DESCRIPTION OF THE CHAIRMAN'S MARK OF THE RETIREMENT ENHANCEMENT AND SAVINGS ACT OF 2016

Scheduled for Markup
by the
SENATE COMMITTEE ON FINANCE
on September 21, 2016

Prepared by the Staff
of the
JOINT COMMITTEE ON TAXATION

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INTRODUCTION

The Senate Committee on Finance has scheduled a committee markup on September 21, 2016, of an original bill, the Retirement Enhancement and Savings Act of 2016 Act of 2016. This document,[1] prepared by the staff of the Joint Committee on Taxation, provides a description of the bill.

[1] This document may be cited as follows: Joint Committee on Taxation, *Description of the Chairman's Mark of the Retirement Enhancement and Savings Act of 2016 Act of 2016* (JCX-85-16), September 19, 2016. This document can also be found on the Joint Committee on Taxation website at www.jct.gov. All section references herein are to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

I. EXPANDING AND PRESERVING RETIREMENT SAVINGS

A. Enhancements to Section 401(k) Plans

1. Removal of limit on automatic enrollment safe harbor default rate

Present Law

General rules for 401(k) plans

A section 401(k) plan legally is not a separate type of plan, but is a profit-sharing or stock bonus plan that contains a qualified cash or deferred arrangement (which allows employees to make elective deferrals if certain requirements are satisfied).[2] Thus, such arrangements are subject to the rules generally applicable to qualified defined contribution plans. In addition, special rules apply to such arrangements.[3]

The maximum annual amount of elective deferrals that can be made by an employee for a year is $18,000 (for 2016) or, if less, the employee's compensation.[4] For an employee who attains age 50 by the end of the year, the dollar limit on elective deferrals is increased by $6,000 (for 2016) (called catch-up contributions).[5] An employee's elective deferrals must be fully vested. A section 401(k) plan may also provide for employer matching and nonelective contributions.

Automatic enrollment

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

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[2] Certain pre-ERISA money purchase plans and rural cooperative plans may also include a qualified cash or deferred arrangement. Except for certain grandfathered plans, a State or local governmental employer may not maintain a section 401(k) plan.

[3] Elective deferrals are generally made on a pretax basis. 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 designated Roth contributions. Designated Roth contributions are elective deferrals that the participant designates as not excludable from the participant's gross income. Qualified distributions from a designated Roth account are excluded from income, even though they include earnings not previously taxed. A qualified distribution is a distribution made after the end of a specified period (generally five years after the participant's first designated Roth contribution) and that is (1) made on or after the date on which the participant attains age 59½, (2) made to a beneficiary (or to the estate of the participant) on or after the death of the participant, or (3) attributable to the participant's being disabled.

[4] Sec. 402(g).

[5] Sec. 414(v).

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

Nondiscrimination test

General rule

A special annual nondiscrimination test, called the actual deferral percentage test (the "ADP" test) applies to elective deferrals under a section 401(k) plan.[6] The ADP test generally compares the average rate of deferral for highly compensated employees to the average rate of deferral for nonhighly compensated employees. The ADP test allows the average deferral rate for highly compensated employees to exceed that for nonhighly compensated employees within certain specified limits.

Design-based safe harbors

This nondiscrimination test is deemed to be satisfied if a section 401(k) plan includes certain minimum benefits (matching or nonelective contributions) as well as certain required rights and features and satisfies a notice requirement ("401(k) safe harbor plan"). One type of 401(k) safe harbor includes automatic enrollment.[7] Under an automatic enrollment 401(k) safe harbor, unless an employee elects otherwise, the employee is treated as electing to make elective deferrals equal to a percentage of compensation as stated in the plan, not in excess of 10 percent and at least (1) three percent of compensation for the first year the deemed election applies to the participant, (2) four percent during the second year, (3) five percent during the third year, and (4) six percent during the fourth year and thereafter.[8] Under the automatic enrollment 401(k) safe harbor, the matching contribution requirement is 100 percent of elective contributions of the employee for contributions not in excess of one percent of compensation, and 50 percent of elective contributions for contributions that exceed one percent of compensation but do not exceed six percent (for a total matching contribution of up to 3.5 percent of compensation)("matching contribution automatic enrollment 401(k) safe harbor"). The rate of nonelective contribution under the automatic enrollment 401(k) safe harbor plan is three percent. Under the automatic enrollment 401(k) safe harbors, the matching and nonelective contributions must become 100 percent vested no later than after two years of service

Description of Proposal

Under the proposal, the 10-percent limitation on the deemed election rate under the automatic enrollment safe harbor plan is removed after the first year that the deemed election applies.

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

[7] Secs. 401(k)(13) and (m)(12).

[8] 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.

Effective Date

The proposal applies to plan years beginning after December 31, 2016.

2. Election of safe harbor 401(k) plan status

Present Law

General rules for 401(k) plans

A section 401(k) plan legally is not a separate type of plan, but is a profit-sharing or stock bonus plan that contains a qualified cash or deferred arrangement (which allows employees to make elective deferrals is certain requirements are satisfied).[9] Thus, such arrangements are subject to the rules generally applicable to qualified defined contribution plans. In addition, special rules apply to such arrangements.[10] One rule is that the arrangement 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.[11] 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.

The maximum annual amount of elective deferrals that can be made by an employee for a year is $18,000 (for 2016) or, if less, the employee's compensation.[12] For an employee who attains age 50 by the end of the year, the dollar limit on elective deferrals is increased by $6,000 (for 2016) (called catch-up contributions).[13] An employee's elective deferrals must be fully vested. A section 401(k) plan may also provide for employer matching and nonelective contributions.

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[9] Certain pre-ERISA money purchase plans and rural cooperative plans may also include a qualified cash or deferred arrangement. Except for certain grandfathered plans, a State or local governmental employer may not maintain a section 401(k) plan.

[10] Elective deferrals are generally made on a pretax basis. 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 designated Roth contributions. Designated Roth contributions are elective deferrals that the participant designates as not excludable from the participant's gross income. Qualified distributions from a designated Roth account are excluded from income, even though they include earnings not previously taxed. A qualified distribution is a distribution made after the end of a specified period (generally five years after the participant's first designated Roth contribution) and that is (1) made on or after the date on which the participant attains age 59½, (2) made to a beneficiary (or to the estate of the participant) on or after the death of the participant, or (3) attributable to the participant's being disabled.

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

[12] Sec. 402(g).

[13] Sec. 414(v).

Automatic enrollment

Section 401(k) plans may be designed so that the employee will receive cash compensation unless the employee affirmatively elects to make elective deferrals to the section 401(k) plan. Alternatively, a plan may provide that elective deferrals are made at a specified rate (when 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 plan design is referred to as automatic enrollment.

Nondiscrimination test

General rule

A special annual nondiscrimination test, called the actual deferral percentage test (the "ADP" test) applies to elective deferrals under a section 401(k) plan.[14] The ADP test generally compares the average rate of deferral for highly compensated employees to the average rate of deferral for nonhighly compensated employees. The ADP test allows the average deferral rate for highly compensated employees to exceed that for nonhighly compensated employees within certain specified limits. [15] If a plan does 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 day of the following plan year.[16]

Design-based safe harbors

This nondiscrimination test is deemed to be satisfied if a section 401(k) plan includes certain minimum benefits (matching or nonelective contributions) as well as certain required rights and features and satisfies a notice requirement ("401(k) safe harbor plan"). Other requirements also apply, including requirements for a plan that satisfies the ACP test as well as the ADP on a safe harbor basis.[17]

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

[15] The limits under the ADP test for the average deferral rate for highly compensated employees are: (1) the average deferral rate for highly compensated employees can be up to 125 percent of the average deferral rate for nonhighly compensated employees; or (2) the average deferral rate for highly compensated employees can be two percentage points greater than the average deferral rate for nonhighly compensated employees or, if less, twice the average deferral rate for nonhighly compensated employees. Catch up contributions are not taken into account for this test. Under section 401(m)(2), employer matching contributions and after-tax employee contributions are subject to a similar special nondiscrimination test (the actual contribution percentage test or "ACP test") which compares the average rate of matching and after-tax contributions to the plan of the two groups.

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

[17] Sec. 401(m)(11) and (12).

Safe harbor contributions

Under one type of 401(k) safe harbor plan ("basic 401(k) safe harbor plan"),[18] the plan either (1) satisfies a matching contribution requirement ("matching contribution basic 401(k) safe harbor plan") or (2) provides for a nonelective contribution to a defined contribution plan of at least three percent of an employee's compensation on behalf of each nonhighly compensated employee who is eligible to participate in the plan ("nonelective basic 401(k) safe harbor plan"). The matching contribution requirement under the matching contribution basic 401(k) safe harbor requires a matching contribution equal to at least 100 percent of elective contributions of the employee for contributions not in excess of three percent of compensation, and 50 percent of elective contributions for contributions that exceed three percent of compensation but do not exceed five percent, for a total matching contribution of up to four percent of compensation. The required matching contributions and the three percent nonelective contribution under the basic 401(k) safe harbor must be immediately nonforfeitable (i.e., 100 percent vested) when made.

Another safe harbor applies for a section 401(k) plan that include automatic enrollment ("automatic enrollment 401(k) safe harbor").[19] Under an automatic enrollment 401(k) safe harbor, unless an employee elects otherwise, the employee is treated as electing to make elective deferrals equal to a percentage of compensation as stated in the plan, not in excess of 10 percent and at least (1) three percent of compensation for the first year the deemed election applies to the participant, (2) four percent during the second year, (3) five percent during the third year, and (4) six percent during the fourth year and thereafter.[20] Under the automatic enrollment 401(k) safe harbor, the matching contribution requirement is 100 percent of elective contributions of the employee for contributions not in excess of one percent of compensation, and 50 percent of elective contributions for contributions that exceed one percent of compensation but do not exceed six percent, for a total matching contribution of up to 3.5 percent of compensation ("matching contribution automatic enrollment 401(k) safe harbor"). The rate of nonelective contribution under the automatic enrollment 401(k) safe harbor plan is three percent, as under the basic 401(k) safe harbor ("nonelective contribution automatic enrollment 401(k) safe harbor"). However, under the automatic enrollment 401(k) safe harbors, the matching and nonelective contributions are allowed to become 100 percent vested only after two years of service (rather than being required to be immediately vested when made).

Safe harbor notice

The notice requirement for a 401(k) safe harbor plan is satisfied if each employee eligible to participate is given, within a reasonable period before any year, written notice of the employee's rights and obligations under the arrangement and the notice meets certain content and

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[18] Sec. 401(k)(12).

[19] Secs. 401(k)(13) and (m)(12).

[20] 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.

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

Delay in adopting nonelective 401(k) safe harbor

Generally the plan provisions for the requirements that must be satisfied to be a 401(k) safe harbor plan must be adopted before the first day of the plan year and remain in effect for an entire 12-month plan year. However, in the case of a nonelective 401(k) safe harbor plan (but not the matching contribution 401(k) safe harbor), a plan may be amended after the first day of the plan year but no later than 30 days before the end of the plan year to adopt the safe harbor plan provisions including providing the 3 percent of compensation nonelective contribution. The plan must also provide a contingent and follow-up notice. The contingent notice must be provided before the beginning of the plan year and specify that the plan may be amended to include the safe harbor nonelective contribution and, if it is so amended, a follow-up notice will be provided. If the plan is amended, the follow-up notice must be provided no later than 30 days before the end of the plan year stating that the safe harbor nonelective contribution will be provided.

Description of Proposal

In general

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

Elimination of notice requirement

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

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

Mid-year amendment

Under the proposal, a plan can be amended to become a nonelective 401(k) safe harbor plan, meaning be amended to provide the required nonelective contributions and thereby satisfy the safe harbor requirements, at any date during a plan year before the 30th day before the close of the plan year.

Post-year amendment

Further, the proposal allows a plan to be amended after the 30th day before the close of the plan year to become a nonelective contribution 401(k) safe harbor plan if the plan is amended to instead provide for a nonelective contribution of at least four percent of compensation for all eligible employees, but the plan must be amended no later than the last day for distributing excess contributions for the plan year under present law (which is the close of following plan year).

Effective Date

The proposals apply to plan years beginning after December 31, 2016.

B. Small Employer Plan Start-Up Credit

Present Law

Present law provides a nonrefundable income tax credit for qualified start-up costs of an eligible small employer that adopts a new qualified retirement plan, SIMPLE IRA plan, or SEP, provided that the plan covers at least one nonhighly compensated employee.[21] Qualified start-up costs are expenses connected with the establishment or administration of the plan or retirement-related education for employees with respect to the plan. The credit is the lesser of a flat dollar amount for $500 per year or 50 percent of the qualified start-up costs. The credit applies for up to three years beginning with the year the plan is first effective, or, at the election of the employer, the preceding year.

An eligible employer is an employer that, for the preceding year, had no more than 100 employees 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.[22] 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 which is equal to the amount of the credit for these costs.

Description of Proposal

The proposal changes the calculation of the flat dollar amount limit on the credit. The flat dollar amount for a taxable year is the greater of (1) $500 or (2) the amount that is the lesser of (a) $250 multiplied by the number of employees of the eligible employer who are not highly compensated employees (as defined in section 414(q)) and who are eligible to participate in the eligible employer plan maintained by the eligible employer, or (b) $5,000. As under present law, the credit only applies up to three years.

Effective Date

The proposal applies to taxable years beginning after December 31, 2016.

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[21] Sec. 45E.

[22] Sec. 52 (a) or (b) and 414(m) or (o).

C. Small Employer Automatic Enrollment Credit

Present Law

Small employer startup credit

Present law provides a nonrefundable income tax credit for qualified start-up costs of an eligible small employer that adopts a new qualified retirement plan, SIMPLE IRA plan, or simplified employee pension plan (‘SEP”), provided that the plan covers at least one nonhighly compensated employee.[23] Qualified start-up costs are expenses connected with the establishment or administration of the plan or retirement-related education for employees with respect to the plan. The credit is the lesser of a flat dollar amount for $500 per year or 50 percent of the qualified start-up costs. The credit applies for up to three years beginning with the year the plan is first effective, or, at the election of the employer, the preceding year.

An eligible employer is an employer that, for the preceding year, had no more than 100 employees 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.[24] 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 which is equal to the amount of the credit for these costs.

Automatic enrollment

A qualified retirement plan that is a profit-sharing plan is permitted to include a qualified cash or deferred arrangement (which allows employees to make elective deferrals if certain requirements are satisfied, and is commonly called a "section 401(k) plan")[25] A SIMPLE IRA plan is required to allow employees to make elective deferrals.[26] Section 401(k) plans and 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

[23] Sec. 45E.

[24] Sec. 52 (a) or (b) and 414(m) or (o).

[25] Certain pre-ERISA money purchase plans and rural cooperative plans may also include a qualified cash or deferred arrangement. Except for certain grandfathered plans, a State or local governmental employer may not maintain a section 401(k) plan.

[26] Sec. 408(p). Except in the cases of SEP plans that, as in effect on December 31, 1996, allowed elective deferrals, a SEP may not allow employees to make elective deferrals.

contributions or to make contributions at a different rate). This alternative plan design is referred to as automatic enrollment.

Description of Proposal

Under the proposal, eligible employers (as defined under present law) are allowed a credit of $500 per year for up to three years for startup costs for new section 401(k) plans and SIMPLE IRA plans that include automatic enrollment (which would be in addition to the credit allowed under present law). Eligible employers are also allowed a credit of $500 per year for up to three years if they add automatic enrollment as a feature to an existing plan.

Effective Date

The proposal applies to taxable years beginning after December 31, 2016.

D. Certain Non-Tuition Fellowship and Stipend Payments Treated as Compensation for IRA Purposes

Present Law

There are two general types of individual retirement arrangements ("IRAs"): traditional IRAs and Roth IRAs.[27] The total amount that an individual may contribute to one or more IRAs for a year is generally limited to the lesser of: (1) a dollar amount ($5,500 for 2016); and (2) the amount of the individual's compensation that is includible in gross income for the year.[28] In the case of an individual who has attained age 50 by the end of the year, the dollar amount is increased by $1,000. 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.[29]

Individuals with adjusted gross income below certain levels may make contributions to a Roth IRA (up to the contribution limit).[30] Contributions to a Roth IRA are not deductible.

As described above, an individual's IRA contributions cannot exceed the amount of his or her compensation that is includible in gross income. Subject to the rule for spouses, described above, an individual who has no compensation income generally is not eligible to make IRA contributions, even if the individual has other income that is includible in gross income.[31]

Description of Proposal

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

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[27] Secs. 408 and 408A.

[28] 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.

[29] Sec. 219(g).

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

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

<u>Effective Date</u>

This proposal is effective for taxable years beginning after December 31, 2016.

E. Repeal of Maximum Age for Traditional IRA Contributions

Present Law

Under present law, an individual may make deductible contributions to a traditional IRA up to the IRA contribution limit if neither the individual nor the individual's spouse is an active participant in an employer-sponsored retirement plan.[32] If an individual (or the individual's spouse) is an active participant in an employer-sponsored retirement plan, the deduction is phased out for taxpayers with adjusted gross income ("AGI") for the taxable year over certain indexed levels.[33]

To the extent an individual cannot or does not make deductible contributions to a traditional IRA, the individual may make nondeductible contributions to a traditional IRA (that is, no AGI limits apply), subject to contribution limits.[34]

An individual who has attained age 70½ prior to the close of a year is not permitted to make contributions to a traditional IRA.[35] This restriction does not apply to contributions to a Roth IRA.[36]

Description of Proposal

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

Effective Date

The proposal applies to contributions made for taxable years beginning after December 31, 2016.

[32] Sec. 219.

[33] Sec. 219(g).

[34] Sec. 408(o). The annual contribution limit for IRAs is coordinated so that the maximum amount that can be contributed to all of an individual's IRAs (both traditional and Roth) for a taxable year is the lesser of a certain dollar amount ($5,500 for 2016) or the individual's compensation.

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

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

F. Shrinking Emergency Account Losses

1. Extended period for the rollover of plan loan offset amounts

Present Law

Taxation of retirement plan distributions

General rule

A distribution from a tax-favored employer-sponsored retirement plan (that is, a qualified retirement plan, section 403(b) plan, or a governmental section 457(b) plan) is generally includible in gross income, except to the extent that the distribution is a recovery of basis under the plan, or the amount of the distribution is contributed to an eligible retirement plan (that is, another tax-favored employer-sponsored retirement plan or an individual retirement arrangement ("IRA")) in a tax-free rollover. In the case of a distribution from a retirement plan to a participant under age 59½, the distribution (other than a distribution from a governmental section 457(b) plan) is also subject to a 10-percent early distribution tax, unless an exception applies.[37]

Rollovers

A distribution from a tax-favored employer-sponsored retirement plan that is an eligible rollover distribution may be rolled over to an eligible retirement plan. The rollover generally can be achieved by direct rollover (direct payment from the distributing plan to the recipient plan) or by contributing the distribution to the eligible retirement plan within 60 days of receiving the distribution ("60-day rollover"). Amounts that are rolled over are usually not included in gross income. Generally, any distribution of the balance to the credit of a participant is an eligible rollover distribution with exceptions, for example, certain periodic payments, required minimum distributions, and hardship distributions.[38]

Tax-favored employer-sponsored retirement plans are required to offer a direct rollover with respect to any eligible rollover distribution before paying the amount to the participant or beneficiary.[39] If an eligible rollover distribution is not directly rolled over into an eligible

[37] Sec. 72(t).

[38] Sec. 402(c)(4). Treas. Reg. sec. 1.402(c)-1 identifies certain other payments that are not eligible for rollover, including, for example, certain corrective distributions, loans that are treated as deemed distributions under section 72(p), and dividends on employer securities as described in section 404(k). In addition, pursuant to section 402(c)(11), any distribution to a beneficiary other than the participant's surviving spouse is only permitted to be rolled over to an IRA using a direct rollover; 60-day rollovers are not available to nonspouse beneficiaries.

[39] Sec. 401(a)(31). Unless a participant elects otherwise, a mandatory cash-out of more than $1,000 must be directly rolled over to an IRA chosen by the plan administrator or the payor.

retirement plan, the taxable portion of the distribution generally is subject to mandatory 20-percent income tax withholding.[40]

Plan loan as a deemed distribution

Tax-favored employer-sponsored retirement plans may provide loans to participants. Unless the loan satisfies certain requirements in both form and operation, the amount of a retirement plan loan is a deemed distribution from the retirement plan.[41] These requirements include the following: the amount of the loan must not exceed the lesser of 50 percent of the participant's account balance or $50,000; the terms of the loan must provide for a repayment period of not more than five years[42] 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. The rules do not limit the number of loans an employee may obtain from a plan.

If a plan participant ceases to make payments on a loan before it is repaid according to the required schedule, a deemed distribution of the outstanding loan balance generally occurs. This deemed distribution of an unpaid loan balance is generally taxed as though an actual distribution occurred, including being subject to a 10-percent early distribution tax, if applicable. However, a deemed distribution is not eligible for rollover to another eligible retirement plan.

Loan offset amount

A plan may also provide that, in certain circumstances (for example, upon a participant's termination of employment with the employer), a participant's obligation to repay a loan is accelerated and, if the loan is not repaid, the loan is cancelled and the amount in participant's account balance is offset by the amount attributable to the loan (the amount of the unpaid loan balance). In the case of a loan offset, an actual distribution equal to the unpaid loan balance (as opposed to a deemed distribution as described above) occurs, and (unlike a deemed distribution) the amount of the distribution is eligible for tax-free rollover to another eligible retirement plan.[43] However, the plan is not required to offer a direct rollover with respect to a plan loan offset amount that is an eligible rollover distribution and the plan loan offset amount is generally not subject to 20-percent income tax withholding.[44]

Description of Proposal

Under the proposal, the period during which a qualified plan loan offset amount may be contributed to an eligible retirement plan as a rollover contribution is extended from 60 days after the date of the offset to the due date (including extensions) for filing the Federal income tax

[40] Treas. Reg. sec. 1.402(c)-2, Q&A-1(b)(3).

[41] Sec. 72(p).

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

[43] Treas. Reg. sec.1.402(c)-2, A-9.

[44] Treas. Reg. sec. 1.401(a)(31)-1, A-16, and Treas. Reg. sec. 31.3405(c)-1, A-11.

return for the taxable year in which the plan loan offset occurs (meaning the taxable year in which such amount is treated as distributed by the plan). Under the proposal, a qualified plan loan offset amount is a plan loan offset amount which is treated as distributed from a tax-favored employer-sponsored retirement plan to a participant or beneficiary solely by reason of either the termination of the plan, or the failure to meet the repayment terms of the loan from such plan because of the separation from service of the participant (whether due to layoff, cessation of business, termination of employment, or otherwise). As under present law, a loan offset amount under the proposal is the amount by which a participant's accrued benefit under the plan is reduced to repay a loan from the plan.

Effective Date

The proposal applies to loan offsets made in taxable years beginning after December 31, 2016.

2. Modification of rule governing hardship distributions

Present Law

A qualified retirement plan that is a profit-sharing plan or stock bonus plan (and certain money purchase pension plans) may allow an employee to make an election between cash and an employer contribution to the plan pursuant to a qualified cash or deferred arrangement.[45] A plan with this feature is generally referred to as a section 401(k) plan. A section 403(b) plan may allow a similar salary reduction agreement under which an employee may make an election between cash and an employer contribution to the plan.[46]

Amounts contributed pursuant to these qualified cash or deferred arrangements and salary reduction agreements generally are referred to as elective deferrals. Elective deferrals under a section 401(k) plan or 403(b) plan may not be distributable prior to the occurrence of one or more specified events. One event upon which distribution is permitted is the financial hardship of the employee.[47] The amount allowed to be distributed on account of hardship is limited to the dollar amount of the employee's elective deferrals, reduced by the amount of elective deferrals previously distributed on account of hardship. 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 heavy need.[48]

The Treasury regulations provide a safe harbor under which a distribution may be deemed necessary to satisfy an immediate and heavy financial need. One requirement of this

[45] Sec. 401(k).

[46] Section 403(b) plans may be maintained only by (1) tax-exempt charitable organizations, and (2) educational institutions of State or local governments (including public schools). 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.

[47] Sec. 401(k)(2)(B)(i)(IV).

[48] Treas. Reg. sec. 1.401(k)-1(d)(3).

safe harbor is that the employee be prohibited from making elective deferrals and employee contributions to the plan and all other plans maintained by the employer for at least six months after receipt of the hardship distribution.

Description of Proposal

The Secretary of the Treasury is directed to revise the applicable regulations within one year of the date of enactment to eliminate the requirement that an employee be prohibited from making elective deferrals and employee contributions for six months after the receipt of a hardship distribution in order for the distribution to be deemed necessary to satisfy an immediate and heavy financial need. It is intended that an employee not be prevented for any period after the receipt of a hardship distribution from continuing to make elective deferrals and employee contributions.

Effective Date

This proposal applies to plan years beginning after December 31, 2016.

3. Qualified employer plans prohibited from making loans through credit cards and other arrangements

Present Law

Tax-favored employer-sponsored retirement plans may provide loans to participants. Unless the loan satisfies certain requirements in both form and operation as discussed above, the amount of a retirement plan loan is a deemed distribution from the retirement plan These requirements include the following: the amount of the loan must not exceed the lesser of 50 percent of the participant's account balance or $50,000 (generally taking into account outstanding balances of previous loans); the terms of the loan must provide for a repayment period of not more than five years[49] and provide for level amortization of loan payments (with payments not less frequently than quarterly); and the terms of the loan must be legally enforceable. Subject to the limit on the amount of loans, as described above, the rules do not limit the number of loans an employee may obtain from a plan.

Description of Proposal

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

Effective Date

The proposal applies to plan years beginning after December 31, 2016.

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

G. Portability of Lifetime Income Options

Present Law

Distribution restrictions for accounts under employer-sponsored plans

Types of plans and contributions

Tax-favored employer-sponsored retirement plans under which individual accounts are maintained for employees include qualified defined contribution plans, tax-deferred annuity plans (referred to as "section 403(b)" plans), and eligible deferred compensation plans of State and local government employers (referred to as "governmental section 457(b)" plans).[50]

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

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

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

Restrictions on in-service distributions

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

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

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

distributions.[51] In-service distributions of elective deferrals (and related earnings) generally are permitted only after attainment of age 59½ or termination of the plan. In-service distributions of elective deferrals (but not related earnings) are also permitted in the case of hardship.

Other distribution restrictions may apply to contributions under certain types of qualified defined contribution plans. A profit-sharing plan generally may allow an in-service distribution of an amount contributed to the plan only after a fixed number of years (not less than two).[52] A money purchase pension plan generally may not allow an in-service distribution before attainment of age 62 (or attainment of normal retirement age under the plan if earlier) or termination of the plan.[53]

Elective deferrals under a section 403(b) plan are subject to in-service distribution restrictions similar to those applicable to elective deferrals under a qualified defined contribution plan, and, in some cases, other contributions to a section 403(b) plan are subject to similar restrictions.[54] Deferrals under a governmental section 457(b) plan are subject to in-service distribution restrictions similar to those applicable to elective deferrals under a qualified defined contribution plan, except that in-service distributions under a governmental section 457(b) plan apply until age 70½ (rather than age 59½).[55]

Distributions and rollovers

A distribution from an employer-sponsored retirement plan is generally includible in income except for any portion attributable to after-tax contributions, which result in basis.[56] Unless an exception applies, in the case of a distribution before age 59½ from a qualified retirement plan or a section 403(b) plan, any amount included in income is subject to an additional 10-percent tax, referred to as the "early withdrawal" tax.[57]

A distribution from an employer-sponsored retirement plan generally may be rolled over on a nontaxable basis to another such plan or to an individual retirement arrangement ("IRA"), either by a direct transfer to the recipient plan or IRA or by contributing the distribution to the

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

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

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

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

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

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

[57] Sec. 72(t).

recipient plan or IRA within 60 days of receiving the distribution.[58] If the distribution from an employer-sponsored retirement plan consists of property, the rollover is accomplished by a transfer or contribution of the property to the recipient plan or IRA.

Investment of accounts under employer-sponsored plans

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

The investment options under a particular employer-sponsored retirement plan may change at times.[59] Similarly, a plan that allows employees to direct the investment of their accounts in any product, instrument or investment offered in the market may be amended to limit the investments that can be held in the plan. In these cases, employees may be required to change the investments held within their accounts.

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

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

Description of Proposal

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

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

[59] In the case of a plan subject to the Employee Retirement Income Security Act of 1974 (“ERISA”), a participant’s exercise of control over the investment of the assets in his or her account by choosing among the investment options offered under the plan does not relieve a plan fiduciary from the duty to prudently select and monitor the investment options offered to participants. 29 C.F.R. sec. 2550.404c-1(d)(2)(iv) (2010); *Tibble v. Edison International*, No. 13-550, 135 S. Ct. 1823 (2015). The duty to monitor investment options may result in a change in the options offered.

distribution must be made within the 90-day period ending on the date when the lifetime income investment is no longer authorized to be held as an investment option under the plan.

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

Effective Date

The proposal applies to plan years beginning after December 31, 2016.

H. Treatment of Custodial Accounts under Section 403(b) Plan Upon Plan Termination

Present Law

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

Section 403(b) plans are a form of tax-favored employer-sponsored plan that provide tax benefits similar to qualified retirement plans. Section 403(b) plans may be maintained only by (1) charitable tax-exempt organizations, and (2) educational institutions of State or local governments (that is, public schools, including colleges and universities). Many of the rules that apply to section 403(b) plans are similar to the rules applicable to qualified retirement plans, including section 401(k) plans. Employers may make nonelective or matching contributions to such plans on behalf of their employees, and the plan may provide for employees to make pre-tax elective deferrals, designated Roth contributions (held in designated Roth accounts)[60] or other after-tax contributions. Generally section 403(b) plans provide for contributions toward the purchase of annuity contracts or provide for contributions to be held in custodial accounts for each employee. In the case of contributions to custodial accounts under a section 403(b) plan, the amounts must be invested only in regulated investment company stock.[61] Contributions to a custodial account are not permitted to be distributed before the employee dies, attains age 59½, has a severance from employment, or, in the case of elective deferrals, encounters financial hardship.

A section 403(b) plan is permitted to contain provision for plan termination and that allow accumulated benefits to be distributed on termination.[62]

Rollovers

A distribution from a section 403(b) plan that is an eligible rollover distribution may be rolled over to an eligible retirement plan (which include another 403(b) plan, a qualified retirement plan, and an IRA).[63] The rollover generally can be achieved by direct rollover (direct payment from the distributing plan to the recipient plan) or by contributing the distribution to the eligible retirement plan within 60 days of receiving the distribution ("60-day rollover").[64] Amounts that are rolled over are usually not included in gross income. Generally, a distribution

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[60] Sec. 402A.

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

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

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

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

of any portion of the balance to the credit of a participant is an eligible rollover distribution with exceptions, for example, certain periodic payments, required minimum distributions, and hardship distributions.[65]

Roth conversions

Distributions from section 403(b) plans may be rolled into a Roth IRA.[66] Distributions from these plans that are rolled over into a Roth IRA and that are not distributions from a designated Roth account must be included in gross income. Further, a section 403(b) plan that allows employees to make designated Roth contributions may also allow employees to elect to transfer amounts held in accounts that are not designated Roth accounts into designated Roth accounts, but the amount transferred must be included in income as though it were distributed.[67]

Approved nonbank trustees required for IRAs

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

In order for a trustee or custodian that is not a bank to be an IRA trustee or custodian, the entity must apply to the IRS for approval. Treasury Regulations list a number of factors that are taken into account in approving an applicant to be a nonbank trustee.[68] The applicant must demonstrate fiduciary ability (ability to act within accepted rules of fiduciary conduct including continuity and diversity of ownership), capacity to account (experience and competence with other activities normally associated with handling of retirement funds), and ability to satisfy other rules of fiduciary conduct which includes a net worth requirement. Because it is an objective requirement that may be difficult for some applicants to satisfy, the net worth requirement is the most significant of the requirements for nonbank trustees.

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

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

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

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

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

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

Description of Proposal

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

Effective Date

The proposal applies to plan terminations occurring after December 31, 2016.

II. ADMINISTRATIVE IMPROVEMENTS

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

Present law

In order for a stock bonus, pension, profit-sharing plan or annuity plan to be treated as maintained for a taxable year, the plan must be adopted by the last day of the taxable year.[69] However, the trust under the plan will not fail to be treated as in existence due to lack of corpus merely because it holds no assets on the last day of the taxable year.[70] Contributions made by the due date (plus extensions) of the tax return for the employer maintaining the plan for a taxable year are treated as contributed on account of that taxable year.[71] Thus a plan can be established on the last day of a taxable year even though the first contribution is not made until the due date of the employer's taxable year. Further, if the terms of a plan adopted during an employer's taxable year fail to satisfy the qualification requirements that apply to the plan for the year, the plan may also be amended retroactively by the due date (including extensions) of the employer's return, provided that the amendment is made retroactively effective.[72] However, this provision does not allow a plan to be adopted after the end of a taxable year and made retroactively effective, for qualification purposes, for the taxable year prior to the taxable year in which the plan was adopted by the employer.[73]

Description of Proposal

Under the proposal, 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.

The proposal does not override rules requiring certain plan provisions to be in effect during a plan year, such as the provision for elective deferrals under a qualified cash or deferral arrangement ("generally referred to as a 401(k) plan").[74]

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[69] Rev. Rul. 76-28; 1976-1 C.B. 106

[70] Rev. Rul. 81-114; 1981-1 C.B. 207

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

[72] Sec. 401(b).

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

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

Effective Date

The proposal applies to plans adopted for taxable years beginning after December 31, 2016.

B. Combined Annual Report for Group of Plans

Present Law

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.[75] ERISA requires the plan administrator of certain pension and welfare benefit plans to file annual reports disclosing certain information to the Department of Labor ("DOL").[76] 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.[77] A separate Form 5500 is required for each plan.

Description of Proposal

The proposal directs the IRS and DOL to work together to modify Form 5500 so that all members of a group of plans described below may file a single consolidated Form 5500. In developing the consolidated Form 5500, IRS and DOL may require it to include all information for each plan in the group as IRS and DOL determine is necessary or appropriate for the enforcement and administration of the Code and ERISA.

For purposes of the proposal, a group of plans is eligible for a consolidated Form 5500 if all the plans in the group (1) are defined contribution plans, (2) have the same trustee, the same named fiduciary (or named fiduciaries) under ERISA, and the same administrator, (3) use the same plan year, and (4) provide the same investments or investment options to participants and beneficiaries. A plan not subject to ERISA may be included in the group if the same person that performs each of the previous functions, as applicable, for all the other plans in the group performs each of the functions for the plan not subject to ERISA.

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

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

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

Effective Date

The consolidated Form 5500 is to be implemented not later than plan years beginning on or after January 1, 2020.

C. Disclosure Regarding Lifetime Income

Present Law

ERISA requires the administrator of a defined contribution plan to provide benefit statements to participants.[78] In the case of a participant who has the right to direct the investment of the assets in his or her account, a benefit statement must be provided at least quarterly. Benefit statements must be provided at least annually to other participants.

Among other items, a benefit statement provided with respect to a defined contribution plan generally must include (1) the participant's total benefits accrued, that is, the participant's account balance, (2) the vested portion of the account balance or the earliest date on which the account balance will become vested, and (3) the value of each investment to which assets in the participant's account are allocated. A quarterly benefit statement provided to a participant who has the right to direct investments must provide additional information, including information relating to investment principles.

In May 2013, the Department of Labor issued an advance notice of proposed rulemaking providing rules under which a benefit provided to a defined contribution plan participant would include an estimated lifetime income stream of payments based on the participant's account balance.[79] However, information about lifetime income that might be provided by funds in a defined contribution plan is not currently required to be included in a benefit statement.

Description of Proposal

The proposal requires a benefit statement provided to a defined contribution plan participant to include a lifetime income disclosure as described in the proposal. However, the lifetime income disclosure is required to be included in only one benefit statement during any 12-month period.

A lifetime income disclosure is required to set forth the lifetime income stream equivalent of the participant's total account balance under the plan. The lifetime income stream equivalent to the account balance is the amount of monthly payments the participant would receive if the total account balance were used to provide lifetime income streams, based on assumptions specified in guidance prescribed by the Secretary of Labor. The required lifetime income streams are (1) a qualified joint and survivor annuity for the participant and the participant's surviving spouse, based on assumptions specified in guidance, including the assumption that the participant has a spouse of equal age, and (2) a single life annuity. The lifetime income streams may have a term certain or other features to the extent permitted under guidance.

[78] ERISA sec. 105. Benefits statements are required also with respect to defined benefit plans. A civil penalty may apply for a failure to provide a required benefit statement.

[79] 78 Fed. Reg. 26727 (May 8, 2013).

The Secretary is directed to issue, not later than a year after the proposal is enacted, a model lifetime income disclosure, written in a manner to be understood by the average plan participant. The model must include provisions to (1) explain that the lifetime income stream equivalent is only provided as an illustration, (2) explains that the actual payments under the lifetime income stream that may be purchased with the account balance will depend on numerous factors and may vary substantially from the lifetime income stream equivalent in the disclosure, (3) explain the assumptions on which the lifetime income stream equivalent is determined, and (4) provides other similar explanations as the Secretary considers appropriate.

In addition, the Secretary is directed, not later than a year after the proposal is enacted, (1) to prescribe assumptions that defined contribution plan administrators may use in converting account balances into lifetime income stream equivalents, and (2) issue interim final rules under the proposal. In prescribing assumptions, the Secretary may prescribe a single set of specific assumptions (in which case the Secretary may issue tables or factors that facilitate conversions of account balances) or ranges of permissible assumptions. To the extent that an account balance is or may be invested in a lifetime income stream, the prescribed assumptions are to allow, to the extent appropriate, plan administrators to use the amounts payable under the lifetime income stream as a lifetime income stream equivalent.

Under the proposal, no plan fiduciary, plan sponsor, or other person has any liability under ERISA solely by reason of the provision of lifetime income stream equivalents that are derived in accordance with the assumptions and guidance under the proposal and that include the explanations contained in model disclosure. This protection applies without regard to whether the lifetime income stream equivalent is required to be provided.

Effective Date

The requirement to provide a lifetime income disclosure applies with respect to benefit statements provided more than 12 months after the latest of the issuance by the Secretary of (1) interim final rules, (2) the model disclosure, or (3) prescribed assumptions.

III. OTHER BENEFITS

A. Judges and Special Trial Judges of the United States Tax Court

1. Tax Court Judges

<u>Present Law</u>

<u>Retirement and survivors benefits</u>

A judge of the United States Tax Court ("Tax Court")[80] may be covered under the Federal Employees Retirement System ("FERS") or, depending on when the judge began Federal employment, the Civil Service Retirement System ("CSRS"). FERS and CSRS provides annuity benefits to a retired employee and, in some cases, to survivors of a deceased employee. Employees covered by FERS are also covered by the Social Security program.[81] Employees covered by FERS and CSRS may contribute to the Thrift Savings Plan ("TSP"). Employees covered by FERS (but not CSRS) generally are also eligible for agency contributions (that is, nonelective contributions and matching contributions). A Tax Court judge is eligible to contribute to the Thrift Savings Plan, but is not eligible for agency contributions, regardless of which Federal retirement plan the judge is covered by.

A Tax Court judge may elect at any time while serving as a Tax Court judge to receive "retired pay" from the Tax Court rather than benefits under another Federal retirement program, such as FERS or CSRS.[82] A Tax Court judge may also elect to participate in a plan providing annuity benefits for the judge's surviving spouse and dependent children (the "Tax Court survivors' annuity plan").[83] Generally, benefits under the Tax Court survivors' annuity plan are payable only if the judge has performed at least five years of service and made contributions to the plan for at least five years of service.[84]

The rules governing the retired pay plan for Tax Court judges and the Tax Court survivors' annuity plan provide for coordination between CSRS and the retired pay or survivors' annuity plan when a judge covered by CSRS elects into those plans. For example, if a judge covered by CSRS elects retired pay, the accumulated CSRS contributions previously made by

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[80] The Tax Court is established (under section 7441) by the Congress pursuant to Article I of the U.S. Constitution.

[81] Wages of employees covered by Social Security are subject to old-age, survivors and disability insurance ("OASDI") taxes under the Federal Insurance Contributions Act ("FICA"), consisting of employer and portions, each at a rate of 6.2 percent of covered wages up to the OASDI wage base ($118,500 for 2016). Wages up to the OASDI wage base are taken into account in determining Social Security benefits.

[82] Secs. 7447. Retired pay is generally equal to the salary of an active Tax Court judge.

[83] Sec. 7448. Special trial judges may also elect into the Tax Court survivors' annuity plan.

[84] For this purpose, a judge may make contributions with respect to service performed before electing to participate in the plan.

the judge are refunded to the judge with interest. However, the rules do not address coordination with FERS.

Limit on outside earned income of a judge receiving retired pay

Under the retired pay plan for Tax Court judges, retired judges generally receive retired pay equal to the salary of an active judge and must be available for recall to perform judicial duties as needed by the court for up to 90 days a year (unless the judge consents to a longer period). However, retired judges may elect to freeze the amount of their retired pay, and those who do so are not available for recall.

Retired Tax Court judges on recall are subject to the limitations on outside earned income that apply to active Federal employees under the Ethics in Government Act of 1978. Retired Tax Court judges who elect to freeze the amount of their retired pay (thus making themselves unavailable for recall) are not subject to the limitations on outside earned income.

Description of Proposals

Retirement and survivors benefits

The proposal allows a Tax Court judge who is covered by FERS to receive agency contributions to the TSP, similar to other employees covered by FERS. If a judge covered by FERS elects retired pay, rather than FERS benefits, the judge's retired pay is offset by the amount of previous TSP distributions attributable to agency contributions (without regard to earnings on the agency contributions) made during years of service as a Tax Court judge while covered by FERS.

Under the proposal, benefits under the survivors' annuity plan are payable if a Tax Court judge has performed at least 18 months of service and made contributions for at least 18 months (rather than five years). In addition, benefits under the survivors' annuity plan are payable if a Tax Court judge is assassinated before the judge has performed 18 months of service and made contributions for 18 months.[85]

The proposal amends the rules governing the retired pay plan for Tax Court judges and the Tax Court survivors' annuity plan to provide for coordination between FERS and those plans when a judge covered by FERS elects into those plans, similar to coordination with CSRS under present law.

Limit on outside earned income of a judge receiving retired pay

Under the proposal, compensation earned by a retired Tax Court judge for teaching is not treated as outside earned income for purposes of limitations under the Ethics in Government Act of 1978.

[85] These changes apply also to special trial judges who elect into the Tax Court survivors' annuity plan.

Effective Date

The proposals are effective on the date of enactment, except that the proposal relating to TSP contributions applies to basic pay earned while serving as a Tax Court judge and the proposal relating to outside earned income of a judge receiving retired pay applies to any individual serving as a retired Tax Court judge on or after the date of enactment.

2. Special Trial Judges of the Tax Court

Present Law

The chief judge of the Tax Court may appoint special trial judges to handle certain cases.[86] Special trial judges serve for an indefinite term. Special trial judges receive a salary of 90 percent of the salary of a Tax Court judge. Special trial judges do not have authority to impose punishment in the case of contempt of the authority of the Tax Court.[87]

Special trial judges generally are covered by the benefit programs that apply to Federal executive branch employees, including CSRS or FERS (depending on when the judge began Federal employment). Special trial judges may contribute to TSP, and those covered by FERS are also eligible for agency contributions. Special trial judges covered by FERS are also covered by the Social Security program. Special trial judges may also elect to participate in the Tax Court survivors' annuity plan. An election into the Tax Court survivors' annuity plan must be made not later than six months after the later of the date the special trial judge takes office or the date the judge marries.

Special trial judges are required to be covered by a leave program under which they earn annual and sick leave during their period of employment. At termination of employment, a lump-sum payment is made to the special trial judge for unused annual leave, and unused sick leave is credited as additional service for certain purposes under CSRS or FERS. Group-term life insurance is available to Federal employees, including special trial judges, under the Federal Employees Group Life Insurance ("FEGLI") program. Under changes made to the FEGLI program in 1999, higher premiums apply to older employees than to younger employees ("age-based premiums").

Description of Proposals

Magistrate judges of the Tax Court

Under the proposal, the position of special trial judge of the Tax Court is renamed as magistrate judge of the Tax Court ("magistrate judge"). Magistrate judges are appointed (or reappointed) to serve for eight-year terms and are subject to removal in limited circumstances. A magistrate judge receives a salary of 92 percent of the salary of a Tax Court judge.

[86] Sec. 7443A.

[87] Sec. 7456(c) deals with contempt authority.

Contempt authority

Under the proposal, magistrate judges have the authority to impose punishment in the case of contempt of the authority of the Tax Court, subject to a limit on the sentence that may be imposed.

Leave, FEGLI and survivors' annuity plan

Under the proposal, magistrate judges are not required to be covered by a leave program. Existing leave balances will be maintained and made available if a magistrate judge changes to a Federal position covered by a leave program. Otherwise, at separation from Federal employment, a lump-sum payment will be made to the magistrate judge for unused annual leave, and unused sick leave will be credited as additional service for certain purposes under CSRS or FERS.

In the case of magistrate judges age 65 or older, the proposal allows the Tax Court to pay the portion of FEGLI premiums attributable to increases resulting from the 1999 FEGLI changes.

Under the proposal, a magistrate judge may elect to participate in the Tax Court survivors' annuity plan at any time while serving as a magistrate judge.

Retirement plan for magistrate judges

In general

The proposal establishes a new retirement plan for magistrate judges, under which a magistrate judge may elect to receive a retirement annuity from the Tax Court in lieu of benefits under CSRS or FERS. A magistrate judge who elects to be covered by the retirement program generally receives a refund of contributions (with interest) made to CSRS or FERS. A magistrate judge who elects to be covered by the retirement program may contribute to the TSP, but not receive agency contributions. The judge's retired pay is offset by the amount of previous TSP distributions attributable to agency contributions (without regard to earnings on the agency contributions) made during years of service as a Tax Court judge while covered by FERS. A special trial judge covered by the retirement program is not covered by the Social Security program.

Under the new plan, a magistrate judge may retire at age 65 with 14 years of service and receive an annuity equal to his or her salary at the time of retirement. For this purpose, service may include service performed as a special trial judge or a magistrate judge, provided the service is performed no earlier than 9½ years before the date of enactment of the proposal. The proposal also provides for payment of a reduced annuity in the case a magistrate judge with at least eight years of service or in the case of disability or failure to be reappointed after serving at least one full term.

A magistrate judge receiving a retirement annuity is entitled to cost-of-living increases based on cost-of-living increases in benefits paid under CSRS. However, such an increase cannot cause the retirement annuity to exceed the current salary of a magistrate judge. A magistrate judge's retirement annuity is subject to freezing or suspension if the retired magistrate judge practices law or accepts other Federal employment.

Contributions of one percent of salary are withheld from the salary of a magistrate judge who elects to participate in the retirement annuity program. Such contributions must be made also with respect to prior service for which the magistrate judge elects credit under the retirement annuity program. No contributions are required after 14 years of service (or retirement before 14 years of service. A lump sum refund of the magistrate judge's contributions (with interest) is made if no annuity is payable, for example, if the magistrate judge dies before retirement.

Establishment of Tax Court Judicial Officers' Retirement Fund

The proposal establishes the Tax Court Judicial Officers' Retirement Fund (the "Fund"), which is appropriated for the payment of annuities, refunds, and other payments under the retirement annuity program. Contributions withheld from a magistrate judge's salary are deposited in the Fund. In addition, the proposal requires there to be deposited into the Fund, by the end of each fiscal year, amounts required to reduce the Fund's unfunded liability to zero. For this purpose, the Fund's unfunded liability means the estimated excess, actuarially determined on an annual basis, of the present value of benefits payable from the Fund over the sum of (1) the present value of contributions to be withheld from the future salary of the magistrate judges and (2) the balance in the Fund as of the date the unfunded liability is determined.

Recall of retired magistrate judges

The proposal provides rules under which a retired magistrate judge may be recalled to perform services for up to 90 days a year. A retired magistrate judge who is receiving an annuity under the retirement plan for magistrate judges and is recalled is to be paid the difference between the annuity and the current rate of salary for magistrate judges. For years after any year in which the retired judge was recalled, the retirement annuity is increased to the rate of salary for magistrate judges during the last year in which the judge was recalled.

Effective Date

The proposals are generally effective on the date of enactment of the proposals. In addition, the proposals relating to the position of magistrate judge, terms of appointment, salary, contempt authority, and leave apply to individuals serving as special trial judges as of the day before the date of enactment. Any individual serving as special trial judges as of the day before the date of enactment is deemed to be appointed as a magistrate judge on the date of enactment.

IV. OTHER REVENUE PROPOSAL

A. Penalty for Failure to File

Present Law

The Federal tax system is one of "self-assessment," *i.e.*, taxpayers are required to declare their income, expenses, and ultimate tax due, while the IRS has the ability to propose subsequent changes. This voluntary system requires that taxpayers comply with deadlines and adhere to the filing requirements. While taxpayers may obtain extensions of time in which to file their returns, the Federal tax system consists of specific due dates of returns. In order to foster compliance in meeting these deadlines, Congress has enacted a penalty for the failure to timely file tax returns.[88]

A taxpayer who fails to file a tax return on or before its due date is subject to a penalty equal to five percent of the net amount of tax due for each month that the return is not filed, up to a maximum of 25 percent of the net amount.[89] If the failure to file a return is fraudulent, the taxpayer is subject to a penalty equal to 15 percent of the net amount of tax due for each month the return is not filed, up to a maximum of 75 percent of the net amount.[90] The net amount of tax due is the amount of tax required to be shown on the return reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credits against tax which may be claimed on the return.[91] The penalty will not apply if it is shown that the failure to file was due to reasonable cause and not willful neglect.[92]

If a return is filed more than 60 days after its due date, and unless it is shown that such failure is due to reasonable cause, then the failure to file penalty may not be less than the lesser of $205 or 100 percent of the amount required to be shown as tax on the return. If a penalty for failure to file and a penalty for failure to pay tax shown on a return both apply for the same month, the amount of the penalty for failure to file for such month is reduced by the amount of the penalty for failure to pay tax shown on a return.[93] If a return is filed more than 60 days after its due date, then the penalty for failure to pay tax shown on a return may not reduce the penalty

[88] See *United States v. Boyle*, 469 U.S. 241, 245 (1985).

[89] Sec. 6651(a)(1).

[90] Sec. 6651(f).

[91] Sec. 6651(b)(1).

[92] Sec. 6651(a)(1).

[93] Sec. 6651(c)(1).

for failure to file below the lesser of $205 or 100 percent of the amount required to be shown on the return.[94]

The failure to file penalty applies to all returns required to be filed under subchapter A of Chapter 61 (relating to income tax returns of an individual, fiduciary of an estate or trust, or corporation; self-employment tax returns, and estate and gift tax returns), subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), and subchapter A of chapter 53 (relating to machine guns and certain other firearms).[95] The failure to file penalty is adjusted annually to account for inflation. The failure to file penalty does not apply to any failure to pay estimated tax required to be paid by sections 6654 or 6655.[96]

Description of Proposal

Under the proposal, if a return is filed more than 60 days after its due date, then the failure to file penalty may not be less than the lesser of $400 or 100 percent of the amount required to be shown as tax on the return.

Effective Date

The proposal applies to returns with filing due dates (including extensions) after December 31, 2016.

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[94] *Ibid*.

[95] Sec. 6651(a)(1).

[96] Sec. 6651(e).