

## **Miscellaneous Changes Under the SECURE 2.0 Act of 2022**

Notice 2024-2

### **I. PURPOSE**

This notice provides guidance in the form of questions and answers with respect to certain provisions of Division T of the Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 4459 (2022), known as the SECURE 2.0 Act of 2022 (SECURE 2.0 Act). Specifically, this notice addresses issues under the following sections of the SECURE 2.0 Act: section 101 (expanding automatic enrollment in retirement plans), section 102 (modification of credit for small employer pension plan startup costs), section 112 (military spouse retirement plan eligibility credit for small employers), section 113 (small immediate financial incentives for contributing to a plan), section 117 (contribution limit for SIMPLE plans), section 326 (exception to the additional tax on early distributions from qualified plans for individuals with a terminal illness), section 332 (employers allowed to replace SIMPLE retirement accounts with safe harbor 401(k) plans during a year), section 348 (cash balance), section 350 (safe harbor for correction of employee elective deferral failures), section 501 (provisions relating to plan amendments), section 601 (SIMPLE and SEP Roth IRAs), and section 604 (optional treatment of employer contributions or nonelective contributions as Roth contributions).

This notice is not intended to provide comprehensive guidance as to the specific provisions of the SECURE 2.0 Act, but rather is intended to provide guidance on discreet issues to assist in commencing implementation of these provisions. The Department of the Treasury (Treasury Department) and the Internal Revenue Service

(IRS) continue to analyze the various provisions of the SECURE 2.0 Act and anticipate issuing further guidance, including regulations, as appropriate.

## **II. PROVISIONS OF THE SECURE 2.0 ACT**

### **TABLE OF CONTENTS:**

A - Section 101 of the SECURE 2.0 Act

B - Section 102 of the SECURE 2.0 Act

C - Section 112 of the SECURE 2.0 Act

D - Section 113 of the SECURE 2.0 Act

E - Section 117 of the SECURE 2.0 Act

F - Section 326 of the SECURE 2.0 Act

G - Section 332 of the SECURE 2.0 Act

H - Section 348 of the SECURE 2.0 Act

I - Section 350 of the SECURE 2.0 Act

J - Section 501 of the SECURE 2.0 Act

K - Section 601 of the SECURE 2.0 Act

L - Section 604 of the SECURE 2.0 Act

### **A. SECTION 101 OF THE SECURE 2.0 ACT**

Section 101 of the SECURE 2.0 Act amends the Internal Revenue Code (Code) to add new section 414A. Section 414A(a) generally provides that a cash or deferred arrangement (CODA) will not be treated as a qualified CODA described in section 401(k), and an annuity contract otherwise described in section 403(b) that is purchased under a salary reduction agreement will not be treated as described in section 403(b), unless the CODA or salary reduction agreement satisfies the automatic

enrollment requirements of section 414A(b). Section 414A(b) requires the CODA or salary reduction agreement to be an eligible automatic contribution arrangement (as defined in section 414(w)(3)) that provides permissible withdrawals and satisfies certain additional requirements involving default elective contributions and default investments.

Section 414A(c) sets forth several exceptions to the application of section 414A(a). Among other exceptions, section 414A(c)(2)(A)(i) and (ii) provides that section 414A(a) does not apply to any qualified CODA established before the date of the enactment of section 101 of the SECURE 2.0 Act (December 29, 2022) or to any annuity contract purchased under a plan established before the date of the enactment of section 101 of the SECURE 2.0 Act. For purposes of this notice, a qualified CODA or section 403(b) plan that is established before December 29, 2022, is called a pre-enactment qualified CODA or pre-enactment section 403(b) plan.

However, section 414A(c)(2)(B) of the Code provides that, in the case of an employer adopting a plan maintained by more than one employer after the date of the enactment of section 101 of the SECURE 2.0 Act, section 414(c)(2)(A) of the Code does not apply to that employer, and section 414A(a) applies with respect to that employer as if that plan were a single plan.

Section 101(c) of the SECURE 2.0 Act provides that the amendments made by section 101 apply to plan years beginning after December 31, 2024.

Q. A-1: When is a qualified CODA established for purposes of determining whether the qualified CODA is excepted under section 414A(c)(2)(A)(i) of the Code from the requirements related to automatic enrollment (that is, whether the qualified CODA is a pre-enactment qualified CODA)?

A. A-1: For purposes of section 414A(c)(2)(A)(i), a qualified CODA is established on the date plan terms providing for the CODA are adopted initially. This is the case even if the plan terms providing for the CODA are effective after the adoption date. For example, if an employer adopted a plan that included a qualified CODA on October 3, 2022, with an effective date of January 1, 2023, then the qualified CODA would have been established on October 3, 2022 (that is, before December 29, 2022), even though the qualified CODA was not effective until after December 29, 2022.

Q. A-2: If a single employer plan that includes a pre-enactment qualified CODA is merged with another plan that includes a pre-enactment qualified CODA, will the qualified CODA included in the ongoing plan after the merger be treated as a pre-enactment qualified CODA?

A. A-2: Yes. In the case of the merger of two single employer plans, each of which includes a pre-enactment qualified CODA, the treatment of the qualified CODA included in the ongoing plan as a pre-enactment qualified CODA is unaffected by the merger. The result is the same if a single employer plan that includes a pre-enactment qualified CODA is merged with a plan maintained by more than one employer that includes a pre-enactment qualified CODA.

Q. A-3: If a plan that includes a qualified CODA that is not a pre-enactment qualified CODA is merged with a plan that includes a pre-enactment qualified CODA, will the qualified CODA included in the ongoing plan be treated as a pre-enactment qualified CODA after the merger?

A. A-3: Generally, no. However, if, in connection with a transaction described in section 410(b)(6)(C), a single employer plan that includes a qualified CODA that is not a

pre-enactment qualified CODA is merged with another single employer plan that includes a pre-enactment qualified CODA, and the plan that includes the pre-enactment qualified CODA is designated as the ongoing plan, then the qualified CODA included in the ongoing plan continues to be treated as a pre-enactment qualified CODA after the merger, provided that the merger occurs by the end of the section 410(b)(6)(C) transition period.

In addition, if a single employer plan that includes a qualified CODA that is not a pre-enactment qualified CODA is merged into a plan maintained by more than one employer that includes a pre-enactment qualified CODA, then the qualified CODA included in the ongoing plan would not be treated as a pre-enactment qualified CODA with respect to that employer. However, in that case, the merger would not affect whether the qualified CODA is treated as a pre-enactment qualified CODA with respect to other employers that participate in the ongoing plan.

Q. A-4: If a plan that includes a qualified CODA is spun-off from a plan that includes a pre-enactment qualified CODA, is the qualified CODA included in the new spun-off plan also treated as a pre-enactment qualified CODA?

A. A-4: Generally, yes. If the plan from which the new plan was spun-off was a single employer plan that included a pre-enactment qualified CODA, then the qualified CODA included in the spun-off plan is also treated as a pre-enactment qualified CODA. However, if the plan from which the new plan was spun-off was a plan maintained by more than one employer that was established before December 29, 2022, then the qualified CODA included in the spun-off plan is treated as a pre-enactment qualified CODA only if the qualified CODA in the plan maintained by more than one employer

was treated as a pre-enactment qualified CODA with respect to the employer sponsoring the spun-off plan.

Q. A-5: How do the rules of section 414A(c)(2)(A)(ii) apply to section 403(b) plans?

A. A-5: In general, the rules of section 414A that apply to qualified CODAs also apply to section 403(b) plans. However, under section 414A(c)(2)(A)(ii), a section 403(b) plan is excepted from the requirements of section 414A(a) as a pre-enactment section 403(b) plan if it was established before December 29, 2022, without regard to the date of adoption of plan terms that provide for salary reduction agreements.

Q. A-6: For plan years beginning after December 31, 2024, does section 414A(a) apply to a starter 401(k) deferral-only arrangement described in section 401(k)(16)(B) or to a safe harbor deferral-only plan described in section 403(b)(16)(B) (which were added to the Code by section 121 of the SECURE 2.0 Act, applicable to plan years beginning after December 31, 2023)?

A. A-6: Generally, yes. Unless an exception set forth in section 414A(c) of the Code applies (for example, the exception for a new or small business under section 414A(c)(4)(A) or (B)), section 414A(a) applies to a starter 401(k) deferral-only arrangement or to a safe harbor deferral-only plan for plan years beginning after December 31, 2024. Although section 414A(c) sets forth several exceptions to the application of section 414A(a), section 414A(c) does not include a specific exception for a starter 401(k) deferral-only arrangement described in section 401(k)(16)(B) or for a safe harbor deferral-only plan described in section 403(b)(16)(B). Similarly, sections 401(k)(16) and 403(b)(16) do not provide that a starter 401(k) deferral-only

arrangement or a safe harbor deferral-only plan is treated as satisfying the requirements of section 414A.

## **B. SECTION 102 OF THE SECURE 2.0 ACT**

Section 102 of the SECURE 2.0 Act amends section 45E of the Code to provide, for an eligible employer within the meaning of section 408(p)(2)(C)(i)<sup>1</sup>: (1) an increased small employer pension plan startup cost credit for qualifying small employers with no more than 50 employees; (2) a new credit based on matching and nonelective contributions made by qualifying small employers with no more than 100 employees; and (3) revised rules for the disallowance of deductions for certain small employer plan startup costs and matching and nonelective contributions to take into account the new credit based on matching and nonelective contributions.

Section 102(a) of the SECURE 2.0 Act adds new paragraph (e)(4) to section 45E of the Code. Section 45E(e)(4) provides for an increase in the small employer pension plan startup cost credit provided under section 45E(a) (startup costs credit), so that the credit for an eligible employer with no more than 50 employees is increased from 50 percent to 100 percent of the qualified startup costs paid or incurred by the eligible employer (increased startup costs credit). A startup costs credit (including the increased startup costs credit) is available to an eligible employer for a first credit year and each of the two taxable years immediately following the first credit year (together, a 3-year startup costs credit period), as described in section 45E(b) and (d)(3) and is subject to a

---

<sup>1</sup> Under section 408(p)(2)(C)(i)(I), an employer is an eligible employer with respect to any taxable year if the employer had no more than 100 employees who received at least \$5,000 of compensation from the employer for the preceding taxable year. In addition, under section 408(p)(2)(C)(i)(II), an eligible employer that establishes and maintains a plan for one or more years will be treated as an eligible employer for the two years following the last year the employer was an eligible employer (unless the increase in the employer's number of employees was due to an acquisition, disposition, or similar transaction involving the eligible employer).

dollar limitation set forth in section 45E(b). Under section 45E(d)(3), the first credit year is (1) the taxable year that includes the date that the eligible employer plan to which such costs relate becomes effective with respect to the eligible employer, or (2) at the election of the eligible employer, the taxable year preceding the taxable year that the plan becomes effective.

Section 102(b) of the SECURE 2.0 Act adds new section 45E(f) to the Code. Section 45E(f) provides for an additional amount of credit under section 45E based on employer matching and nonelective contributions to an eligible employer plan other than a defined benefit plan (employer contributions credit). Under section 45E(f)(1), an eligible employer is entitled to a credit for a taxable year equal to a specified applicable percentage of aggregate employer contributions (other than any elective deferrals, as defined in section 402(g)(3)) made by the employer during the taxable year to an eligible employer plan (other than a defined benefit plan, as defined in section 414(j)). The amount of the credit under section 45E(f)(1) is limited, under section 45E(f)(2)(A), to no more than \$1,000 with respect to any employee. In addition, under section 45E(f)(2)(C), contributions with respect to any employee who receives wages, as defined under section 3121(a) (that is, wages for purposes of the Federal Insurance Contributions Act (FICA) (chapter 21 of the Code)), from the employer for the taxable year in excess of \$100,000 (indexed for inflation) are excluded from the credit amount calculation for the taxable year. Further, under section 45E(f)(2)(B), the amount determined under section 45E(f)(1) (after applying the section 45E(d)(2)(A) and (C) limitations) is reduced through a credit phase-in formula by 2 percent for each employee of the employer for the preceding taxable year in excess of 50 employees. For purposes



of the credit formula in section 45E(f)(1), section 45E(f)(3) provides that the applicable percentage is 100 percent for the first taxable year during which the eligible employer plan is established with respect to the eligible employer (the first employer contributions credit taxable year), 100 percent for the second employer contributions credit taxable year, 75 percent for the third employer contributions credit taxable year, 50 percent for the fourth employer contributions credit taxable year, and 25 percent for the fifth employer contributions credit taxable year (together, a 5-year employer contributions credit period).

Section 102(c) of the SECURE 2.0 Act amends section 45E(e)(2) of the Code with respect to the disallowance of deductions for certain small employer plan startup costs and matching and nonelective contributions to take into account the new credit under section 45E(f), by providing that no deduction is allowed (1) for that portion of the qualified startup costs paid or incurred for the taxable year that is equal to so much of the portion of the credit determined under section 45E(a) as is properly allocable to such costs, and (2) for that portion of the employer contributions by the employer for the taxable year that is equal to so much of the credit increase determined under section 45E(f) as is properly allocable to such contributions.

Section 102(d) of the SECURE 2.0 Act provides that the amendments to section 45E of the Code made by section 102 of the SECURE 2.0 Act apply to taxable years beginning after December 31, 2022.

Q. B-1: Is the employer contributions credit under section 45E(f) of the Code treated as a separate credit that is in addition to the startup costs credit under section 45E(a)?

A. B-1: Yes. For example, an eligible employer might be eligible both for a startup costs credit calculated under section 45E(a) (as limited by the dollar limitation in section 45E(b)), and an additional employer contributions credit calculated under section 45E(f)(1) (as limited by the dollar, wage, and credit phase-in limitations in section 45E(f)(2), but not the dollar limitation in section 45E(b)).

Q. B-2: When is an eligible employer plan treated as being established, for purposes of determining the first (and subsequent) employer contributions credit taxable years during the 5-year employer contributions credit period for which an eligible employer can claim an employer contributions credit under section 45E(f)?

A. B-2: An eligible employer plan is treated as being established, for purposes of determining the first (and subsequent) employer contributions credit taxable years during the 5-year employer contributions credit period for which an eligible employer is permitted to claim an employer contributions credit under section 45E(f), on the date the plan becomes effective with respect to the eligible employer. This determination of the first employer contributions credit taxable year during the 5-year employer contributions credit period is similar to the determination of the taxable year that is the first credit year during the 3-year startup costs credit period under section 45E(a), as defined in section 45E(d)(3), except that an employer is permitted to elect, under section 45E(d)(3)(B), for the first startup costs credit year to be the taxable year preceding the taxable year in which the plan becomes effective with respect to the eligible employer. Thus, an eligible employer may be able to claim both the startup costs credit and the employer contributions credit beginning with the taxable year in which the plan becomes effective with respect to the eligible employer. If an eligible employer elects, for purposes of the

startup costs credit, for the taxable year preceding the taxable year in which the plan becomes effective with respect to the eligible employer to be the first startup costs credit year, then the 5-year employer contributions credit period begins with the second taxable year of the 3-year startup costs credit period.

Q. B-3: How does a change in an employer's status as an eligible employer under section 408(p)(2)(C)(i) due to a change in the number of the employer's employees who received at least \$5,000 of compensation from the employer for the preceding taxable year affect the employer's eligibility for the employer contributions credit under section 45E(f) for taxable years during the employer's 5-year employer contributions credit period?

A. B-3: An employer is eligible for the employer contributions credit for a taxable year during the employer's 5-year employer contributions credit period only if (1) the employer was an eligible employer under section 408(p)(2)(C)(i)(I) for the first employer contributions credit taxable year during the employer's 5-year employer contributions credit period, and (2) the employer is an eligible employer under section 408(p)(2)(C)(i) for the taxable year with respect to which the employer contributions credit is claimed. Accordingly, if an employer had more than 100 employees for the taxable year preceding the first employer contributions credit taxable year during the employer's 5-year employer contributions credit period, the employer will not become eligible for the employer contributions credit for the first time in a subsequent taxable year, even if the number of employees who received at least \$5,000 of compensation from the employer drops to 100 or fewer for a taxable year following the taxable year preceding the first taxable year in the employer's 5-year employer contributions credit period.

Q. B-4: How does a change in an employer's status as an eligible employer under section 408(p)(2)(C)(i) due to a change in the number of the employer's employees who received at least \$5,000 of compensation from the employer for a taxable year that precedes a particular taxable year during the employer's 3-year startup costs credit period affect the employer's eligibility for (1) the startup costs credit under section 45E(a) for that particular taxable year or (2) the increased startup costs credit under section 45E(e)(4) for that particular taxable year?

A. B-4: (1) An employer is eligible for the startup costs credit under section 45E(a) (disregarding the increased startup costs credit under section 45E(e)(4)) for a taxable year during the employer's 3-year startup costs credit period only if (a) the employer was an eligible employer under section 408(p)(2)(C)(i)(I) for the first taxable year during the employer's 3-year startup costs credit period, and (b) the employer is an eligible employer under section 408(p)(2)(C)(i) for the taxable year with respect to which the startup costs credit is claimed. Accordingly, if an employer had more than 100 employees for the taxable year preceding the first taxable year during the employer's 3-year startup costs credit period, the employer will not become eligible for the employer contributions credit for the first time in a subsequent taxable year, even if the number of employees who received at least \$5,000 of compensation from the employer drops to 100 or fewer for a taxable year following the taxable year preceding the first taxable year during the employer's 3-year startup costs credit period.

(2) An employer is eligible for the increased startup costs credit under section 45E(e)(4) for a taxable year during the employer's 3-year startup costs credit period only if (a) the employer was an eligible employer under section 408(p)(2)(C)(i)(I),

applied by substituting “50 employees” for “100 employees,” for the first taxable year during the employer’s 3-year startup costs credit period, and (b) the employer is an eligible employer under section 408(p)(2)(C)(i), applied by substituting “50 employees” for “100 employees,” for the taxable year with respect to which the startup costs credit is claimed. Accordingly, if an employer had more than 50 employees for the taxable year immediately preceding the first taxable year during the employer’s 3-year startup costs credit period, the employer will not become eligible for the increased startup costs credit under section 45E(e)(4) for the first time in a subsequent taxable year, even if the number of employees who received at least \$5,000 of compensation from the employer drops to 50 or fewer for a taxable year following the taxable year preceding the first taxable year during the employer’s 3-year startup costs credit period.

Q. B-5: Is it possible for an employer that was eligible for the startup costs credit under section 45E(a) for a taxable year that began on or before December 31, 2022, to be eligible for the increased startup costs credit under section 45E(e)(4) or the employer contributions credit under section 45E(f) for a taxable year that begins after December 31, 2022?

A. B-5: Yes. However, an employer that was eligible for the startup costs credit under section 45E(a) for a taxable year that began on or before December 31, 2022, can be eligible for the increased startup costs credit under section 45E(e)(4) or the employer contributions credit under section 45E(f) for a taxable year that begins after December 31, 2022, only if there is a taxable year during the employer’s applicable 3- or 5-year credit period that begins after December 31, 2022. For example, for an eligible employer with a calendar year taxable year that maintains a plan that became effective

on January 1, 2021: (1) the 5-year employer contributions credit period began with the eligible employer's 2021 taxable year and ends with the employer's 2025 taxable year; and (2) for the three employer contributions credit taxable years in the 5-year employer contributions credit period that begin after December 31, 2022, it is possible, if the employer meets the eligibility requirements described in Q&A B-3 of this notice, for the employer to be eligible for an employer contributions credit equal to the applicable percentage of aggregate employer contributions set forth in section 45E(f)(1) (75 percent for the 2023 taxable year, 50 percent for the 2024 taxable year, and 25 percent for the 2025 taxable year).

Q. B-6: Is an eligible employer permitted to take into account, for purposes of determining the employer contributions credit under section 45E(f) for a taxable year, contributions to an individual who does not have wages as defined in section 3121(a) in excess of the \$100,000 (indexed for inflation) wage limitation set forth in section 45E(f)(2)(C) for the taxable year, even if the individual has earned income that is not wages as defined in section 3121(a) for the taxable year in excess of the \$100,000 amount or the individual is a state or local government employee with remuneration in excess of the \$100,000 amount whose services are excluded from employment under section 3121(b)(7)?

A. B-6: Yes. The \$100,000 (indexed for inflation) wage limitation set forth in section 45E(f)(2)(C), under which no contributions with respect to any individual who receives wages from the employer for a taxable year in excess of \$100,000 (indexed for inflation) may be taken into account for purposes of determining employer contributions credits for the taxable year, only applies with respect to an individual who has wages as

defined in section 3121(a) that are in excess of the wage limitation for the taxable year. Accordingly, contributions with respect to an individual who does not have any wages as defined in section 3121(a) for a taxable year because the individual is self-employed (including a partner) or because the individual is a state or local government employee whose services are excluded from employment under section 3121(b)(7) (and, thus, does not have wages as defined in section 3121(a)) may be taken into account for purposes of determining employer contributions credits for the taxable year, even if the individual has earned income or remuneration from a state or local government in excess of the \$100,000 wage limitation.

Q. B-7: In which taxable year of an eligible employer is a matching or nonelective contribution made by the employer to an eligible employer plan taken into account for purposes of the employer contributions credit under section 45E(f)?

A. B-7: A matching or nonelective contribution made by an eligible employer to an eligible employer plan is taken into account for purposes of the employer contributions credit for the same taxable year that a deduction under section 404(a) would apply with respect to the contribution. Thus, an employer is deemed to have made a matching or nonelective contribution on the last day of the preceding taxable year if the contribution is on account of that taxable year and is not made later than the time prescribed by law for filing the return for that taxable year (including extensions thereof). See section 404(a)(6).

### **C. SECTION 112 OF THE SECURE 2.0 ACT**

Section 112 of the SECURE 2.0 Act amends the Code to add new section 45AA, which provides a military spouse retirement plan eligibility credit for small employers

(section 45AA credit). This new credit provides a business credit under section 38 of the Code for an eligible employer that provides for participation and benefits to a military spouse under an eligible defined contribution plan or plans of the employer (as defined under section 45AA(e)) within two months after the military spouse's date of hire by the employer.

Section 45AA(a) provides that the section 45AA credit for the taxable year is equal to the sum of (1) \$200 with respect to each military spouse who is an employee of the employer and who participates in an eligible defined contribution plan of the employer at any time during the taxable year, plus (2) so much of the contributions made by the employer (other than an elective deferral as defined in section 402(g)(3)) to all eligible defined contribution plans with respect to the employee during the taxable year as do not exceed \$300.

Section 45AA(b) provides that, for purposes of the section 45AA credit, a military spouse is only taken into account for the taxable year which includes the date on which the spouse began participating in the eligible defined contribution plan of the employer and the two succeeding taxable years (3-year credit period).

Section 45AA(c) provides that the term "eligible small employer" means an eligible employer as defined in section 408(p)(2)(C)(i)(I), which requires that an employer have had no more than 100 employees who received at least \$5,000 of compensation from the employer for the preceding taxable year.

Section 45AA(d) defines a military spouse as any individual who is married (within the meaning of section 7703 as of the first date that the employee is employed by the employer) to an individual who is a member of the uniformed services (as defined



in section 101(a)(5) of title 10, United States Code) serving on active duty. For purposes of the credit, an employer may rely on an employee's certification that the employee's spouse is a member of the uniformed services if the certification provides the name, rank, and service branch of the spouse. However, section 45AA(d)(2) of the Code provides that a military spouse does not include any individual who is a highly compensated employee of the employer (within the meaning of section 414(q)).

Section 45AA(e) defines an eligible defined contribution plan as any defined contribution plan (as defined in section 414(i)) of the eligible small employer if, under the terms of the plan, (1) military spouses employed by the employer are eligible to participate in the plan not later than the date which is two months after the date on which the military spouse begins employment with the employer, and (2) military spouses who are eligible to participate in the plan (A) are immediately eligible to receive an amount of employer contributions under the plan which is not less than the amount of contributions that a similarly situated participant who is not a military spouse would be eligible to receive under the plan after two years of service, and (B) immediately have a nonforfeitable right to the employee's accrued benefit derived from employer contributions under the plan.

Section 45AA(f) provides that all persons treated as a single employer under section 414(b), (c), (m), or (o) will be treated as one employer for purposes of section 45AA.

Section 112(e) of the SECURE 2.0 Act provides that the section 45AA credit applies to taxable years of the employer beginning after December 29, 2022.

Q. C-1: May an employer claim the section 45AA credit with respect to a military spouse for any taxable year of the employer within the 3-year credit period for which the employer does not meet the requirements of section 408(p)(2)(C)(i)(I) of the Code?

A. C-1: No. Section 45AA(c) specifies that the employer must meet the requirements of section 408(p)(2)(C)(i)(I) to be eligible for the section 45AA credit for a taxable year. For example, if an employer had no more than 100 employees who received at least \$5,000 of compensation from the employer for the taxable year preceding the 2024 taxable year but more than 100 such employees for the taxable year preceding both the employer's 2023 and 2025 taxable years, with respect to a military spouse whose 3-year credit period begins in the employer's 2023 taxable year and ends in the employer's 2025 taxable year, the employer is eligible for the section 45AA credit only for the employer's 2024 taxable year.

Q. C-2: May an eligible small employer claim the section 45AA credit with respect to a military spouse who participated in a defined contribution plan of the employer before the employer amends the plan to become an eligible defined contribution plan, or adopts another plan that is an eligible defined contribution plan in which the military spouse participates?

A. C-2: Yes. If an employer amends the plan (or adopts another plan) to become an eligible defined contribution plan, the employer is eligible for the section 45AA credit for the employer's taxable year that includes the later of the date on which the plan or amendment becomes effective and the date on which the military spouse began participating in the plan after it was amended (or adopted) to become an eligible defined contribution plan and any of the 2 succeeding taxable years during which the

military spouse participates in the plan for any period (3-year credit period). A military spouse's 3-year credit period begins from the first date that the military spouse participates in any eligible defined contribution plan of the employer. For example, for an eligible small employer that uses the calendar year as the employer's taxable year and that amends a defined contribution plan, effective January 1, 2024, to provide the benefits enumerated in section 45AA(e) to all military spouses employed by the employer, with respect to a military spouse who began participating in the plan on June 15, 2020 (and who has not participated in any other eligible defined contribution plans of the employer), the employer may claim a section 45AA credit (of the applicable amount) for any of the employer's 2024, 2025, or 2026 taxable years during which the military spouse participates in the plan for any period.

Q. C-3: May an eligible small employer claim the section 45AA credit with respect to a military spouse whose 3-year credit period described in Q&A C-2 of this notice began during a taxable year of the employer beginning on or before December 29, 2022?

A. C-3: Yes. The employer is eligible for the section 45AA credit for any taxable year of the employer beginning after December 29, 2022 that remains within the military spouse's 3-year credit period, as described in Q&A C-2 of this notice. For example, for an eligible small employer that uses the calendar year as the employer's taxable year and that adopted a defined contribution plan that provides the benefits enumerated in section 45AA(e) to all employees employed by the employer and that became effective as of January 1, 2021, with respect to a military spouse who began participating in the plan within 2 months of the spouse's date of hire by the employer on June 15, 2022, the

employer may claim a section 45AA credit (of the applicable amount) for any of the employer's 2023 and 2024 taxable years during which the spouse participates in the plan for any period.

#### **D. SECTION 113 OF THE SECURE 2.0 ACT**

Section 401(k)(4)(A), prior to amendment by section 113(a) of the SECURE 2.0 Act, provided that "a cash or deferred arrangement of any employer shall not be treated as a qualified cash or deferred arrangement if any other benefit is conditioned (directly or indirectly) on the employee electing to have the employer make or not make contributions under the arrangement in lieu of receiving cash. The preceding sentence shall not apply to any matching contribution (as defined in section 401(m) of the Code) made by reason of such an election." This provision is commonly referred to as the contingent benefit rule.

Section 403(b)(12)(A) describes nondiscrimination requirements that apply to section 403(b) plans under which employees participate pursuant to salary reduction agreements. Section 403(b)(12)(A)(ii), which is commonly referred to as the universal availability requirement, provides that a section 403(b) plan will satisfy the applicable nondiscrimination requirements if all employees of the organization may elect to have the employer make contributions of more than \$200 pursuant to a salary reduction agreement if any employee of the organization may elect to have the organization make contributions for such contracts pursuant to such agreement.

Section 1.403(b)-5(b)(2) provides that an employee is not treated as being permitted to have section 403(b) elective deferrals contributed on the employee's behalf unless the employee is provided an effective opportunity that satisfies the requirements

of that paragraph. An effective opportunity is not considered to exist if there are any other rights or benefits (other than matching contributions or other rights or benefits listed in § 1.401(k)-1(e)(6)(i)) that are conditioned (directly or indirectly) upon the participant making or failing to make a cash or deferred election with respect to a contribution to a section 403(b) contract.

Section 113(a) of the SECURE 2.0 Act amended section 401(k)(4)(A) of the Code to provide that a *de minimis* financial incentive (not paid for with plan assets) provided to employees who elect to have the employer make contributions under the arrangement in lieu of receiving cash will not violate the contingent benefit rule of section 401(k)(4)(A).

Section 113(b) of the SECURE 2.0 Act amended section 403(b)(12)(A) of the Code to provide that a plan does not fail to satisfy section 403(b)(12)(A)(ii) solely by reason of offering a *de minimis* financial incentive (not derived from plan assets) to employees to elect to have the employer make contributions pursuant to a salary reduction agreement.

Section 113(c) of the SECURE 2.0 Act amended section 4975(d) of the Code to add a new paragraph (24) under which the provision of a *de minimis* financial incentive described in section 401(k)(4)(A) is exempted from the tax on prohibited transactions. As a conforming change, section 113(d) of the SECURE 2.0 Act amended section 408(b) of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829, as amended (ERISA), to add a new paragraph (21) under which the provision of a *de minimis* financial incentive described in either section 401(k)(4)(A) or 403(b)(12)(A) of the Code is exempted from the ERISA prohibited transaction rules.

Section 113 of the SECURE 2.0 Act did not specify what would constitute a *de minimis* financial incentive described in section 401(k)(4)(A) or 403(b)(12)(A)(ii) of the Code. However, legislative history mentions gift cards in small amounts as an example of a *de minimis* financial incentive an employer might offer to boost employee participation in workplace retirement plans (see H. Rept. 117-283, Part 1 (117 Cong. 2d Sess.) at 86).

Section 113 of the SECURE 2.0 Act is effective for plan years beginning after December 29, 2022.

Q. D-1: Is there a limit on the value of a financial incentive for the incentive to be a *de minimis* financial incentive described in section 401(k)(4)(A) of the Code?

A. D-1: A financial incentive is a *de minimis* financial incentive described in section 401(k)(4)(A) only if it does not exceed \$250 in value.

Q. D-2: Does the exception to the contingent benefit rule that is described in section 401(k)(4)(A) for a *de minimis* financial incentive provided to employees who elect to have the employer make contributions under a CODA apply to an employee for whom an election to defer is already in effect?

A. D-2: A *de minimis* financial incentive is described in section 401(k)(4)(A) only if it is offered to employees for whom no election to defer under the CODA is already in effect. Thus, for example, if an employer announces on February 1, 2024, that any employee for whom an election to defer under a CODA is not in effect on that date and who, within the next 90 days, makes an election to defer, will receive a \$200 gift card, then the gift card is a *de minimis* financial incentive that does not cause the CODA to fail to be a qualified CODA on account of the contingent benefit rule of section

401(k)(4)(A). A financial incentive does not fail to be a *de minimis* financial incentive described in section 401(k)(4)(A) merely because the incentive is provided in the form of installments that are contingent on the employee's continuing to defer (even if those installments are paid over more than one plan year). Thus, if the employer in the preceding example provides a \$100 gift card (instead of providing a \$200 gift card) with a promise to provide an additional \$100 gift card a year later, but only if the employee continues to defer at that later date, then the \$200 total amount of gift cards is still a *de minimis* financial incentive within the meaning of section 401(k)(4)(A).

Q. D-3: Can a matching contribution within the meaning of section 401(m)(4) be a *de minimis* financial incentive described in section 401(k)(4)(A)?

A. D-3: No. A matching contribution cannot be a *de minimis* financial incentive described in section 401(k)(4)(A).

Q. D-4: Is the provision of a *de minimis* financial incentive described in section 401(k)(4)(A) subject to the rules under the Code that apply with respect to a plan contribution?

A. D-4: No. A *de minimis* financial incentive described in section 401(k)(4)(A) is not subject to the Code rules that apply to a plan contribution, including the qualification requirements of section 401(a) and the deductibility timing rules of section 404(a).

Q. D-5: What is an employee's tax treatment with respect to a *de minimis* financial incentive described in section 401(k)(4)(A) that is provided by an employer?

A. D-5: If an employer provides a *de minimis* financial incentive described in section 401(k)(4)(A) to an employee, that incentive constitutes remuneration that is includible in the employee's gross income and wages and is subject to applicable

withholding and reporting requirements for employment tax purposes, unless the provision of the *de minimis* financial incentive satisfies an exception under the Code. For example, the \$200 gift card described in Q&A D-2 of this notice is not excludable from the employee's gross income as a *de minimis* fringe benefit within the meaning of section 132(e) and § 1.132-6(c) because, as a cash equivalent, it is not eligible for that exclusion (and therefore the gift card is includible in the employee's gross income and wages and is a taxable fringe benefit for employment tax and reporting purposes unless another exception applies).

Q. D-6: Do the rules of Q&A D-1 through Q&A D-5 of this notice apply with respect to a *de minimis* financial incentive described in section 403(b)(12)(A) of the Code that is offered to employees to elect to have the employer make contributions to a section 403(b) plan on their behalf pursuant to a salary reduction agreement?

A. D-6: Yes. The statutory provisions that apply with respect to a *de minimis* financial incentive described in section 403(b)(12)(A) are generally the same as the statutory provisions that apply with respect to a *de minimis* financial incentive described in section 401(k)(4)(A). Accordingly, the rules of Q&A D-1 through Q&A D-5 of this part D of this notice also apply with respect to a *de minimis* financial incentive described in section 403(b)(12)(A).

## **E. SECTION 117 OF THE SECURE 2.0 ACT**

A SIMPLE IRA plan under section 408(p) or a SIMPLE 401(k) plan under section 401(k)(11) is a plan under which employees may elect to have salary reduction contributions (or elective contributions, in the case of a SIMPLE 401(k) plan) made on their behalf, and which may only be sponsored by an eligible employer defined in



section 408(p)(2)(C)(i) (that is, generally, an employer who has 100 or fewer employees who received at least \$5,000 of compensation from the employer for the preceding year). Under a SIMPLE IRA plan or SIMPLE 401(k) plan, the employer generally is required to make either (1) a matching contribution equal to the employee's salary reduction contributions or elective contributions that do not exceed 3 percent of the employee's compensation or (2) a nonelective contribution of 2 percent of the employee's compensation (regardless of whether the employee elects to make contributions). Section 116 of the SECURE 2.0 Act amends sections 408(p) and 401(k)(11) of the Code to permit the employer to make additional nonelective contributions (up to 10 percent of compensation of each employee eligible to participate, but initially limited to \$5,000 with respect to each employee). Under section 408(p)(2)(D), an employer generally cannot make contributions to a SIMPLE IRA plan or a SIMPLE 401(k) plan for a year if the employer maintained another qualified plan with respect to which contributions were made or benefits accrued for the period beginning with the year that the SIMPLE IRA plan or SIMPLE 401(k) plan was established and ending with the current year.

Notice 98-4, 1998-1 CB 269, provides guidance regarding SIMPLE IRA plans, such as guidance on the determination of the number of employees who received at least \$5,000 of compensation for the preceding year and the required notifications to employees.

Section 117 of the SECURE 2.0 Act amends sections 408(p), 401(k)(11), and 414(v) of the Code to increase both the annual salary reduction contribution/elective contribution limit and the limit on additional catch-up contributions beginning at age 50

for a SIMPLE IRA plan or a SIMPLE 401(k) plan for certain eligible employers. For some of those eligible employers, the increased limits apply automatically; while other of those eligible employers must make an election for the increased limits to apply and must also make additional employer contributions. The increased limits are 110 percent of the otherwise applicable limits for 2024.<sup>2</sup>

Section 117(h) of the SECURE 2.0 Act provides that the amendments made by section 117 of the SECURE 2.0 Act apply for taxable years beginning after December 31, 2023.

Q. E-1: For which eligible employers do the increased limits under section 117 of the SECURE 2.0 Act apply?

A. E-1: The increased limits under section 117 of the SECURE 2.0 Act apply to an eligible employer described in section 408(p)(2)(E)(iv)<sup>3</sup> of the Code. An eligible employer is described in section 408(p)(2)(E)(iv) if, during the 3-taxable year period preceding the first year that the employer maintained the SIMPLE IRA plan or SIMPLE 401(k) plan, the employer (including any member of the employer's controlled group or any predecessor of the employer or any member) has not established or maintained a qualified plan under section 401(a), a section 403(a) annuity plan, or a section 403(b) plan under which contributions were made or benefits were accrued for substantially the same employees as are eligible to participate in the SIMPLE IRA plan or SIMPLE 401(k) plan.

---

<sup>2</sup> The annual salary reduction contribution/elective contribution limit for a SIMPLE IRA plan or SIMPLE 401(k) plan for 2023 is \$15,500 and the limit on additional catch-up contributions beginning at age 50 for 2023 is \$3,500.

<sup>3</sup> Section 408(p)(2)(E)(i)(I) and (II) refer to "an eligible employer described in clause (iii)." There is no description of an eligible employer in clause (iii), but there is a description of eligible employer in clause (iv).

Q. E-2: What are the differences in how the increased limits apply to eligible employers described in section 408(p)(2)(E)(iv) depending on the number of employees of the employer?

A. E-2: The increased limits apply automatically in the case of an eligible employer described in section 408(p)(2)(E)(iv) that has no more than 25 employees who received at least \$5,000 of compensation for the preceding calendar year. For an employer that has more than 25 employees who received at least \$5,000 of compensation for the preceding year, the increased limits apply only if the employer makes an election for the increased limits to apply. If the employer makes an election for the increased limits to apply, the employer must provide higher matching or nonelective contributions, as described in Q&A E-5 of this notice.

Q. E-3: How are the number of employees who received at least \$5,000 of compensation for the preceding year determined?

A. E-3: The rules set forth in Q&A B-1 of Notice 98-4 apply for purposes of calculating the number of employees. Thus, all employees employed at any time during the calendar year are taken into account, regardless of whether they are eligible to participate in the SIMPLE IRA plan or SIMPLE 401(k) plan (including employees excludable under the rules of section 410(b)(3) or who have not met the plan's minimum eligibility requirements, as well as self-employed individuals described in section 401(c)(1) who received earned income from the employer during the year).

For purposes of determining whether an employer has no more than 25 employees who received at least \$5,000 of compensation for the preceding year, there generally is a 2-year grace period. Thus, if an employer that has no more than 25

employees increases the number of employees to more than 25, the employer will still be treated as having 25 employees for two years following the last year the employer had no more than 25 employees (unless the increase in the employer's number of employees was due to an acquisition, disposition, or similar transaction involving the eligible employer).

Q. E-4: How does an employer reflect the increased limits?

A. E-4: An employer that must make an election to apply the increased limits must take formal written action to make an election to reflect the increased limits and should maintain documentation of the election in the plan's records. An employer (including employers for whom the increased limits apply automatically) must reflect the increased limits in the plan terms (see section II.J. of this notice regarding plan amendment deadlines) and must notify employees of the increased limits (see Q&A E-6 of this notice).

Q. E-5: If an employer makes an election to apply the increased limits, what other contributions must be made?

A. E-5: If an employer makes an election under Q&A E-4 of this notice to apply the increased limits, the employer must make matching contributions equal to the employee's salary reduction contributions or elective contributions that do not exceed 4 percent (increased from 3 percent) of the employee's compensation or make a nonelective contribution of 3 percent (increased from 2 percent) of the employee's compensation (regardless of whether the employee elects to make contributions).

Q. E-6: Who must an employer notify of the increased limits?

A. E-6: The employer must notify employees of the increased limits. The notice must be included in the annual employer notification that informs employees of the opportunity to enter into a salary reduction agreement or to modify a prior agreement. In the case of an employer for whom the increased limits apply pursuant to an election, the employer also must notify employees of the increased matching contribution or increased nonelective contribution. The employer should also (1) notify the SIMPLE IRA plan's or SIMPLE 401(k) plan's financial institution and payroll provider of the increased limits, and (2) keep records of all actions concerning the increased limits. However, the employer does not need to notify the IRS of the election to apply the increased limits.

Q. E-7: What is the deadline for an employer to make the election to apply the increased limits for a year?

A. E-7: An employer election to apply the increased limits for a calendar year must be made before the employer provides the annual notice to each employee of the employee's opportunity to enter into a salary reduction agreement or to modify a prior agreement for that calendar year, as provided in Q&A G-1 of Notice 98-4.

Q. E-8: For how long is an employer election to apply the increased limits effective?

A. E-8: An employer's election to apply the increased limits is effective until it is revoked by the employer. The employer must take formal written action to revoke the election before the employer provides the annual notice to each employee of the employee's opportunity to enter into a salary reduction agreement or to modify a prior agreement for the next calendar year. The employer should maintain documentation of the revocation in the plan's records.

If an employer revokes a prior election to apply the increased limits, the employer must also amend the plan terms to reflect the revocation (see section II.J. of this notice regarding plan amendment deadlines) and notify employees of the applicable limits (see generally Q&A E-6 of this notice).

#### **F. SECTION 326 OF THE SECURE 2.0 ACT**

Section 72(t)(1) generally imposes a 10 percent additional tax on any distribution from a qualified retirement plan within the meaning of section 4974(c), unless the distribution qualifies for one of the exceptions listed in section 72(t)(2). Section 326 of the SECURE 2.0 Act amended section 72(t)(2) of the Code to add a new exception to the 10 percent additional tax for any distribution made to a terminally ill individual.

Section 72(t)(2)(L) permits an employee<sup>4</sup> who is a terminally ill individual to receive a distribution (terminally ill individual distribution) on or after the date on which the employee has been certified by a physician as having a terminal illness.

Section 72(t)(2)(L)(ii) provides that the term "terminally ill individual" has the same meaning given that term under section 101(g)(4)(A), except that "84 months" is substituted for "24 months."

Section 72(t)(2)(L)(iii) provides that, in order to be considered a terminally ill individual, an employee must furnish sufficient evidence to the plan administrator in the form and manner as the Secretary of the Treasury (Secretary) may require. A terminally ill individual distribution is includible in gross income but is not subject to the 10 percent additional tax under section 72(t)(1). Section 72(t)(2)(L)(iv) provides that a terminally ill

---

<sup>4</sup> Section 72(t)(5) provides that, for purposes of section 72(t), the term "employee" includes any participant, and in the case of an individual retirement plan, an individual for whose benefit such plan was established.

individual distribution may be repaid following rules similar to repayment of qualified birth or adoption distributions in section 72(t)(2)(H)(v).

The amendment made to section 72(t)(2) by section 326 of the SECURE 2.0 Act applies to terminally ill individual distributions made after December 29, 2022.

The Treasury Department and the IRS intend to issue regulations under section 72(t) of the Code, including providing guidance on exceptions under section 72(t)(2) as added by the SECURE 2.0 Act (such as the exception to the 10 percent additional tax for an eligible distribution to a domestic abuse victim).

#### Questions and Answers Relating to Terminally Ill Individual Distributions

Q. F-1: What is a terminally ill individual distribution?

A. F-1: The term “terminally ill individual distribution” means any distribution from a qualified retirement plan to an employee (as defined in section 72(t)(5)) who is a terminally ill individual (within the meaning of Q&A F-4 of this notice) that is made on or after the date on which the employee has been certified by a physician as having a terminal illness. The certification must satisfy the content requirements in Q&A F-6 of this notice.

Q. F-2: Which types of plans are eligible to permit a terminally ill individual distribution?

A. F-2: Unlike qualified birth or adoption distributions in section 72(t)(2)(H), which uses the term “applicable eligible retirement plan” described in section 72(t)(2)(H)(vi)(I), section 72(t)(2)(L) does not include a special definition of retirement plan. Section 72(t)(1) provides that the 10 percent additional tax applies to any amount received from a qualified retirement plan within the meaning of

section 4974(c). Therefore, for purposes of section 72(t)(2)(L), a terminally ill individual distribution may be made from a qualified retirement plan as defined in section 4974(c), which is defined as a section 401(a) qualified plan (including a defined benefit plan), section 403(a) annuity plan, section 403(b) annuity contract, or an individual retirement account described in section 408(a) or an individual retirement annuity described in section 408(b).<sup>5</sup> Note that, for purposes of section 72(t)(2)(L), an eligible deferred compensation plan that is maintained by an eligible employer described in section 457(e)(1)(A) is not eligible to permit a terminally ill individual distribution because it is not a qualified retirement plan as defined in section 4974(c).

Q. F-3: Is a terminally ill individual distribution subject to the 10 percent additional tax under section 72(t)?

A. F-3: No. Although a terminally ill individual distribution is includible in gross income, it is not subject to the 10 percent additional tax under section 72(t)(1).

Q. F-4: Who is a terminally ill individual for purposes of the exception to the 10 percent additional tax under section 72(t)(2)(L)?

A. F-4: Section 72(t)(2)(L)(ii) provides that the term “terminally ill individual” has the same meaning as the term under section 101(g)(4)(A), except that “84 months” is substituted for “24 months.” Thus, for purposes of the exception to the 10 percent additional tax under section 72(t)(2)(L), a terminally ill individual means an individual who has been certified by a physician as having an illness or physical condition that can reasonably be expected to result in death in 84 months or less after the date of the certification.

---

<sup>5</sup> For purposes of this notice, the term “IRA” includes both an individual retirement account described in section 408(a) and an individual retirement annuity described in section 408(b).



Q. F-5: In determining who is a terminally ill individual, how is the term “physician” defined for purposes of section 72(t)(2)(L)?

A. F-5: The definition of terminally ill individual under section 72(t)(2)(L) is derived, in part, from the definition of terminally ill individual under section 101(g)(4)(A). For purposes of section 72(t)(2)(L), a physician capable of making a certification is a physician defined in section 101(g)(4)(D), which has the same meaning as the term used in section 1861(r)(1) of the Social Security Act (42 USC 1395x(r)(1)). Thus, for purposes of section 72(t)(2)(L) of the Code, the term “physician” generally means a doctor of medicine or osteopathy that is legally authorized to practice medicine and surgery by the State in which the doctor performs such function or action.<sup>6</sup>

Q. F-6: For purposes of section 72(t)(2)(L), what must be included in a certification of terminal illness from a physician?

A. F-6: A certification of terminal illness from a physician must include the following:

(1) A statement that the individual’s illness or physical condition can be reasonably expected to result in death in 84 months or less after the date of certification;

(2) A narrative description of the evidence that was used to support the statement of illness or physical condition (as described in this F-6 (1));

(3) The name and contact information of the physician making the statement;

---

<sup>6</sup> The definition of “State” for purposes of 42 USC 1395x(r)(1) is in 42 USC 410(h), which provides that the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(4) The date the physician examined the individual or reviewed the evidence provided by the individual, and the date that the certification is signed by the physician; and

(5) The signature of the physician making the statement, and an attestation from the physician that, by signing the form, the physician confirms that the physician composed the narrative description based on the physician's examination of the individual or the physician's review of the evidence provided by the individual.

As provided in Q&A F-13 of this notice, for purposes of section 72(t)(2)(L)(iii), it is not sufficient evidence for an employee who is a physician to certify the physician's own terminal illness.

Q. F-7: May a certification be made after an employee receives a terminally ill individual distribution?

A. F-7: No. For a distribution to be a terminally ill individual distribution, for purposes of section 72(t)(2)(L) and Q&A F-1 of this notice, the distribution must be made on or after the date a physician makes the certification that the employee has a terminal illness.

Q. F-8: Is there a limit on the amount received as a terminally ill individual distribution?

A. F-8: In general, there is no limit on the amount that an employee is permitted to receive as a terminally ill individual distribution. However, see Q&A F-15 of this notice for rules on when an employee may elect to treat an otherwise permissible in-service distribution as a terminally ill individual distribution.

Q. F-9: May an employee recontribute a terminally ill individual distribution to a qualified retirement plan?

A. F-9: Yes. An employee may recontribute any portion of a terminally ill individual distribution (up to the entire amount of the terminally ill individual distribution) to a qualified retirement plan in which the employee is a beneficiary and to which a rollover can be made under sections 402(c), 403(a)(4), 403(b)(8), or 408(d)(3), as applicable. Rules similar to recontributions of qualified birth or adoption distributions in section 72(t)(2)(H)(v) apply for purposes of terminally ill individual distributions.<sup>7</sup>

Questions and Answers Relating to Qualified Retirement Plans Permitting Terminally Ill Individual Distributions

Q. F-10: Is a qualified retirement plan required to permit terminally ill individual distributions under section 72(t)(2)(L)?

A. F-10: No. It is optional for a qualified retirement plan, including an IRA, to permit terminally ill individual distributions pursuant to section 72(t)(2)(L). Plan amendments adopted to permit terminally ill individual distributions are discretionary amendments for purposes of the plan amendment rules discussed in section II.J. of this notice. To the extent that a qualified retirement plan does not permit terminally ill individual distributions, the employee is permitted to treat an otherwise permissible in-service distribution as a terminally ill individual distribution. See Q&A F-15 of this notice.

---

<sup>7</sup> Section 311 of the SECURE 2.0 Act amends section 72(t)(2)(H)(v)(I) of the Code to require that an individual who receives a qualified birth or adoption distribution may, at any time during the 3-year period beginning on the day after the date on which the distribution was received, recontribute the qualified birth or adoption distribution to an applicable eligible retirement plan. Section 311 of the SECURE 2.0 Act is generally effective for qualified birth or adoption distributions made after December 29, 2022.

Q. F-11: If an employer chooses to amend its qualified retirement plan to permit terminally ill individual distributions, what is the deadline for adopting that amendment?

A. F-11: For information relating to the deadline for adopting plan amendments, see section II.J. of this notice.

Q. F-12: Do terminally ill individual distributions from a qualified retirement plan meet the distribution restriction requirements in sections 401(k)(2)(B)(i), 403(b)(7)(A)(i), and 403(b)(11)?

A. F-12: No. Section 72(t)(2)(L) provides an exception to the 10 percent additional tax but does not provide an exception from the distribution restriction requirements in sections 401(k)(2)(B)(i), 403(b)(7)(A)(i), and 403(b)(11). Therefore, for a plan that is subject to the distribution restriction requirements under sections 401(k)(2)(B)(i), 403(b)(7)(A)(i), and 403(b)(11) to permit a terminally ill individual distribution to an employee and not violate the distribution restriction requirements, the employee must otherwise be eligible for a permissible in-service distribution. Thus, for example, a section 401(k) plan may distribute a terminally ill individual distribution to an employee who is otherwise eligible for a permissible in-service distribution and meets the requirements of that permissible in-service distribution, such as a hardship distribution or a disability distribution, without violating the distribution restriction requirements under section 401(k)(2)(B)(i). However, for the hardship distribution or disability distribution to also meet the requirements of a terminally ill individual distribution, the distribution must also meet the applicable requirements in this notice for a terminally ill individual distribution, including the content requirement for the certification described in Q&A F-6 of this notice, the timing

requirement for the certification described in Q&A F-7 of this notice, and the documentation requirement described in Q&A F-13 of this notice.

Q. F-13: In order for an employee to be a terminally ill individual for purposes of section 72(t)(2)(L), what documentation is required to be provided to a plan administrator under section 72(t)(2)(L)(iii)?

A. F-13: An employee must furnish to the plan administrator a physician's certification that certifies that the employee is a terminally ill individual. A physician's certification is sufficient evidence that an employee is a terminally ill individual. However, for purposes of section 72(t)(2)(L)(iii), it is not sufficient evidence for an employee who is a physician to certify the physician's own terminal illness.

Although the certification must meet the requirements of Q&A F-6 of this notice, as well as this Q&A, it does not need to include the underlying documentation upon which the certification is based. However, the employee should retain both the underlying documentation and a copy of the certification for the employee's tax records (as required by section 6001).

A plan administrator for purposes of section 72(t)(2)(L)(iii) is a plan administrator as defined in section 414(g), or an IRA trustee, custodian, or issuer. However, see Q&A F-15 of this notice for rules relating to when a qualified retirement plan does not permit terminally ill individual distributions.

Q. F-14: May a plan administrator rely on a self-certification of an employee that the employee is terminally ill?

A. F-14: No. For a qualified retirement plan that permits terminally ill individual distributions, section 72(t)(2)(L)(i) requires that an employee must be certified by a

physician as having a terminal illness. As provided in section 72(t)(2)(L)(iii), an employee generally will not be considered terminally ill unless the employee provides sufficient evidence of the terminal illness to the plan administrator. The only documentation required to be provided to the plan administrator is the certification from a physician that meets the requirements of Q&As F-6 and F-13 of this notice.

Q. F-15: If a qualified retirement plan does not permit terminally ill individual distributions, may an employee treat an otherwise permissible in-service distribution as a terminally ill individual distribution?

A. F-15: Yes. If a qualified retirement plan does not permit terminally ill individual distributions and an employee receives an otherwise permissible in-service distribution that meets the requirements of both the permissible in-service distribution and a terminally ill individual distribution, the employee may treat the distribution as a terminally ill individual distribution on the employee's federal income tax return. As part of the employee's tax return, the employee will claim on Form 5329, *Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts*, that the distribution is a terminally ill individual distribution, in accordance with form's instructions. The employee must retain the physician's certification that meets the requirements of Q&A F-6 and F-13 of this notice in the employee's tax files (as required by section 6001) in case the IRS later requests the certification. The terminally ill individual distribution, while includible in gross income, is not subject to the 10 percent additional tax under section 72(t)(1). If the employee decides to recontribute the amount to a qualified retirement plan, the employee may recontribute the amount to an IRA.

For example, on May 15, 2024, Participant B, age 50, goes to the doctor and gets a certification of terminal illness that meets the requirements of Q&A F-6 of this notice. Participant B's plan, a section 401(k) plan, does not permit terminally ill individual distributions but does permit hardship distributions. On June 10, 2024, Participant B applies for a hardship distribution in the amount of \$15,000. When Participant B files his tax return, Participant B indicates on Form 5329 that the distribution is excepted from the 10 percent additional tax as a terminally ill individual distribution under section 72(t)(2)(L). Participant B retains the physician's certification, dated May 15, 2024, with Participant B's files as part of Participant B's tax returns for tax year 2024. Participant B does not owe the additional \$1,500 (representing the 10 percent additional tax of the amount includible in gross income). Unlike a hardship distribution, Participant B may also re contribute the \$15,000 to an IRA following rules similar to qualified birth or adoption distributions.

#### **G. SECTION 332 OF THE SECURE 2.0 ACT**

Under section 408(p)(2)(D), an employer that maintains a SIMPLE IRA plan for a calendar year generally is not permitted to maintain another plan, contract, pension, or trust described in section 219(g)(5)(A) or (B) to which contributions were made or benefits were accrued for service in the year. Also, prior to amendment by section 332 of the SECURE 2.0 Act, section 408(d)(3)(G) of the Code provided that if section 72(t)(6) applied to a distribution (that is, the distribution is from a SIMPLE IRA within the first two years of an individual's participation in the SIMPLE IRA plan), then the individual could only roll over the distribution to another eligible retirement plan if the other eligible retirement plan was a SIMPLE IRA.

Section 332(a) of the SECURE 2.0 Act amended section 408(p) of the Code by adding paragraph (11). Section 408(p)(11)(A) permits an employer to elect (in such form and manner as the Secretary may prescribe), at any time during a year, to terminate the qualified salary reduction arrangement under a SIMPLE IRA plan if the employer establishes and maintains a safe harbor section 401(k) plan to replace the terminated arrangement.

Section 408(p)(11)(B) provides a combined limit on the total of the salary reduction contributions under the terminated arrangement and elective contributions under the safe harbor section 401(k) plan for the transition year described in section 408(p)(11)(C) (that is, the period beginning after the termination date and ending on the last day of the calendar year during which the termination occurs). Under this limit, the total of those contributions must not exceed the time-weighted average of the limits that apply, on a full year basis, to a SIMPLE IRA plan (after the application of the catch-up provisions of section 414(v)) and a section 401(k) plan.

Section 332(b) of the SECURE 2.0 Act adds section 72(t)(6)(B) to the Code and amends section 408(d)(3)(G). Under the addition and amendment, the limitation on rollovers of a distribution from a SIMPLE IRA does not apply if an employer terminates the qualified salary reduction arrangement of a SIMPLE IRA plan and establishes a section 401(k) plan or section 403(b) plan, provided that the amount is paid in a rollover contribution described in section 408(d)(3) into a qualified trust under section 401(k) (but only if such contribution is subsequently subject to the rules of section 401(k)(2)(B))



or an annuity contract described in section 403(b) (but only if such contribution is subsequently subject to the rules of section 403(b)(12).<sup>8</sup>

Section 401(k)(12)(D) generally requires a CODA that is intended to satisfy the requirements of section 401(k)(12) to provide an annual notice to each eligible employee that is sufficiently accurate and comprehensive to apprise the employee of the employee's rights and obligations under the CODA. A similar notice requirement applies under section 401(k)(13)(E) to a CODA that is intended to satisfy the requirements of section 401(k)(13). Under section 401(k)(16)(B)(iii), a CODA that is intended to satisfy the notice requirements of section 401(k)(16) must satisfy the requirements of section 401(k)(13)(E).

Section 1.401(k)-3(d)(2)(ii) lists certain information that generally must be described in a notice for the notice to be considered sufficiently accurate and comprehensive under section 401(k)(12)(D) of the Code and subject to the additional information requirements under § 1.401(k)-3(k)(4)(ii) and under section 401(k)(13)(E) of the Code.

Section 332(c) of the SECURE 2.0 Act provides that amendments made by section 332 apply to plan years beginning after December 31, 2023.

Q. G-1: How does an employer terminate a SIMPLE IRA plan?

A. G-1: An employer terminates a SIMPLE IRA plan by taking formal written action that specifies the date as of which the plan is terminated (termination date).

---

<sup>8</sup> It should be noted that section 72(t)(6)(B) refers to section 403(b)(12). However, unlike section 401(k)(2)(B), section 403(b)(12) does not include distribution limitations. Instead, section 403(b)(11) includes distribution limitations that are comparable to section 401(k)(2)(B).

Q. G-2: If an employer terminates a SIMPLE IRA plan, when do the contributions under the plan cease?

A. G-2: If an employer terminates a SIMPLE IRA plan, then no salary reduction contributions may be made under the plan with respect to compensation that would be paid after the termination date. However, the employer must make employer matching contributions under the plan attributable to salary reduction contributions or nonelective contributions, based on the employees' compensation earned through the termination date of the SIMPLE IRA plan.

Q. G-3: Who must the employer notify of the termination of a SIMPLE IRA plan?

A. G-3: The employer must notify employees of the termination of a SIMPLE IRA plan at least 30 days before the termination date. The notification must specify that no salary reduction contributions will be made to the plan with respect to compensation that would be paid after the termination date. The notice must also include a statement that employees will receive matching contributions attributable to salary reduction contributions or nonelective contributions based on the employees' compensation through the termination date of the SIMPLE IRA plan. The employer should also (1) notify the SIMPLE IRA plan's financial institution and the employer's payroll provider that the employer will cease making any SIMPLE IRA contributions, and (2) keep records of all actions concerning the termination of the SIMPLE IRA plan. However, the employer does not need to notify the IRS that the SIMPLE IRA plan has been terminated.

Q. G-4: If a participant takes a distribution from a terminated SIMPLE IRA plan within the first two years of participation under the plan, under what circumstances can

that distribution be rolled over to another eligible retirement plan that is not a SIMPLE IRA?

A. G-4: If a participant takes a distribution from a terminated SIMPLE IRA plan within the first two years of participation under the plan, the distribution may be rolled over to an eligible retirement plan that is not a SIMPLE IRA only if the amount is rolled over to either: (1) a section 401(k) plan that is subject to the distribution limits of section 401(k)(2)(B) of the Code; or (2) a section 403(b) plan that is subject to the distribution limits of section 403(b)(11).

Q. G-5: Is the establishment of a safe harbor section 408(k) plan under section 408(p)(11) an exception to the rule in section 408(p)(2)(D)?

A. G-5: Yes. The rule under section 408(p)(11) that permits an employer to terminate a SIMPLE IRA plan and replace it with a section 401(k) safe harbor plan is an exception to the section 408(p)(2)(D) prohibition on an employer maintaining both a SIMPLE IRA plan and another plan, contract, pension, or trust described in section 219(g)(5)(A) or (B) in the same calendar year.

Q. G-6: When a SIMPLE IRA plan is replaced by a safe harbor section 401(k) plan mid-year, how are the elective contribution limits determined under the safe harbor section 401(k) plan?

A. G-6: When a SIMPLE IRA plan is replaced by the safe harbor section 401(k) plan mid-year, the total amount that may be contributed as salary reduction contributions under the terminated SIMPLE IRA plan and as elective contributions under the safe harbor section 401(k) plan may not exceed the weighted average of the salary reduction contribution and elective contribution limits for each of those plans (weighted

by how many of the 365 days in the transition year each plan was in effect). Thus, the total amount that may be contributed as elective contributions to the safe harbor section 401(k) plan is equal to-

(1) The annual limit on salary reduction contributions under a SIMPLE IRA plan for the year (taking into account catch-up contributions described in section 414(v)), multiplied by a fraction equal to the number of days the SIMPLE IRA plan was in effect for that year divided by 365, plus

(2) The annual limit on elective contributions under a section 401(k) plan for the year, under section 402(g), multiplied by a fraction equal to the number of days the safe harbor plan was in effect for that year divided by 365, minus

(3) Any salary reduction contributions under the SIMPLE IRA plan for the year.

Q. G-7: If an employer elects during a year to terminate a qualified salary reduction arrangement under section 408(p)(2), and the employer establishes and maintains a safe harbor section 401(k) plan to replace the terminated arrangement, must the notice required under section 401(k)(12)(D), (13)(E), or (16)(B)(iii) for the year the safe harbor plan is established describe the limit on contributions to the safe harbor section 401(k) plan for the transition year pursuant to section 408(p)(11)(B)?

A. G-7: Yes. Under § 1.401(k)-3(d)(2)(ii)(D), a notice must accurately describe the type and amount of compensation that may be deferred under the plan for the notice to satisfy the requirements of section 401(k)(12)(D), (13)(E), or (16)(B)(iii) of the Code. Accordingly, the notice required under section 401(k)(12)(D), (13)(E), or (16)(B)(iii) for the transition year must describe the limit on contributions to the safe harbor section 401(k) plan for that year pursuant to section 408(p)(11)(B).

## **H. SECTION 348 OF THE SECURE 2.0 ACT**

Under section 411(a), for a defined benefit plan to be qualified under section 401(a), it must satisfy the accrual requirements of section 411(b)(1).

Section 411(b)(1)(A), (B), and (C) provide three alternative methods of demonstrating that the plan satisfies the accrual requirements, each of which limits the extent to which accruals under a defined benefit plan can be provided at a greater rate later in a participant's career (commonly referred to as backloading). Under each of these alternative methods, all relevant factors used to compute benefits are treated as remaining constant as of the current year for all years after the current year.

Section 348(a) of the SECURE 2.0 Act, which is titled "Cash Balance," amends section 411(b) of the Code to add paragraph (6), effective for plan years beginning after December 29, 2022. Section 411(b)(6) provides a special rule for applying the anti-backloading rules of section 411(b)(1)(A), (B), and (C) for applicable defined benefit plans, as defined in section 411(a)(13)(C). Under section 411(b)(6), for purposes of applying the rules of section 411(b)(1) in the case of an applicable defined benefit plan that provides variable interest crediting rates, the interest crediting rate that is treated as in effect and as the projected interest crediting rate is a reasonable projection of that variable interest crediting rate, not to exceed 6 percent. Section 348(b) of the SECURE 2.0 Act amends ERISA by adding corresponding provisions to ERISA section 204(b)(6).

Section 411(a)(13)(C)(i) of the Code defines the term "applicable defined benefit plan" as a defined benefit plan under which the accrued benefit (or any portion of the accrued benefit) is calculated as the balance of a hypothetical account maintained for the participant or as an accumulated percentage of the participant's final average

compensation. Under section 411(a)(13)(C)(ii), the Secretary is instructed to issue regulations that include in the definition of an applicable defined benefit plan any defined benefit plan (or any portion of such a plan) that has an effect similar to an applicable defined benefit plan.

Under section 411(b)(1)(H), a defined benefit plan does not satisfy the requirements of section 411(b)(1) if, under the plan, the employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age. Under section 411(b)(5)(B)(i)(I), an applicable defined benefit plan is treated as violating section 411(b)(1)(H) if any interest credit (or an equivalent amount) for any plan year is at a rate that is greater than a market rate of return.

Section 1.411(b)-1 provides rules for the application of section 411(b)(1)(A), (B), and (C) of the Code. Under that section, the rules generally providing that all relevant factors used to compute benefits are treated as remaining constant for all future years under the three alternative methods are interpreted as meaning that the factors are treated as remaining constant as of the beginning of the current plan year for all subsequent plan years. Section 1.411(b)-1(b)(2)(ii)(G) (relating to the 133 1/3 percent rule) provides that a plan that determines any portion of the participant's accrued benefit pursuant to a statutory hybrid benefit formula<sup>9</sup> that utilizes an interest crediting rate described in § 1.411(b)(5)-1(d) that is a variable rate that was less than zero for the prior plan year is not treated as failing to satisfy the requirements of § 1.411(b)-1(b)(2) for the current plan year merely because the plan assumes for purposes of § 1.411(b)-1(b)(2) that the variable rate is zero for the current plan year and all future plan years.

---

<sup>9</sup> The term "statutory hybrid benefit formula" is defined in § 1.411(a)(13)-1(d)(4) to encompass the formulas used under applicable defined benefit plans described in section 411(a)(13)(C)(i) or (ii).

Section 1.411(b)(5)-1(d)(1)(i) provides that a statutory hybrid plan<sup>10</sup> satisfies the requirements of section 411(b)(1)(H) of the Code only if, for any plan year, the interest crediting rate with respect to benefits determined under a statutory hybrid benefit formula is not greater than a market rate of return. Under § 1.411(b)(5)-1(d)(1), an interest crediting rate is not in excess of a market rate of return only if the interest crediting rate is described in § 1.411(b)(5)-1(d)(3) through (5) (or is a rate that can never be in excess of one of those rates). Section 1.411(b)(5)-1(d)(3) provides for interest rates that are based on long-term investment grade corporate bonds.

Section 1.411(b)(5)-1(d)(4) provides for interest rates that are: (1) based on Treasury bonds, (2) based on changes in the cost of living, (3) based on short and mid-term investment grade corporate bonds, or (4) a fixed 6 percent. Section 1.411(b)(5)-1(d)(5) provides for investment-based interest crediting rates that are not greater than a market rate of return.

Section 1.411(b)(5)-1(d)(6) provides rules for determining whether a plan with an interest crediting rate that is equal to the greater of two or more interest crediting rates provides an effective interest crediting rate in excess of a market rate of return. Under those rules, an interest crediting rate based on investment-grade corporate bonds under § 1.411(b)(5)-1(d)(3) or (d)(4)(iv) may be combined with an annual floor of 4 percent and an interest crediting rate based on Treasury bonds or a cost-of-living index under § 1.411(b)(5)-1(d)(4)(ii) or (iii) may be combined with an annual floor of 5 percent. If the interest crediting rate is an investment-based rate, it is not permitted to be combined

---

<sup>10</sup> The term “statutory hybrid plan” is defined in § 1.411(a)(13)-1(d)(5) as a defined benefit plan that contains a statutory hybrid benefit formula.

with any annual floor (but may be combined with a cumulative floor described in § 1.411(b)(5)-1(d)(6)(iii)).

Section 1.411(b)(5)-1(e)(3) provides that the right to future interest credits determined in the manner specified under the plan and not conditioned on future service is a factor that is used to determine the participant's accrued benefit, for purposes of section 411(d)(6). Thus, to the extent that benefits have accrued under the terms of a statutory hybrid plan that entitle the participant to future interest credits, an amendment to the plan to change the interest crediting rate must satisfy section 411(d)(6) if the revised rate under any circumstances could result in interest credits that are smaller as of any date after the applicable amendment date than the interest credits that would be provided without regard to the amendment.

Section 411(d)(6) provides generally that a plan is treated as not satisfying the requirements of section 411 if a plan amendment decreases the accrued benefit of a participant. For this purpose, a plan amendment that eliminates or reduces an early retirement benefit or retirement-type subsidy, or eliminates an optional form of benefit, with respect to benefits attributable to service before the amendment, generally is treated as reducing a participant's accrued benefit.

As described in section II.J. of this notice, section 501 of the SECURE 2.0 Act sets forth provisions with respect to plan amendments adopted pursuant to a provision of the SECURE 2.0 Act or the regulations thereunder, including a provision specifying that, except as provided by the Secretary (or the Secretary's delegate), a retirement plan will not violate section 411(d)(6) of the Code because of an amendment made to the plan that is made pursuant to the SECURE 2.0 Act.



Q. H-1: What is the effect of the enactment of section 348 of the SECURE 2.0 Act for a cash balance plan<sup>11</sup>?

A. H-1: For a cash balance plan that provides for pay credits to participants that increase with a participant's age or service and provides for a variable interest crediting rate, the effect of the enactment of section 348 of the SECURE 2.0 Act is that the plan no longer risks violating the accrual requirements of section 411(b)(1) of the Code if that interest crediting rate falls below a certain point. To prevent such a violation prior to the enactment of section 348 of the SECURE 2.0 Act, a plan of this type had to provide for a fixed annual minimum interest crediting rate as part of its interest crediting rate. With the enactment of section 348 of the SECURE 2.0 Act, the fixed annual minimum interest crediting rate is no longer needed to avoid a violation of section 411(b)(1) of the Code for this type of plan.

Q. H-2: Under what circumstances is an amendment to a cash balance plan made pursuant to section 348 of the SECURE 2.0 Act?

A. H-2: An amendment to a cash balance plan is made pursuant to section 348 of the SECURE 2.0 Act (and is therefore eligible for the treatment in section 501 of the SECURE 2.0 Act) only if: (1) the plan is currently providing for principal credits that increase with a participant's age or service, and the amendment is to change the plan's interest crediting rate, or (2) the plan is implementing such a pattern of principal credits as part of the amendment.

---

<sup>11</sup> For purposes of this notice, a cash balance plan is a plan with a lump sum-based benefit formula (as defined in § 1.411(a)(13)-1(d)(3)) under which the accumulated benefit (within the meaning of § 1.411(a)(13)-1(d)(2)) for a participant is the current balance of a hypothetical account.

Q. H-3: Does the exception from section 411(d)(6) of the Code for certain amendments that is provided under section 501 of the SECURE 2.0 Act apply to an amendment that reduces a participant's accumulated benefit?

A. H-3: No, the exception from section 411(d)(6) of the Code under section 501 of the SECURE 2.0 Act does not apply to an amendment that reduces a participant's accumulated benefit determined as of the end of the interest crediting period that includes the applicable amendment date (as defined in § 1.411(d)-3(g)(4)) for the amendment. Thus, the exception from section 411(d)(6) of the Code applies with respect to an amendment that affects interest credits for interest crediting periods beginning after the later of the effective date of the amendment or the date the amendment is adopted, but not interest credits for interest crediting periods beginning before the later of the effective date of the amendment or the date the amendment is adopted.

Q. H-4: For which amendments affecting future interest crediting rates that are made pursuant to section 348 of the SECURE 2.0 Act does the exception from section 411(d)(6) of the Code apply?

A. H-4: The exception from section 411(d)(6) of the Code provided under section 501 of the SECURE 2.0 Act applies to a plan amendment affecting future interest crediting rates that is made pursuant to section 348 of the SECURE 2.0 Act only if: (1) the plan's interest crediting rate prior to the amendment is the greater of a fixed annual minimum rate or an interest rate described in § 1.411(b)(5)-1(d)(3) or (4), and the amendment either (a) reduces or eliminates the fixed minimum interest crediting rate while retaining the underlying interest rate described in § 1.411(b)(5)-1(d)(3) or (4),

or (b) changes the interest crediting rate to an investment-based rate described in § 1.411(b)(5)-1(d)(5); or (2) the plan's interest crediting rate prior to the amendment is a permitted fixed rate described in § 1.411(b)(5)-1(d)(4)(v), and the amendment changes the interest crediting rate to any permitted variable rate, subject to a limitation that the amount by which the new variable interest crediting rate is less than the maximum variable interest crediting rate of the same type must not exceed the amount by which the pre-amendment fixed interest crediting rate was less than the maximum fixed interest crediting rate of 6 percent.

Q. H-5: Does the enactment of section 348 of the SECURE 2.0 Act have an impact on a statutory hybrid plan that is not a cash balance plan?

A. H-5: The Treasury Department and the IRS expect that a sponsor of a statutory hybrid plan that is not a cash balance plan will have no reason to apply section 411(b)(6) of the Code as added by section 348 of the SECURE 2.0 Act; accordingly, no amendment to the plan would be made pursuant to section 348 of the SECURE 2.0 Act.

## **I. SECTION 350 OF THE SECURE 2.0 ACT**

Section 350(a) of the SECURE 2.0 Act adds new section 414(cc) to the Code. Section 414(cc) provides that, if certain conditions are satisfied, a plan or arrangement will not fail to be treated as described in section 401(a), 403(b), 408, or 457(b) solely by reason of a corrected reasonable administrative error made (1) in implementing an automatic enrollment or automatic escalation feature with respect to an eligible employee (or an affirmative election made by an eligible employee covered by such a feature), or (2) by failing to afford an eligible employee the opportunity to make an

affirmative election because the employee was improperly excluded from the plan (implementation error).

Section 414(cc)(2)(B)(i) specifies that the date by which an implementation error with respect to elective deferrals must be corrected is the earlier of (1) the date of the first payment of compensation made by the employer to the employee on or after the last day of the 9½-month period after the end of the plan year during which the error with respect to the employee first occurred, or (2) in the case of an employee who notifies the plan sponsor of the error, the date of the first payment of compensation made by the employer to the employee on or after the last day of the month following the month in which the notification was made.

Section 414(cc)(2)(B)(ii) provides that, in the case of an employee who would have been entitled to additional matching contributions had any missed elective deferrals been made, the plan sponsor must make a corrective allocation of matching contributions to which the employee would have been entitled (adjusted to account for earnings) had the missed elective deferrals been made, and that the additional matching contributions must be allocated not later than the deadline for allocating corrective matching contributions specified by the Secretary in regulations, or other guidance of general applicability.

Section 414(cc)(2)(B)(iii) through (v) provides that the implementation error must be corrected for all similarly situated participants in a nondiscriminatory manner and that notice of the error that satisfies regulations or other guidance prescribed by the Secretary must be given to employees affected by the error within 45 days after the date on which correct deferrals begin.

Section 414(cc)(2) also provides that the correction described in section 414(cc)(2) may occur before or after the participant has terminated employment and may occur without regard to whether the error is identified by the Secretary.

Section 414(cc)(3) provides that if the requirements in section 414(cc)(2) are satisfied, an employer is not required to provide employees affected by the error with the missed amount of elective deferrals resulting from the error through a qualified nonelective contribution, or otherwise.

Section 414(cc)(4) provides that the Secretary will, by regulations or other guidance of general applicability, prescribe (i) the deadline for making a corrective allocation of matching contributions, (ii) the content of the required notice to affected employees, (iii) the manner in which the amount of the corrective matching allocation is determined, (iv) the manner of adjustment to account for earnings on matching contributions, and (v) such other rules as are necessary to carry out the purposes of the subsection.

Section 350(b) of the SECURE 2.0 Act provides that section 414(cc) of the Code applies with respect to any errors for which the date referred to in section 414(cc) is after December 31, 2023, and that, prior to the application of any regulations or other guidance prescribed under section 414(cc), taxpayers may rely upon their reasonable good faith interpretations of the provisions of section 414(cc).

Q. I-1: For purposes of determining the effective date of section 414(cc) with respect to an implementation error in accordance with section 350(b) of the SECURE 2.0 Act, what is “the date referred to in section 414(cc)”?

A. I-1: For purposes of determining the effective date of section 414(cc) of the Code with respect to an implementation error in accordance with section 350(b) of the SECURE 2.0 Act, “the date referred to in section 414(cc)” is the date by which an employer must implement correct deferrals in accordance with section 414(cc)(2)(B)(i) of the Code (or, with respect to a terminated employee, the date by which they would have been implemented but for the termination of employment). This date is the earlier of (1) the date of the first payment of compensation made by the employer to the employee on or after the last day of the 9½-month period after the end of the plan year during which an implementation error with respect to the employee first occurred, or (2) in the case of an employee who notifies the plan sponsor of the error, the date of the first payment of compensation made by the employer to the employee on or after the last day of the month following the month in which the notification was made. Accordingly, the effective date with respect to an implementation error may vary depending on, for example, the date the error occurs, the date compensation is paid, whether the employee notifies the plan sponsor of the error, and whether the plan year is a fiscal year or calendar year.

For example, Employer X sponsors a calendar year 401(k) plan that includes an automatic contribution enrollment feature. On January 1, 2023, Employer X fails to automatically enroll an eligible employee due to an implementation error. The employee does not inform Employer X of the error. Under section 414(cc)(2)(B), Employer X has until the date of the first payment of compensation made by the employer to the employee on or after October 15, 2024 (the last day of the 9½-month period after the end of the 2023 plan year) to begin corrected elective deferrals for the eligible

employee. The date of the first payment of compensation made to the employee after October 15, 2024, is October 18, 2024. Because October 18, 2024, is after December 31, 2023, section 414(cc) applies with respect to the error that occurred on January 1, 2023.

Q. I-2. How may a plan sponsor correct, pursuant to section 414(cc), an implementation error to which section 414(cc) is applicable?

A. I-2. In general, the sponsor of a plan to which section 414(cc) applies may correct, pursuant to section 414(cc), an implementation error by following the safe harbor correction method set forth in Appendix A, section .05(8), of Rev. Proc. 2021-30, 2021-31 IRB 172, for failures related to automatic contribution features in a section 401(k) plan or a section 403(b) plan. However, see Q&A I-4 of this notice for rules regarding the deadline for making the allocation of matching contributions with respect to missed elective deferrals.

Q. I-3. Is section 414(cc) available for correcting an implementation error with respect to an individual even if the individual terminates employment before corrected deferrals would otherwise have begun?

A. I-3. Yes. In general, the sponsor of a plan to which section 414(cc) applies is permitted to correct an implementation error with respect to both active and terminated employees, by following, as described in Q&A I-2 of this notice, the correction method set forth in Appendix A, section .05(8), of Rev. Proc. 2021-30, for failures related to automatic contribution features in a section 401(k) plan or a section 403(b) plan, including by satisfying the notice requirement set forth in Appendix A, section .05(8)(c). However, the notice provided to a terminated employee is not required to include the

following information set forth in Appendix A, section .05(8)(c): (1) a statement that appropriate amounts have begun to be deducted from compensation and contributed to the plan (or that appropriate deductions and contributions will begin shortly), or (2) an explanation that the affected terminated employee may elect an increased deferral percentage to make up for the missed deferral opportunity.

Q. I-4. If an individual affected by an implementation error would have been entitled to additional matching contributions had missed elective deferrals been made, what is the deadline for making a corrective allocation of matching contributions with respect to the missed elective deferrals?

A. I-4. A corrective allocation of matching contributions (adjusted for earnings) must be made within a reasonable period, as determined applying all relevant facts and circumstances, after the date on which the correct elective deferrals begin (or, with respect to a terminated employee, would have begun but for the termination of employment). A corrective allocation of matching contributions that is made by the last day of the sixth month following the month in which correct elective deferrals begin (or, with respect to a terminated employee, would have begun but for the termination of employment) will be treated as having been made within a reasonable period.

In addition, with respect to an automatic contribution error that begins on or before December 31, 2023, as described in the safe harbor correction method of Appendix A, section .05(8) of Rev. Proc. 2021-30, for failures related to automatic contribution features in a section 401(k) plan or a section 403(b) plan, a corrective allocation of matching contributions made by the end of the third plan year following the



year in which the error occurred will be treated as having been made within a reasonable period.

## **J. SECTION 501 OF THE SECURE 2.0 ACT**

Section 501 of the SECURE 2.0 Act provides, in general, that a retirement plan or annuity contract will be treated as being operated in accordance with the terms of the plan during a specified period (as described in paragraph (3) of this section II.J) and, except as provided by the Secretary of the Treasury (or the Secretary's delegate), a retirement plan will not fail to satisfy the anti-cutback requirements of section 411(d)(6) of the Code or section 204(g) of ERISA,<sup>12</sup> by reason of a plan amendment made pursuant to any amendment made by the SECURE 2.0 Act or pursuant to any regulation issued by the Secretary of the Treasury or the Secretary of Labor (or a delegate of either such Secretary) under the SECURE 2.0 Act, provided that:

(1) the amendment is adopted no later than the last day of the first plan year beginning on or after January 1, 2025, or, for an applicable collectively bargained plan (a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before December 29, 2022), or for a governmental plan (within the meaning of section 414(d) of the Code), the last day of the first plan year beginning on or after January 1, 2027, or such later date as the Secretary may prescribe (the section 501 date);

(2) the amendment applies retroactively to the effective date of the SECURE 2.0 Act provision or the regulations thereunder (or, in the case of an amendment not

---

<sup>12</sup> As described in section II.H of this notice, section 411(d)(6) generally prohibits plan amendments that decrease accrued benefits. Section 204(g) of ERISA provides parallel rules to the rules of section 411(d)(6) of the Code. The Secretary has interpretive authority over section 204(g) of ERISA pursuant to Reorganization Plan No. 4 of 1978, 5 U.S.C. App.

required by a provision of the SECURE 2.0 Act or the regulations thereunder, the effective date specified by the plan); and

(3) the plan or contract is operated as if the amendment were in effect during the period beginning on the effective date of the SECURE 2.0 Act provision or the regulations thereunder (or, in the case of an amendment not required by a provision of the SECURE 2.0 Act or the regulations thereunder, the effective date specified by the plan or contract) and ending on the section 501 date or, if earlier, the date the amendment is adopted.

Section 501(c) of the SECURE 2.0 Act modifies section 601(b)(1) of Division O of the Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, 133 Stat. 2534, known as the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), sections 2202(c)(2)(A) and 2203(c)(2)(B)(i) of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act),<sup>13</sup> and section 302(d)(2)(A) of Title III of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act), enacted as Division EE of the Consolidated Appropriations Act, 2021, to extend plan amendment deadlines with respect to these sections to coordinate with the plan amendment deadlines under section 501 of the SECURE 2.0 Act, as applicable.<sup>14</sup>

---

<sup>13</sup> Section 2202 of the CARES Act is modified by section 280 of the COVID-related Tax Relief Act of 2020, which was enacted as Subtitle B, Title II, Division N, of the Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 1182 (2020). References in section II.J of this notice to section 2202 of the CARES Act are to section 2202 of the CARES Act as modified. Notice 2020-51, 2020-29 IRB 73, which sets forth guidance relating to a waiver of 2020 required minimum distributions under section 2203 of the CARES Act, provides that an IRA does not have to be amended to reflect the waiver and provides a sample amendment for defined contribution plans that plan sponsors may adopt to implement section 401(a)(9)(I) of the Code. The notice provides that, although employers may adopt amendments pursuant to section 2203 of the CARES Act other than those provided in the sample amendment, the Treasury Department and the IRS are exercising their authority under section 2203(c) of the CARES Act to deny Code section 411(d)(6) relief for a plan amendment that eliminates an optional form of benefit.

<sup>14</sup> Section G of Notice 2020-68, 2020-38 IRB 567, extended the deadline to amend a plan to reflect section 104 of Division M of the Further Consolidated Appropriations Act, 2020, known as the Bipartisan

## Rev. Proc. 2022-40

Rev. Proc. 2022-40, 2022-47 IRB 487,<sup>15</sup> sets forth plan amendment deadlines for qualified plans and section 403(b) plans that apply except as otherwise provided by statute or in regulations or other guidance published in the Internal Revenue Bulletin. For example, for an individually designed qualified plan that is not a governmental plan (within the meaning of section 414(d) of the Code), the plan amendment deadline for a disqualifying provision with respect to a change in qualification requirements is the last day of the second calendar year that begins after the issuance of the Required Amendments List in which the change in qualification requirements appears, and the plan amendment deadline for a discretionary amendment is the end of the plan year in which the plan amendment is operationally put into effect. Rev. Proc. 2020-40 sets forth similar plan amendment deadlines for section 403(b) form defects first occurring after June 30, 2020, and for discretionary amendments made to section 403(b) plans with respect to plan years beginning on or after January 1, 2020. Although Rev. Proc. 2020-40 provides plan amendment deadlines, it does not provide relief from the anti-cutback requirements of section 411(d)(6) of the Code or section 204(g) of ERISA, if applicable, for amendments adopted by those deadlines.

---

American Miners Act of 2019 (Miners Act), to coordinate with the plan amendment deadlines provided in section 601 of the SECURE Act.

<sup>15</sup> See Part III of Rev. Proc. 2016-37, 2016-29 IRB 136, as modified by Rev. Proc. 2017-41, 2017-29 IRB 92, Rev. Proc. 2018-21, 2018-14 IRB 467, Rev. Proc. 2018-42, 2018-36 IRB 424, Rev. Proc. 2020-10, 2020-2 IRB 295, Notice 2020-35, 2020-25 IRB 948, Rev. Proc. 2020-40, 2020-38 IRB 575, and Rev. Proc. 2021-38, 2021-38 IRB 425, with respect to qualified pre-approved plans, and Part III of Rev. Proc. 2019-39, 2019-42 IRB, 945, as modified by Notice 2020-35, Rev. Proc. 2020-40, and Rev. Proc. 2021-37, 2021-38 IRB 385, with respect to section 403(b) pre-approved plans. The Treasury Department and the IRS anticipate updating the provisions of Part III of Rev. Proc. 2016-37 and Part III of Rev. Proc. 2019-39 in future guidance relating to qualified pre-approved plans and section 403(b) pre-approved plans, respectively.

### Eligible governmental plans

Section 457(b) of the Code provides, generally, that a section 457(b) plan maintained by an employer described in section 457(e)(1)(A) (an eligible governmental plan) that is administered in a manner that is inconsistent with the requirements of section 457(b) is not treated as an eligible governmental plan as of the first plan year beginning more than 180 days after the date of notification by the Secretary of the inconsistency unless the employer corrects the inconsistency before the first day of such plan year.

### IRAs

Under section 408(a), an IRA that is an individual retirement account is a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, provided that the written instrument creating the trust meets certain requirements. Under section 408(b), an IRA that is an individual retirement annuity is an annuity contract or endowment contract that is issued by an insurance company and that meets certain requirements.

Q. J-1: When must a retirement plan be amended to reflect the applicable provisions of the SECURE Act, section 104 of the Miners Act, section 2202 or 2203 of the CARES Act, section 302 of the Relief Act, and the SECURE 2.0 Act (collectively, the Acts), or any regulations thereunder?

A. J-1: The deadlines to amend an eligible retirement plan (including an IRA or annuity contract) for the applicable provisions of the Acts, or any regulations thereunder,

which apply to both required and discretionary plan amendments,<sup>16</sup> are hereby extended as follows:

(a) Qualified plans

In general, the deadline to amend a qualified plan: (1) that is not a governmental plan within the meaning of section 414(d) of the Code or an applicable collectively bargained plan is December 31, 2026; (2) that is an applicable collectively bargained plan is December 31, 2028; or (3) that is a governmental plan within the meaning of section 414(d) is December 31, 2029.<sup>17</sup> See section II. H. of this notice relating to section 348 of the SECURE 2.0 Act for guidance that (1) addresses which cash balance plan amendments are made “pursuant to” section 348 of the SECURE 2.0 Act for purposes of applying section 501, and (2) sets forth the extent of anti-cutback relief for those plan amendments changing the interest crediting rate under the plan.

A sponsor of a qualified plan may amend its plan, in accordance with Rev. Proc. 2022-40, to reflect the Acts, or any regulations thereunder, after the dates set forth in the preceding paragraph. However, amendments made after the dates set forth in the preceding paragraph are not entitled, under Rev. Proc. 2022-40, to the anti-cutback relief from the requirements of section 411(d)(6) of the Code or section 204(g) of ERISA provided by section 501 of the SECURE 2.0 Act.

---

<sup>16</sup> With respect to pre-approved plans, the extended plan amendment deadlines apply to both interim (required) and discretionary amendments. It is anticipated that the cumulative list for the fourth remedial amendment cycle for pre-approved defined contribution plans (pre-approved plans for which the opinion letter application submission window falls between February 1, 2024, and January 31, 2025) will include certain provisions of the Acts. Accordingly, it is anticipated that the pre-approved defined contribution plans submitted for that cycle will need to include provisions that reflect the applicable provisions of the Acts.

<sup>17</sup> It is anticipated that this date will accommodate the needs of states without annual legislative sessions, which will not be required to amend their plans before 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after 2023 (the year in which this notice is published).

(b) Section 403(b) plans

In general, the deadline to amend a section 403(b) plan: (1) that is not maintained by a public school, as described in section 403(b)(1)(A)(ii) of the Code, is December 31, 2026; (2) that is an applicable collectively bargained plan of a tax-exempt organization described in section 501(c)(3) is December 31, 2028; or (3) that is maintained by a public school, as described in section 403(b)(1)(A)(ii), is December 31, 2029.

A sponsor of a section 403(b) plan may be entitled to amend its plan, in accordance with Rev. Proc. 2022-40, to reflect the Acts, as applicable, or any regulations thereunder, after the dates set forth in the preceding paragraph.

Amendments to a section 403(b) plan that is subject to ERISA that are made after the dates set forth in the preceding paragraph are not entitled, under Rev. Proc. 2022-40, to the anti-cutback relief from the requirements of section 204(g) of ERISA provided by section 501 of the SECURE 2.0 Act.

(c) Eligible governmental plans

The deadline to amend an eligible governmental plan is the later of (1) December 31, 2029, or (2) if applicable, the first day of the first plan year beginning more than 180 days after the date of notification by the Secretary that the plan was administered in a manner that is inconsistent with the requirements of section 457(b) of the Code.

(d) IRAs

The deadline to amend the trust governing an IRA that is an individual retirement account or the contract issued by an insurance company with respect to an IRA that is

an individual retirement annuity is December 31, 2026, or such later date as the Secretary prescribes in guidance.

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

#### **K. SECTION 601 OF THE SECURE 2.0 ACT**

Section 601 of the SECURE 2.0 Act amends certain provisions of the Code to permit an employee who participates in a SIMPLE IRA plan or simplified employee pension (SEP) arrangement to designate a Roth IRA as the IRA to which contributions under the plan or arrangement are made.

Section 601(a) of the SECURE 2.0 Act amends section 408A of the Code by striking subsection (f). Prior to the deletion, section 408A(f) provided that (1) a SEP or SIMPLE IRA account could not be designated as a Roth IRA, and (2) contributions to any such SEP or SIMPLE IRA account would not be taken into account for purposes of the Roth IRA contribution limit of section 408A(c)(2)(B).

Section 601(b)(1) of the SECURE 2.0 Act amends section 408(k) of the Code by adding a new paragraph (section 408(k)(7)) that provides that a Roth IRA will not be treated as a SEP unless the employee elects for the Roth IRA to be so treated (at such time and in such manner as the Secretary may provide).

Section 601(c) of the SECURE 2.0 Act similarly amends section 408(p) of the Code by adding a new paragraph (section 408(p)(12)) that provides that a Roth IRA will not be treated as a simple retirement account unless the employee elects for the Roth IRA to be so treated (at such time and in such manner as the Secretary may provide).

Added by section 601(b) of the SECURE 2.0 Act, new subsection 402(h)(1)(C) of the Code provides that any contribution under a SEP which is made to a Roth IRA is not excludable from the employee's gross income. Section 402(k) provides that rules similar to the rules in section 402(h)(1) applies to contributions under a SIMPLE IRA plan. Therefore, any contribution under a SIMPLE IRA which is made to a Roth IRA is not excludable from the employee's gross income.

Section 601(e) of the SECURE 2.0 Act provides that these amendments apply to taxable years beginning after December 31, 2022.

Q. K-1: Is an employer required to offer an employee an election to designate a Roth IRA as the IRA to which SIMPLE IRA plan or SEP arrangement contributions are made (Roth contribution election)?

A. K-1: No. The employer is not required to offer an employee a Roth contribution election.

Q. K-2: If an employer offers a Roth contribution election, when may an employee make the election?

A. K-2: For a SIMPLE IRA plan, the employer must offer employees the same effective opportunity to make a Roth contribution election as the employees have to enter into a salary reduction agreement under the plan, the minimum requirements of which are provided in section 408(p)(5) of the Code, as described in Notice 98-4.

For a SEP arrangement with a Salary Reduction SEP (SARSEP) component, the employer must offer employees the same effective opportunity to make a Roth contribution election as the employees have to enter into a salary reduction agreement under the SARSEP arrangement.



For a SEP arrangement without a SARSEP component, the employer must offer employees an effective opportunity, as described in § 1.401(k)-1(e)(2)(ii), to elect that a SEP contribution is to be made to a Roth IRA.

In all cases, an election to have a contribution made to a Roth IRA must be made before the contribution is made.

Q. K-3: May an employer make SIMPLE IRA plan or SEP arrangement contributions to a Roth IRA without an employee's prior Roth contribution election, for example, under the terms of an automatic enrollment arrangement?

A. K-3: No. An employer can make contributions to a Roth IRA under a SIMPLE IRA plan or SEP arrangement only if the employee has affirmatively elected that contributions under the plan or arrangement are to be made to a Roth IRA.

Q. K-4: In which taxable year is a Roth IRA contribution includible in the employee's income?

A. K-4: A salary reduction contribution made to a Roth IRA is includible in the employee's gross income for the taxable year that includes the date on which the employee would otherwise have received the salary reduction contribution as wages or salary if the employee had not elected for the amount to be contributed to the SIMPLE IRA plan or SEP arrangement.

An employer matching or nonelective contribution made to a Roth IRA is includible in the employee's gross income for the taxable year that includes the date on which the contribution is made to the Roth IRA. The preceding sentence applies even if the employer matching contribution or nonelective contribution is treated as if it were

made for the prior taxable year of the employer, as described in section 404(h)(1)(B) or (m)(2)(B).

Q. K-5: How is a contribution to a Roth IRA under a SIMPLE IRA plan or SEP arrangement reported?

A. K-5: The employer must report salary reduction contributions made to a Roth IRA on Form W-2, *Wage and Tax Statement*, Box 12, using Code F (for a SARSEP) or Code S (for a SIMPLE IRA), and include the same amount in Boxes 1, 3, and 5.

The employer must report employer matching and nonelective contributions made to a Roth IRA on Form 1099-R, *Distributions From Pensions, Annuities, Retirement or Profit Sharing Plans, IRAs, Insurance Contracts, etc.*, in the same manner as the reporting that would have applied if (1) there were no after-tax contributions made to any of the employee's IRAs, and (2) the matching or nonelective contributions were made to an IRA that was not a Roth IRA and then immediately converted to a Roth IRA. Thus, the contributions must be reported using Form 1099-R, for the year in which the contributions are made to the employee's Roth IRA, with the total reported in boxes 1 and 2a of Form 1099-R, using code 2 or 7 in box 7, and the IRA/SEP/SIMPLE checkbox in box 7 checked.

Q. K-6: Which amounts contributed to a Roth IRA under a SIMPLE IRA plan or SEP arrangement are subject to income tax withholding, FICA and the Federal Unemployment Tax Act (FUTA) (chapter 23 of the Code)?

A. K-6: The salary reduction contributions contributed to a Roth IRA under a SIMPLE IRA plan or SEP arrangement are subject to income tax withholding, FICA, and FUTA taxes.

Matching contributions and nonelective contributions that are made to an IRA under a SIMPLE IRA plan or SEP arrangement are excluded from wages under section 3401(a). Similarly, matching contributions and nonelective contributions that are made to a Roth IRA under a SIMPLE IRA plan or SEP arrangement are excluded from wages under section 3401(a). Accordingly, these matching contributions and nonelective contributions are not wages, as defined in section 3401(a), for purposes of federal income tax withholding under section 3402. However, an employee on whose behalf either type of contribution is made may need to increase the employee's withholding or make estimated tax payments to avoid an underpayment penalty.

Matching contributions and nonelective contributions that are made to an IRA under a SIMPLE IRA plan or SEP arrangement are excluded from wages under section 3121(a)(5)(C) and (H). Similarly, matching contributions and nonelective contributions that are made to a Roth IRA under a SIMPLE IRA plan or SEP arrangement are excluded from wages under section 3121(a)(5)(C) and (H) (and those contributions are not added back into wages under section 3121(v)(1)(A)). Accordingly, those contributions are not wages, as defined in section 3121(a), for purposes of FICA.

Matching and nonelective contributions that are made to an IRA under a SIMPLE IRA plan or SEP arrangement also are excluded from wages under section 3306(b)(5)(C) and (H). Similarly, matching contributions and nonelective contributions that are made to a Roth IRA under a SIMPLE IRA plan or SEP arrangement are excluded from wages under section 3306(b)(5)(C) and (H). Accordingly, those contributions are not wages, as defined in section 3306(b), for purposes of FUTA.

Q. K-7: How may an employer make SIMPLE IRA plan or SEP arrangement contributions to a Roth IRA prior to the amendment of IRS forms and Listings of Required Modifications?

A. K-7: An employer using any of Form 5304-SIMPLE, *Savings Incentive Match Plan for Employees of Small Employers (SIMPLE)—Not for Use With a Designated Financial Institution*, Form 5305-SIMPLE, *Savings Incentive Match Plan for Employees of Small Employers (SIMPLE)—for Use With a Designated Financial Institution*, Form 5305-SEP, *Simplified Employee Pension—Retirement Accounts Contribution Agreement*, Form 5305A-SEP, *Salary Reduction Simplified Employee Pension—Individual Retirement Accounts Contribution Agreement*, or a prototype plan document approved by the IRS, may continue to use (or begin to use) the form or document without amendment, until the IRS issues new forms or provides new guidance on prototype plan documents.

Q. K-8: What is the effect of the deletion of section 408A(f)(2) on the Roth IRA contribution limit in section 408A(c)(2)(B)?

A. K-8: The deletion of section 408A(f)(2) will be addressed in future guidance.

#### **L. SECTION 604 OF THE SECURE 2.0 ACT**

Prior to amendment by section 604 of the SECURE 2.0 Act, section 402A of the Code generally permitted an applicable retirement plan (that is, a qualified plan under section 401(a), a section 403(b) plan, or a section 457(b) plan maintained by an employer described in section 457(e)(1)(A) (an eligible governmental plan)) to include a qualified Roth contribution program as defined in section 402A(b)(1). Prior to that amendment, a qualified Roth contribution program was a program under which an

employee could elect to make designated Roth contributions in lieu of all or a portion of elective deferrals the employee was otherwise eligible to make under the applicable retirement plan. These contributions have been referred to as designated Roth contributions; however, for purposes of this notice, they are referred to as designated Roth elective contributions.

Prior to amendment by section 604 of the SECURE 2.0 Act, section 402A(a) of the Code provided that if an applicable retirement plan includes a qualified Roth contribution program, then (1) any designated Roth elective contribution made by an employee pursuant to the program is treated as an elective deferral for purposes of chapter 1 of the Code, except that the contribution “shall not be excludable from gross income,” and (2) the plan (and any arrangement that is part of the plan) is not treated as failing to satisfy any requirement of chapter 1 of the Code solely by reason of including the program.

Section 604(a) of the SECURE 2.0 Act amends section 402A(a) of the Code to redesignate section 402A(a)(2) as section 402A(a)(4) and to add the following as section 402A(a)(2) and (3): “(2) any designated Roth contribution which pursuant to the program is made by the employer on the employee's behalf on account of the employee's contribution, elective deferral, or (subject to the requirements of section 401(m)(13)) qualified student loan payment shall be treated as a matching contribution for purposes of this chapter, except that such contribution shall not be excludable from gross income,” and “(3) any designated Roth contribution which pursuant to the program is made by the employer on the employee's behalf and which is a nonelective contribution shall be nonforfeitable and shall not be excludable from gross income...”

Section 604(b) of the SECURE 2.0 Act makes a conforming change to the definition of a “qualified Roth contribution program” under section 402A(b)(1) of the Code. As amended, a “qualified Roth contribution program” means a program under which an employee may elect to make, or to have made on the employee’s behalf, designated Roth contributions in lieu of all or a portion of elective deferrals the employee is otherwise eligible to make, or of matching contributions or nonelective contributions that may otherwise be made on the employee’s behalf, under the applicable retirement plan.

Section 604(c) of the SECURE 2.0 Act amends the definition of a “designated Roth contribution” under section 402A(c)(1) of the Code to mean any elective deferral, matching contribution, or nonelective contribution that is excludable from gross income of an employee without regard to section 402A, and that the employee designates (at such time and in such manner as the Secretary may prescribe) as not being so excludable. For purposes of this notice, matching contributions and nonelective contributions that an employee designates as Roth contributions are referred to as designated Roth matching contributions and designated Roth nonelective contributions.

Section 604(d) of the SECURE 2.0 Act adds section 402A(f)(3) of the Code, which defines “matching contribution” for purposes of section 402A to mean any matching contribution described in section 401(m)(4)(A), and any contribution to an eligible governmental plan on behalf of an employee and on account of the employee’s elective deferral under the plan, but only if the contribution is nonforfeitable at the time received.

Section 604(e) of the SECURE 2.0 Act provides that the amendments made by section 604 apply to contributions made after December 29, 2022.

Q. L-1: Do rules similar to the rules of § 1.401(k)-1(f) apply to designated Roth matching contributions and designated Roth nonelective contributions?

A. L-1: Yes. Rules similar to the rules for designated Roth elective contributions under § 1.401(k)-1(f) (other than § 1.401(k)-1(f)(4)(i) and (6)) apply to designated Roth matching contributions and designated Roth nonelective contributions. For example, similar to the rules under § 1.401(k)-1(f)(1) that apply to designated Roth elective contributions: (1) any designation of a matching contribution or nonelective contribution as a Roth contribution must be made by the employee no later than the time that the contribution is allocated to the employee's account and must be irrevocable, and (2) designated Roth matching contributions and designated Roth nonelective contributions are subject to inclusion treatment and separate accounting rules. In addition, to the extent a plan permits an employee to designate matching contributions or nonelective contributions as Roth contributions, an employee must have an effective opportunity to make (or change) that designation at least once during each plan year.

Q. L-2: If an employee designates a matching contribution or nonelective contribution as a Roth contribution, for which taxable year is that designated Roth matching contribution or designated Roth nonelective contribution includible in the individual's gross income?

A. L-2: A designated Roth matching contribution or designated Roth nonelective contribution is includible in an individual's gross income for the taxable year in which the contribution is allocated to the individual's account. The preceding sentence applies

even if the designated Roth matching contribution or designated Roth nonelective contribution is deemed to have been made on the last day of the prior taxable year of the employer under section 404(a)(6) of the Code.

Q. L-3: May an employee designate a matching contribution or nonelective contribution as a Roth contribution if the employee is not fully vested in that type of contribution at the time the contribution is allocated to the employee's account?

A. L-3: No. Under section 402A(f)(3), a matching contribution may be designated as a Roth contribution only if the employee is fully vested in matching contributions at the time the contribution is allocated to the employee's account. Similarly, under section 402A(a)(3), a nonelective contribution may be designated as a Roth contribution only if the employee is fully vested in nonelective contributions at the time the contribution is allocated to the employee's account. For example, if at the time a matching contribution is allocated to the employee's account, the employee is only partially vested in the portion of the employee's account balance attributable to matching contributions, then the employee may not designate any part of that matching contribution as a Roth contribution.

Q. L-4: If matching contributions or nonelective contributions under an applicable retirement plan are subject to a vesting schedule, will the plan fail to satisfy section 401(a)(4) (if applicable) merely because the plan provides that an employee may designate a matching contribution or nonelective contribution as a Roth contribution only if the employee is fully vested in that type of contribution at the time the contribution is allocated to the employee's account?



A. L-4: Under § 1.401(a)(4)-4(e)(3)(i), the term “other right or feature” generally means any right or feature applicable to employees under the plan, except as provided in § 1.401(a)(4)-4(e)(3)(ii). Because there is no applicable exception under § 1.401(a)(4)-4(e)(3)(ii), an employee’s right under a plan to designate a matching contribution or nonelective contribution that may otherwise be made on the employee’s behalf under the plan as a Roth contribution is an “other right or feature” for purposes of § 1.401(a)(4)-4(e)(3).

However, pursuant to the authority in § 1.401(a)(4)-1(d) to issue additional guidance that is necessary or appropriate in applying the nondiscrimination requirements of section 401(a)(4) of the Code, a plan will not be treated as failing to satisfy section 401(a)(4) merely because the plan provides that an employee may designate a matching contribution or nonelective contribution as a Roth contribution only if the employee is fully vested in that type of contribution at the time the contribution is allocated to the employee’s account (even if the right to make that designation is not currently available to a group of employees that would satisfy section 410(b) without regard to the average benefit percentage test of § 1.410(b)-5)).

Q. L-5: Are designated Roth matching contributions or designated Roth nonelective contributions included in wages, as defined in section 3401(a) of the Code, for purposes of federal income tax withholding under section 3402?

A. L-5: No. Matching contributions and nonelective contributions that are made to a qualified plan under section 401(a) (including a section 401(k) plan), a section 403(b) plan, or an eligible governmental plan are excluded from wages under section 3401(a). Similarly, designated Roth matching contributions and designated Roth

nonelective contributions that are made to a qualified plan under section 401(a), a section 403(b) plan, or an eligible governmental plan are excluded from wages under section 3401(a). Accordingly, designated Roth matching contributions and designated Roth nonelective contributions are not wages, as defined in section 3401(a), for purposes of federal income tax withholding under section 3402. However, an employee who designates a matching contribution or nonelective contribution as a Roth contribution may need to increase the employee's withholding or make estimated tax payments to avoid an underpayment penalty.

Q. L-6: Are designated Roth matching contributions or designated Roth nonelective contributions that are contributed to a qualified plan under section 401(a) or to a section 403(b) plan included in wages, as defined in section 3121(a), for purposes of FICA, or as defined in section 3306(b), for purposes of FUTA?

A. L-6: No. Matching contributions and nonelective contributions that are contributed to a qualified plan under section 401(a) or to a section 403(b) plan are excluded from wages under section 3121(a)(5)(A) and (D). Similarly, designated Roth matching contributions and designated Roth nonelective contributions that are contributed to a qualified plan under section 401(a) or to a section 403(b) plan are excluded from wages under section 3121(a)(5)(A) and (D) (and those contributions are not added back to wages under section 3121(v)(1)(A)). Accordingly, those contributions are not wages, as defined in section 3121(a), for purposes of FICA.

Matching and nonelective contributions that are contributed to a qualified plan under section 401(a) or to a section 403(b) plan also are excluded from wages under section 3306(b)(5)(A) and (D). Similarly, designated Roth matching contributions and

designated Roth nonelective contributions that are contributed to a qualified plan under section 401(a) or to a section 403(b) plan are excluded from wages under section 3306(b)(5)(A) and (D). Accordingly, those contributions are not wages, as defined in section 3306(b), for purposes of FUTA.

Q. L-7: Are designated Roth nonelective contributions that are contributed to an eligible governmental plan (including amounts that would be treated as matching contributions under section 401(m) if the plan were a qualified plan) included in wages, as defined in section 3121(a), for purposes of FICA?

A. L-7: Section 3121(a) defines wages as all remuneration for employment, unless specifically excluded. Section 3121(v)(2) includes special timing rules that apply in determining when amounts deferred under an eligible governmental plan (including employers' contributions) are required to be taken into account. Under these sections, an amount deferred under an eligible governmental plan is required to be taken into account for purposes of social security and Medicare taxes as of the later of when the services are performed or when there is no substantial risk of forfeiture of the rights to such amount. Because designated Roth nonelective contributions that are contributed to an eligible governmental plan (including amounts that would be treated as matching contributions under section 401(m) if the plan were a qualified plan) must be fully vested at the time the contribution is allocated to a participant's account, these contributions are subject to social security and Medicare taxes at that time. However, FICA tax applies to employees of state and local governments only if they are subject to social security or Medicare tax under section 3121(b)(7)(E) (relating to agreements entered into pursuant to section 218 of the Social Security Act) or another provision of the Code,

such as section 3121(b)(7)(F) (relating to state and local government employees who are not members of a state or local retirement system), or section 3121(u) (relating to Medicare). See *a/so* Notice 2003-20, 2003-1 CB 894.

Q. L-8: Are designated Roth nonelective contributions that are contributed to an eligible governmental plan (including amounts that would be treated as matching contributions under section 401(m) if the plan were a qualified plan) included in wages, as defined in section 3306(b), for purposes of FUTA?

A. L-8: Section 3306(c)(7) generally provides a FUTA exemption for service performed in the employ of a state or any political subdivision thereof or any instrumentality of any one or more of the foregoing. In accordance with this provision, designated Roth nonelective contributions that are contributed to an eligible governmental plan (including amounts that would be treated as matching contributions under section 401(m) if the plan were a qualified plan) are excluded from wages under section 3306(c)(7). Accordingly, those contributions are not wages, as defined in section 3306(b), for purposes of FUTA. See *a/so* Notice 2003-20.

Q. L-9: If designated Roth matching contributions or designated Roth nonelective contributions are allocated to an individual's account in a taxable year, what reporting obligations apply to those contributions?

A. L-9: The reporting obligations that apply to a designated Roth matching contribution or designated Roth nonelective contribution are the same as if: (1) the contribution had been the only contribution made to an individual's account under the plan, and (2) the contribution, upon allocation to that account, had been directly rolled over to a designated Roth account in the plan as an in-plan Roth rollover. Thus,

designated Roth matching contributions and designated Roth nonelective contributions to a qualified plan under section 401(a) or to a section 403(b) plan must be reported using Form 1099-R for the year in which the contributions are allocated to the individual's account. The total amount of designated Roth matching contributions and designated Roth nonelective contributions that are allocated in that year are reported in boxes 1 and 2a of Form 1099-R, and code "G" is used in box 7.

The same reporting applies to designated Roth nonelective contributions that are contributed to an eligible governmental plan (including amounts that would be treated as matching contributions under section 401(m) if the plan were a qualified plan).

Q. L-10: If a plan uses a safe harbor definition of compensation under § 1.415(c)-2(d)(3) or (4) for purposes of section 415 of the Code, are designated Roth matching contributions or designated Roth nonelective contributions included in that safe harbor definition of compensation?

A. L-10: No. In general, the safe harbor definition of compensation under § 1.415(c)-2(d)(3) includes wages within the meaning of section 3401(a) of the Code (for purposes of income tax withholding at the source), plus amounts that would be included in wages but for an election under section 125(a), 132(f)(4), 402(e)(3), 402(h)(1)(B), 402(k), or 457(b). However, as described in Q&A L-5 of this notice, designated Roth matching contributions and designated Roth nonelective contributions are not included in wages within the meaning of section 3401(a) (nor would those contributions have been included in wages but for an election to have those contributions made as Roth contributions).

Similarly, the safe harbor definition of compensation under § 1.415(c)-2(d)(4) generally includes amounts that are compensation under § 1.415(c)-2(d)(3), plus all other payments of compensation to an employee by his employer (in the course of the employer's trade or business) for which the employer is required to furnish the employee a written statement under sections 6041(d), 6051(a)(3), and 6052 of the Code. However, designated Roth matching contributions and designated Roth nonelective contributions are not payments of compensation to an employee by his employer for which the employer is required to furnish the employee a written statement under sections 6041(d), 6051(a)(3), and 6052.

Q. L-11: If an applicable retirement plan includes a qualified Roth contribution program, which types of designated Roth contributions must an employee be permitted to elect to make, or have made on the employee's behalf, under the program?

A. L-11: Pursuant to section 402A(b)(1), a qualified Roth contribution program may, but is not required, to include every type of designated Roth contribution. Thus, an employee generally may be permitted to designate an elective contribution as a Roth contribution without being permitted to designate a matching contribution or nonelective contribution as a Roth contribution. Similarly, an employee generally may be permitted to designate a matching contribution or nonelective contribution (or both) as a Roth contribution without being permitted to designate an elective contribution as a Roth contribution. However, the right to make designated Roth contributions is a right or feature subject to the requirements of section 401(a)(4). See § 1.401(k)-1(a)(4)(iv)(B) and Q&A L-4 of this notice.

Further, under sections 402(c)(8)(B) and 402A(c)(3)(A) of the Code, if any portion of an eligible rollover distribution is attributable to payments or distributions from a designated Roth account (as defined in section 402A), that portion is permitted to be rolled over only to another designated Roth account or to a Roth IRA. For purposes of sections 402(c)(8)(B) and 402A(c)(3)(A), the term “designated Roth account” includes a separate account that is established for designated Roth matching contributions or designated Roth nonelective contributions. Similarly, section 402A(c)(4)(B) requires an applicable retirement plan to include a qualified Roth contribution program in order for the plan to permit employees to make in-plan Roth rollovers. For purposes of section 402A(c)(4)(B), a qualified Roth contribution program includes a program under which an employee may designate a matching contribution or nonelective contribution as a Roth contribution, even if the employee is not permitted to designate an elective contribution as a Roth contribution.

### **III. REQUEST FOR COMMENTS**

The Treasury Department and the IRS invite comments and suggestions regarding the matters discussed in this notice. In particular, the Treasury Department and the IRS request comments on:

- Section 113 of the SECURE 2.0 Act with respect to a *de minimis* financial incentive that is provided by a party other than the employer; and
- Section 348 of the SECURE 2.0 Act with respect to whether there are situations under which a plan with a statutory hybrid benefit formula within the meaning of § 1.411(a)(13)-1(d)(4) that is not described in Q&A H-2 of

this notice would be amended pursuant to section 348 of the SECURE 2.0 Act, as described in section II.H of this notice.

Comments should be submitted in writing on or before February 20, 2024 and should include a reference to Notice 2024-2. Comments may be submitted electronically via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (type “IRS Notice 2024-2” in the search field on the Regulations.gov home page to find this notice and submit comments). Alternatively, comments may be submitted by mail to: Internal Revenue Service, Attn: CC:PA:LPD:PR (Notice 2024-2), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044.

The Treasury Department and the IRS will publish for public availability any comment submitted electronically or on paper to its public docket.

#### **IV. PAPERWORK REDUCTION ACT**

The collection of information contained in this notice has been submitted to the Office of Management and Budget in accordance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3507) under control number 1545-2317. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this notice are section II.E, section II.F, and section II.G of this notice. The information collection requirements in section II.E and section II.G of this notice are accounted for in OMB Control Number 1545-1502. The information collection requirements in section II.F will be submitted to OMB for review and approval in accordance with 5 CFR 1320.13.



Q&A F-1 of this notice provides that a “terminally ill individual distribution” is any distribution from a qualified retirement plan to an employee who is a terminally ill individual that is made on or after the date on which the employee has been certified by a physician as having a terminal illness. A certification of terminal illness must meet the content requirement for the certification described in Q&A F-6 of this notice, the timing requirement for the certification described in Q&A F-7 of this notice, and the documentation requirement described in Q&A F-13 of this notice.

The collection of information is required to obtain a benefit. The likely respondents are individual taxpayers who are requesting terminally ill distributions from a qualified retirement plan.

Estimated total annual reporting burden: 125 hours.

Estimated average annual burden per respondent: .25 hours.

Estimated number of respondents: 500.

Estimated frequency of responses: 1.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103 of the Code.

## **V. DRAFTING INFORMATION**

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