

Q. F-2: If a pension plan is amended to lower its minimum age for an in-service distribution from age 62 to age 59½ pursuant to § 401(a)(36), may the plan also change its definition of normal retirement age to age 59½ or later without violating other qualification requirements, such as the definitely determinable benefit requirement in § 1.401(a)-1(b)(1)(i)?

A. F-2: The in-service distribution rule in § 401(a)(36) is separate from the definitely determinable benefit requirement in § 1.401(a)-1(b)(1)(i). A plan does not fail to satisfy the requirements in § 1.401(a)-1(b)(1)(i) merely because the plan provides for in-service distributions in accordance with § 401(a)(36). In addition to satisfying other applicable qualification requirements (such as § 411(d)(6)), any change to a pension plan's definition of normal retirement age must satisfy the requirements in § 1.401(a)-1(b)(2), including the requirement that a normal retirement age must be an age that is

not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. A normal retirement age of age 62 or later is deemed to satisfy the reasonably representative requirement (see § 1.401(a)-1(b)(2)(ii)). For purposes of the reasonably representative requirement, governmental pension plans may continue to rely on proposed regulations that were published in the Federal Register on January 27, 2016 (81 FR 4599).

G. PROVISIONS RELATING TO PLAN AMENDMENTS

Section 601 of the SECURE Act provides, in general, that a retirement plan or annuity contract will be treated as being operated in accordance with the terms of the plan during the period described in paragraph (3) in this section G and, except as provided by the Secretary of the Treasury (Secretary), or the Secretary's delegate, a retirement plan will not fail to satisfy the anti-cutback requirements of § 411(d)(6) of the Code or § 204(g) of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829 (1974), as amended (ERISA),[2] as a result of a plan amendment made pursuant to a provision of the SECURE Act or the regulations thereunder, provided that:

(1) the amendment is adopted no later than the last day of the first plan year beginning on or after January 1, 2022, or, for an applicable collectively bargained plan (a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before December 20, 2019) or a § 414(d) governmental plan, the last day of the first plan year beginning on or

[2] Section 411(d)(6) provides, generally, that a plan will not satisfy § 401(a) if an amendment to the plan decreases a participant's accrued benefit. For this purpose, a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy or eliminating an optional form of benefit with respect to benefits attributable to service before the amendment is treated as reducing accrued benefits. Section 204(g) of ERISA provides parallel rules to the rules of § 411(d)(6) of the Code.

after January 1, 2024, or such later date as the Secretary may prescribe (the § 601 date);

(2) the amendment applies retroactively to the effective date of the SECURE Act provision or the regulations thereunder (or, in the case of an amendment not required by a provision of the SECURE Act or the regulations thereunder, the effective date specified by the plan); and

(3) the plan or contract is operated as if the amendment were in effect during the period beginning on the effective date of the SECURE Act provision or the regulations thereunder (or, in the case of an amendment not required by a provision of the SECURE Act or the regulations thereunder, the effective date specified by the plan or contract) and ending on the § 601 date or, if earlier, the date the amendment is adopted.

Rev. Proc. 2016-37, 2016-29 I.R.B. 136, as modified by Rev. Proc. 2017-41, 2017-29 I.R.B. 92 and Rev. Proc. 2020-40, this Bulletin,[3] sets forth plan amendment deadlines for qualified plans. Rev. Proc. 2016-37, as modified by Rev. Proc. 2020-40, provides that, except as otherwise provided by statute, or in regulations or other guidance published in the Internal Revenue Bulletin, the plan amendment deadline for a discretionary amendment is the end of the plan year in which the plan amendment is operationally put into effect, or, in the case of a governmental plan, the later of the end of the plan year in which the plan amendment is operationally put into effect or 90 days after the close of the second regular legislative session of the legislative body with the

[3] Other revisions of Rev. Proc. 2016-37 include Notice 2020-35, 2020-25 I.R.B. 948; Rev. Proc. 2020-10, 2020-2 I.R.B. 295; Rev. Proc. 2019-20, 2019-20 I.R.B. 1182; Rev. Proc. 2018-42, 2018-36 I.R.B. 424; and Rev. Proc. 2018-21, 2018-14 I.R.B. 467.

authority to amend the plan that begins on or after the date the plan amendment is operationally put into effect. An amendment that is made pursuant to the SECURE Act, the regulations thereunder, or § 104 of the Miners Act, that is not required to be adopted in order for the plan to satisfy the requirements of the Code is a discretionary amendment.

Rev. Proc. 2019-39, 2019-42 I.R.B. 945, as modified by Notice 2020-35, 2020-25 I.R.B. 948, and Rev. Proc. 2020-40, sets forth plan amendment deadlines for § 403(b) plans. Rev. Proc. 2019-39, as modified, provides that, effective for plan years beginning on or after January 1, 2020, except as otherwise provided by statute, or in regulations or other guidance published in the Internal Revenue Bulletin, the plan amendment deadline for a discretionary amendment is the end of the plan year in which the plan amendment is operationally put into effect, or, in the case of a governmental plan, the later of the end of the plan year in which the plan amendment is operationally put into effect or 90 days after the close of the second regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the plan amendment becomes effective.

Section 457(b) provides, generally, that a § 457(b) governmental plan that is administered in a manner that is inconsistent with the requirements of § 457(b) is not treated as a § 457(b) governmental plan as of the first 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 first day of such plan year.

Under § 408(a), an IRA that is an individual retirement account is a trust created or organized in the United States for the exclusive benefit of an individual or his

beneficiaries, provided that the written instrument creating the trust meets certain requirements. Under § 408(b), an IRA that is an individual retirement annuity is an annuity contract or endowment contract that is issued by an insurance company and that meets certain requirements.

Q. G-1: When must a retirement plan be amended to reflect the provisions of the SECURE Act, the regulations thereunder, or § 104 of the Miners Act?

A. G-1: The deadlines to amend a retirement plan for provisions of the SECURE Act, the regulations thereunder, or § 104 of the Miners Act are set forth in this Q&A G-1. These amendment deadlines apply to both required and discretionary plan amendments.

(a) Qualified plans

In general, for a qualified plan that is not a governmental plan within the meaning of § 414(d) of the Code, or an applicable collectively bargained plan, the deadline to amend a plan for provisions of the SECURE Act, the regulations thereunder, or § 104 of the Miners Act is the last day of the first plan year beginning on or after January 1, 2022. The plan amendment deadline for a qualified governmental plan, as defined in § 414(d), or for an applicable collectively bargained plan, is the last day of the first plan year beginning on or after January 1, 2024.

A sponsor of a qualified plan may amend its plan to reflect the SECURE Act, the regulations thereunder, or § 104 of the Miners Act after the dates set forth in the preceding paragraph, in accordance with Rev. Proc. 2016-37, as modified by Rev. Proc. 2017-41 and Rev. Proc. 2020-40. However, under Rev. Proc. 2016-37, amendments made after the dates set forth in the preceding paragraph, are not entitled to the anti-

cutback relief provided by § 411(d)(6) of the Code or § 204(g) of ERISA.

(b) Section 403(b) plans

In general, the deadline for a § 403(b) plan that is not maintained by a public school, as described in § 403(b)(1)(A)(ii), to amend a plan for provisions of the SECURE Act or the regulations thereunder is the last day of the first plan year beginning on or after January 1, 2022. The plan amendment deadline for a § 403(b) plan that is maintained by a public school, as described in § 403(b)(1)(A)(ii), is the last day of the first plan year beginning on or after January 1, 2024.

A sponsor of a § 403(b) plan may be entitled to amend its plan to reflect the SECURE Act or the regulations thereunder after the dates set forth in the preceding paragraph, in accordance with Rev. Proc. 2019-39, as modified by Notice 2020-35 and Rev. Proc. 2020-40. However, under Rev. Proc. 2019-39, amendments to a § 403(b) plan that is subject to ERISA that are made after the dates set forth in the preceding paragraph are not entitled to the anti-cutback relief provided by § 204(g) of ERISA.

(c) Section 457(b) governmental plans

The deadline to amend a governmental plan under § 457(b) of the Code for provisions of the SECURE Act, the regulations thereunder, or § 104 of the Miners Act is the later of (i) the last day of the first plan year beginning on or after January 1, 2024, or (ii) if applicable, the first day of the first plan year beginning more than 180 days after the date of notification by the Secretary that the plan was administered in a manner that is inconsistent with the requirements of § 457(b) of the Code.

(d) Individual retirement plans

The deadline to amend the trust governing an IRA that is an individual retirement account or the contract issued by an insurance company with respect to an IRA that is an individual retirement annuity for provisions of the SECURE Act or the regulations thereunder is December 31, 2022, or such later date as the Secretary prescribes in guidance.

In the case of a deemed IRA described in § 408(q), the deadline to amend the deemed IRA provisions is the deadline applicable to the plan under which the deemed IRA is established.

III. REQUEST FOR COMMENTS

The Treasury Department and the IRS invite comments and suggestions regarding the matters discussed in this notice. In particular, in connection with section II.C. of this notice, the Treasury Department and the IRS request comments on how to reduce potential administrative burdens related to counting years of service beginning before January 1, 2021, for purposes of determining a long-term, part-time employee's nonforfeitable right to employer contributions pursuant to § 112 of the SECURE Act, while still complying with the requirements of §§ 401(k)(15)(B)(iii) and 411(a)(4) of the Code.

Comments should be submitted in writing on or before November 2, 2020, and should include a reference to Notice 2020-68. Comments may be submitted in one of two ways:

(1) Electronically via the Federal eRulemaking Portal at www.regulations.gov (type IRS-2020-0027 in the search field on the regulations.gov homepage to find this notice and submit comments).

(2) Alternatively, by mail to: Internal Revenue Service, Attn: CC:PA:LPD:PR (Notice 2020-68), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044.

All commenters are strongly encouraged to submit public comments electronically. The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Treasury Department and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket.

IV. DRAFTING INFORMATION

The principal author of this notice is Tom Morgan of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). For further information regarding this notice, please contact Mr. Morgan at (202) 317-6700 (not a toll-free number).