January 17, 2020

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Re: Immediate Guidance on SECURE Act

On December 20, 2019, the president signed into law the Further Consolidated Appropriations Act of 2020, which includes the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 and a few other important benefit specific provisions. The American Benefits Council ("The Council") applauds the enactment of the SECURE Act and looks forward to working with you on implementation.

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

Many of the provisions of the SECURE Act are effective on enactment, or for plan or tax years after December 31, 2019. We have already begun to collect input from our

members on areas for which regulations and guidance may be needed. In this letter, we highlight the provisions that are in need of pressing guidance simply because of the immediate or nearly immediate effective dates of certain provisions.

As an initial matter, we would ask that you confirm that, unless and until substantive guidance is issued, plan sponsors may implement the SECURE Act using a reasonable, good faith interpretation of the law.

WITHHOLDING

The SECURE Act includes a few provisions going into effect in 2020 that will impact federal income tax withholding, two of which will have an impact as early as January 1, 2020. It is not possible to adjust systems in time to reflect these changes.

Required Minimum Distributions for Participants Turning 70 ½ in 2020

The SECURE Act changes the required beginning age to 72 for participants that attain age 70 ½ in 2020 or later. Had the law not changed, a participant who received a distribution in 2020 and who would attain 70 ½ in 2020 would have all or a portion of the distribution treated as a required minimum distribution (RMD). This affects the requirements with respect to withholding under Internal Revenue Code Section 3405. Since the distribution is no longer an RMD, it should be subject to 20% mandatory withholding (unless for another reason it is not an eligible rollover distribution). As a result of the short window between passage of SECURE Act and the effective date, a plan administrator may not withhold the proper amount.

Withdrawals for Birth or Adoption

Similarly, the SECURE Act provides that a "qualified birth or adoption" distribution is not treated as an eligible rollover distribution for purposes of Section 3405. Even if a plan does not provide for a special in-service distribution in connection with a birth or adoption, it appears that if a participant is eligible for a distribution and happens to meet the criteria for relief from the 10% penalty for a qualified birth or adoption, the distribution should not be subject to 20% withholding. As a practical matter, no plan administrator is ready to process these new distributions and thus must treat them like other distributions.[1] This means the plan administrator will withhold 20% even if the participant informs the plan administrator that the withdrawal is within one year of a birth or adoption.

[1] There may be some plans that *want* to allow a participant to waive out of withholding as allowed by the SECURE Act, so that the entire amount of the distribution is available.

The challenges with respect to withholding have been somewhat amplified because the Service did not issue Notice 2020-3, which provides guidance on pension withholdings for 2020, until December 18, 2019, and the Form W4-P for 2020 is still in draft form as of December 23, 2019.

The SECURE Act also makes significant changes to the rules under Code Section 401(a)(9) for distributions under defined contribution plans to beneficiaries, effective for deaths after December 31, 2019 (with a later effective date for governmental and collectively bargained plans). Because the first RMD in the case of a death in 2020 is not due until 2021, we do not believe this change has an immediate impact on withholding. But we anticipate a range of questions will arise regarding this provision and we expect to follow up with you with further requests for guidance.

DIRECT ROLLOVERS AND SPECIAL TAX NOTICE

In addition to withholding, the changes noted above affect the extent to which a plan must offer a direct rollover. Plans generally do not allow a direct rollover of any amount it believes to be a required minimum distribution for the year. The systems changes needed to account for the revisions to the required minimum distribution rules will take time to implement. We believe a plan administrator does not need to treat a distribution as associated with a qualified birth or adoption unless it is pursuant to a special distribution option allowed by the plan and requested by the participant.

In addition, the SECURE Act states that a qualified birth or adoption distribution is not considered an eligible rollover distribution for purposes of Code Section 401(a)(31), which requires plans to offer a direct rollover. Thus, if a participant happens to have a distribution close in time to a birth or adoption, one reading of the SECURE Act is that such distribution is not eligible for a direct rollover.[2] We do not believe such a reading is correct, but, in any event, in the short term plans will generally offer a direct rollover with respect to a distribution that might qualify as a qualified birth or adoption distribution.

A plan should not be disqualified solely because, in the first part of 2020, it fails to offer a direct rollover when it should, or vice versa.

[2] New Internal Revenue Code Section 72(t)(H)(iii)(I) defines a qualified birth or adoption distribution as "any distribution" from a plan made during the one-year period beginning on the date of the birth or adoption of a child of an individual. New Code Section 72(t)(H)(vi)(II) provides that a qualified birth or adoption distribution is not treated as an eligible rollover distribution for purposes of Code sections 401(a)(31), 402(f) and Section 3405. We do not think Congress intended a participant to be precluded from a rollover for any distribution within a year of a birth or adoption.

Whether or not a distribution is an eligible rollover distribution also determines whether a Special Tax Notice under Code Section 402(f) must be provided. We urge relief in the case of a plan administrator (or its service provider) that incorrectly fails to provide, or incorrectly provides, a Section 402(f) notice. Further, we urge the Service to release a new model Special Tax Notice as soon as possible.[3]

OTHER QUALIFIED BIRTH OR ADOPTION DISTRIBUTION ISSUES

The new qualified birth or adoption provision appears to be the provision that is in most need of urgent interpretative guidance. For example, we already have the following questions about this provision:

Proper Documentation

It is unclear what documentation, if any, a plan administrator must collect before processing a distribution as a qualified birth or adoption distribution. The only reference to documentation in the statute provides that the taxpayer must include the name, age and TIN of the child or adoptee on the taxpayer's return. We appreciate that, pursuant to future guidance, the plan might be required to collect some documentation if the plan allows a separate in-service distribution option, but regardless, for purposes of Form 1099-R reporting, we do not believe any documentation should be required, because a participant can make the proper representations on his or her tax return to avoid the 10% penalty.

Numerous Questions Regarding Repayment Provision

The provision allows for repayment of a qualified birth or adoption distribution, seemingly without any deadline, and states in that case the repayment is treated as having been transferred to the applicable eligible retirement plan in a direct trustee to trustee transfer within 60 days. It is unclear how this would be reported by the individual, how the repayment should be tracked by the plan, under what circumstances (if any) the repayment would have after-tax basis and whether the result changes if the amounts reflect designated Roth contributions. We also believe guidance should address a plan administrator's responsibilities with respect to the $5,000 limit if a participant receives a distribution from one plan ("distributing plan") for a qualified birth/adoption and repays that amount to another, different plan, outside of the control group associated with the distributing plan. In any event, we believe a plan should be able to rely on a participant representation when a repayment is made.

[3] The model Special Tax Notice refers to age 70 ½ as the key age for required minimum distributions. Further, the list of exceptions from the 10% penalty for early distributions will need to be expanded.

Provision is Optional

We believe offering a new in-service distribution under this provision is optional, but this should be confirmed. We also believe it should be optional for a plan to accept repayments, especially if the original distribution was not from that plan.

Application of $5000 Limit

It appears that the $5000 amount is available for each parent separately and for each child in the case of multiple births (twins, triplets, etc.) or adoption of multiple children simultaneously, but these points should be confirmed.

Adoption of Child of Spouse

The provision states that an eligible adoptee does not include "a child of the taxpayer's spouse." We believe this is intended to preclude use of the distribution when an individual adopts the natural child of his or her spouse, not when a couple adopts a child simultaneously.

AUTOMATIC ESCALATION CHANGES

The SECURE Act increases the maximum deferral percentage under the safe harbor in Code Section 401(k)(13) from 10% to 15%, effective for plan years after December 31, 2019. As a practical matter, it would be very difficult for an employer to update its payroll system to allow for increased deferrals beyond 10% by January 1, 2020. Thus, two types of relief are needed. First, Treasury and the Service should confirm that a plan may implement the changes to the escalation cap in the middle of 2020 if it wishes to do so, as long as the employer provides notice to affected employees. Second, if a plan provision incorporates Code Section 401(k)(13)(C)(iii) by reference, a plan should not be disqualified or treated as failing the safe harbor solely because the plan administrator does not incorporate the increased deferral percentage until the end of 2020.

IN-SERVICE DISTRIBUTIONS

In addition to the qualified birth or adoption provision, there are a number of other provisions in the SECURE Act that we believe are optional plan provisions. We believe it would be helpful for confirmation. This includes the reduction of the age for in-service distributions to 59 ½ in the case of pension plans and governmental 457(b) plans.

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Thank you for your efforts to implement the SECURE Act and for providing appropriate relief in the case of reasonable, good faith attempts to comply with the changes made by the SECURE Act. We look forward to working with you.

Sincerely,

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy