I. **IRS Notice 2019-18.** The IRS reversed its previous position that offering a lump-sum option to participants in pay status during a one-time “window” violates Internal Revenue Code section 401(a)(9). Notice 2019-18 (a copy of which is attached as Exhibit A) supersedes Notice 2015-49, where the IRS expressed its intent to amend the minimum required distribution (“MRD”) regulations to prohibit amendments to qualified defined benefit plans permitting participants in pay status to commute the remaining value of their annuity payments to a lump-sum payment during such a window.

The MRD regulations generally provide that, once pension annuity payments begin, they cannot be changed and must be “non-increasing.” Treas. Reg. § 1.401(a)(9)-6, A-14(a). One exception allows annuity payments to increase if the payment of increased benefits results from a plan amendment. *Id.*, A-14(a)(4). In a series of private rulings issued before Notice 2015-49, the IRS ruled that this exception applied to a plan amendment implementing a lump-sum window feature, provided certain requirements were met. Ltr. Ruls. 201228045, 201228051, 201422028, 201422029, 201422030, 201422031, and 201424031. In light of these rulings, it appeared that defined benefit plans could offer retirees a temporary one-time election to receive their remaining benefit in a lump sum (often referred to as a “window”) without violating the MRD rules. However, IRS Notice 2015-49 rejected the rulings’ interpretation of the MRD rules and effectively prohibited this type of de-risking amendment. In its explanation, the IRS indicated that offering retirees the right to accelerate distributions would not be allowed.

In Notice 2019-18, the IRS again reversed course and announced that the IRS no longer intends to amend the MRD regulations to prohibit retiree lump-sum windows, but will continue to study the issue. Importantly, until further guidance is issued, the IRS will not assert that an amendment providing for a retiree lump-sum window will cause a plan to violate Code section 401(a)(9). The Notice states that the IRS will continue to evaluate whether such a plan amendment continues to satisfy other Code sections – including 401(a)(4) (nondiscrimination rules), 411 (non-forfeiture requirement), 415 (benefit limitations), 417 (spousal protections), and 436 (funding-based benefit restrictions). The Notice also states that the IRS will not issue private letter rulings on retiree lump-sum windows. However, for a plan sponsor who is eligible to seek a determination letter, the letter will no longer include a caveat expressing no opinion on the tax consequences of a retiree lump-sum window.

With this Notice, the IRS appears to have re-opened the door for retiree lump-sum windows. In light of this change, some plan sponsors may wish to evaluate this alternative to the annuitization of benefits currently being paid from the plan’s trust. Both strategies remove longevity and investment risks, as well as saving significant PBGC premiums.
II. **SECURE Act.**

On April 2, 2019, the House Ways and Means Committee approved The Setting Every Community Up for Retirement Enhancement Act of 2019 (the “SECURE Act”) (a copy of which is attached as Exhibit B). Among other changes, the legislation would make the following changes to retirement plan distribution rules:

- **Post-Death MRDs.** The legislation modifies the minimum required distribution (“MRD”) rules with respect to defined contribution plan and IRA balances upon the death of the account owner. Under the legislation, distributions to individuals other than the surviving spouse of the employee (or IRA owner), disabled or chronically ill individuals, individuals who are not more than 10 years younger than the employee (or IRA owner), or child of the employee (or IRA owner) who has not reached the age of majority are generally required to be distributed by the end of the tenth calendar year following the year of the employee or IRA owner’s death. Prior iterations of this and other pieces of legislation also provide for a suspension of the MRD requirements for “small” accounts – where the amounts held by an individual participant do not exceed a threshold of $50,000 or $100,000 (depending upon the legislation). Thus, it is likely that there will be modifications to the MRD rules if any comprehensive retirement legislation is passed within this Congress.

- **Change in Required Beginning Date.** The legislation increases the age at which MRDs must begin from 70-1/2 to 72.

- **Childbirth or Adoption Withdrawals.** The legislation permits individuals to take penalty free-withdrawals of up to $5,000 from their defined contribution plans and IRAs for birth or adoption expenses for up to one year following childbirth or legal adoption.

III. **Missing and Lost Participants.** There have been requests from multiple trade associations requesting guidance from the Internal Revenue Service and Department of Labor pertaining to issues arising from missing and lost participants (See Exhibit C). Those requests include:

- Encouragement that the Department extend Field Assistance Bulletin 2014-01 to searches for missing participants in nonterminating plans and defined benefit plans, provided the Department frames these steps as recommendations and allows fiduciaries the discretion to select from among them.

- Recommendation that the Department articulate additional examples of compliance steps (in addition to extending FAB 2014-01) that:
  - fiduciaries can consider in fulfilling their duties with respect to missing participants.
  - provide examples of compliance steps related to unresponsive participants.
  - provide guidance that supports, and provides fiduciary protection for, additional distribution options, particularly in the defined contribution plan context.
  - provide some fiduciary protection (and monitoring guidance) for plan administrators that rely upon third parties to conduct missing participant search activities.
• Encouragement that the Department provide additional but separate guidance—i.e., separate from this missing and unresponsive participant guidance—on the related issue of uncashed checks and returned electronic file transfer payments.
Notice 2019-18

Offering a Lump-Sum Payment Option to Retirees Currently Receiving Annuity Payments under a Defined Benefit Plan

I. PURPOSE

This notice is to inform taxpayers that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) no longer intend to amend the required minimum distribution regulations under § 401(a)(9) of the Internal Revenue Code (Code) to address the practice of offering retirees and beneficiaries who are currently receiving annuity payments under a defined benefit plan a temporary option to elect a lump-sum payment in lieu of future annuity payments.

II. BACKGROUND

A. Section 401(a)(9) and Required Minimum Distributions

Section 401(a)(9) prescribes required minimum distribution rules for a qualified plan under § 401(a). In general, under these rules, distribution of each employee’s entire interest must begin by the required beginning date. The required beginning date generally is April 1 of the calendar year following the later of (1) the calendar year in which the employee attains age 70½, or (2) the calendar year in which the employee retires. However, the ability to delay distribution until the calendar year in which an employee retires does not apply in the case of a 5-percent owner (as defined in § 416).

If the employee’s entire interest is not distributed by the required beginning date, § 401(a)(9)(A) provides that the entire interest must be distributed, beginning not later than the required beginning date, in accordance with regulations, over the life of the employee or lives of the employee and a designated beneficiary (or a period not extending beyond the life expectancy of the employee or the life expectancy of the employee and a designated beneficiary). Section 401(a)(9)(B) prescribes required minimum distribution rules that apply after the death of the employee.

Section 1.401(a)(9)-6, A-1(a) provides that, absent an applicable exception, in order to satisfy § 401(a)(9), distributions of an employee’s entire interest under a defined benefit plan must be paid in the form of periodic annuity payments for the employee’s or beneficiary’s life (or the joint lives of the employee and beneficiary) over a period certain that is no longer than a period permitted under § 1.401(a)(9)-6, A-3 or A-10, as applicable (which is approximately equal to the joint and last survivor life expectancy of the employee and an assumed beneficiary who is 10 years younger than the employee, with a longer period if the sole beneficiary is the employee’s spouse and the spouse is more than 10 years younger). The regulations prohibit any change in the
period or form of the distribution after it has commenced, except in accordance with § 1.401(a)(9)-6, A-13. If certain conditions are met, § 1.401(a)(9)-6, A-13(a) permits changes to the payment period after payments have commenced in association with an annuity payment increase described in § 1.401(a)(9)-6, A-14.

Section 1.401(a)(9)-6, A-1(a) also provides that periodic annuity payments must be nonincreasing or may increase only as otherwise provided, such as permitted increases described in § 1.401(a)(9)-6, A-14. Section 1.401(a)(9)-6, A-14(a)(4) permits annuity payments to increase “[t]o pay increased benefits that result from a plan amendment.” In addition, § 1.401(a)(9)-6, A-14(a)(5) permits annuity payments to increase “to allow a beneficiary to convert the survivor portion of a joint and survivor annuity into a lump sum upon the employee’s death,” but no similar rule is provided with respect to conversion of an employee’s annuity benefit during an employee’s life or conversion of a beneficiary’s annuity other than upon the employee’s death.

B. Notice 2015-49 and Participant Elections to Convert Annuities to Immediate Lump Sum Payments

A number of sponsors of defined benefit plans have amended their plans to provide a limited period during which certain retirees who are currently receiving lifetime annuity payments from those plans may elect to convert their annuities into lump sums that are payable immediately. These arrangements are sometimes referred to as retiree lump-sum windows. Although the treatment under § 401(a)(9) of such a right to convert a current annuity into an immediate lump sum payment has not been addressed explicitly in regulations or other generally applicable published guidance, the addition of such a right to a plan has been treated in some instances as an increase in benefits that is described in § 1.401(a)(9)-6, A-14(a)(4) (with the result that the annuity payment period would be permitted to change under § 1.401(a)(9)-6, A-13(a)).

On July 9, 2015, the IRS issued Notice 2015-49, 2015-30 I.R.B. 79, which informed taxpayers that the Treasury Department and the IRS intended to propose amendments to the required minimum distribution regulations under § 401(a)(9) to address the use of lump-sum payments to replace ongoing annuity payments under a qualified defined benefit plan. These amendments to the regulations would have provided that a lump-sum or other accelerated payment made pursuant to a plan amendment to a qualified defined benefit plan that gives a participant currently receiving annuity payments the right to convert those annuity payments into an immediate lump-sum or other accelerated payment is not treated as a payment of increased benefits described in § 1.401(a)(9)-6, A-14(a)(4). Consequently, a retiree lump-sum window would not have been eligible for the § 1.401(a)(9)-6, A-13(a) exception under which an annuity payment period may be changed in association with an annuity payment increase described in § 1.401(a)(9)-6, A-14. Notice 2015-49 explained that the
§ 401(a)(9) provisions and related regulations regarding pension plan annuities were crafted to provide an administrable way to ensure that a distribution of the employee’s benefit will not be unduly tax-deferred. For example, a pension plan may not permit an employee who has passed the required beginning date to defer distribution of the bulk of the employee’s benefit (and thus defer the tax) until later in life, while taking relatively small periodic benefits in the interim. In addition, under the regulations, a defined benefit plan may not permit the annuity payment period to be changed or the annuity payment to be increased, except in a narrow set of circumstances specified in the regulations, such as in the case of retirement, death, or plan termination. Notice 2015-49 further explained that if a participant has the ability to accelerate annuity distributions at any time, then the actuarial cost associated with that acceleration right would result in smaller initial benefits, which would contravene the purpose of § 401(a)(9).

Notice 2015-49 provided that the Treasury Department and the IRS intended that these amendments to the regulations would apply as of July 9, 2015, except in the case of a retiree lump-sum window with respect to which specified concrete steps (adoption, specific authorization to adopt, collective bargaining, or written communication furnished to participants) with respect to the plan amendment had been taken, or a determination letter or letter ruling had been received, before that date. In addition, Notice 2015-49 provided that the IRS would not express an opinion in private letter rulings or determination letters as to the federal tax consequences of a retiree lump-sum window.

III. RETRACTION OF INTENT TO PROPOSE REGULATIONS UNDER § 401(a)(9)

The Treasury Department and the IRS no longer intend to propose the amendments to the regulations under § 401(a)(9) that were described in Notice 2015-49. However, the Treasury Department and the IRS will continue to study the issue of retiree lump-sum windows. Until further guidance is issued, the IRS will not assert that a plan amendment providing for a retiree lump-sum window program causes the plan to violate § 401(a)(9), but will continue to evaluate whether the plan, as amended, satisfies the requirements of §§ 401(a)(4), 411, 415, 417, 436, and other sections of the Code. During this period, the IRS will not issue private letter rulings with regard to retiree lump-sum windows. However, if a taxpayer is eligible to apply for and receive a determination letter, the IRS will no longer include a caveat expressing no opinion regarding the tax consequences of such a window in the letter.

IV. EFFECT ON OTHER DOCUMENTS

Notice 2015-49 is superseded.

V. DRAFTING INFORMATION
The principal author of this notice is Thomas C. Morgan of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the IRS participated in development of this guidance. For further information regarding this notice, please contact Mr. Morgan at (202) 317-6700 (not a toll-free number).
AMENDMENT IN THE NATURE OF A SUBSTITUTE
OFFERED BY MR. NEAL OF MASSACHUSETTS

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE, ETC.

2 (a) SHORT TITLE.—This Act may be cited as the "Setting Every Community Up for Retirement Enhancement Act of 2019".

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

Sec. 1. Short title, etc.

TITLE I—EXPANDING AND PRESERVING RETIREMENT SAVINGS

Sec. 101. Multiple employer plans; pooled employer plans.
Sec. 102. Increase in 10 percent cap for automatic enrollment safe harbor after 1st plan year.
Sec. 103. Rules relating to election of safe harbor 401(k) status.
Sec. 104. Increase in credit limitation for small employer pension plan startup costs.
Sec. 105. Small employer automatic enrollment credit.
Sec. 106. Certain taxable non-tuition fellowship and stipend payments treated as compensation for IRA purposes.
Sec. 107. Repeal of maximum age for traditional IRA contributions.
Sec. 108. Qualified employer plans prohibited from making loans through credit cards and other similar arrangements.
Sec. 109. Portability of lifetime income options.
Sec. 110. Treatment of custodial accounts on termination of section 403(b) plans.
Sec. 111. Clarification of retirement income account rules relating to church-controlled organizations.
Sec. 112. Qualified cash or deferred arrangements must allow long-term employees working more than 500 but less than 1,000 hours per year to participate.
Sec. 113. Penalty-free withdrawals from retirement plans for individuals in case of birth of child or adoption.
Sec. 114. Increase in age for required beginning date for mandatory distributions.
Sec. 115. Special rules for minimum funding standards for community newspaper plans.
Sec. 116. Treating excluded difficulty of care payments as compensation for determining retirement contribution limitations.

TITLE II—ADMINISTRATIVE IMPROVEMENTS

Sec. 201. Plan adopted by filing due date for year may be treated as in effect as of close of year.
Sec. 203. Disclosure regarding lifetime income.
Sec. 204. Fiduciary safe harbor for selection of lifetime income provider.
Sec. 205. Modification of nondiscrimination rules to protect older, longer service participants.
Sec. 206. Modification of PBGC premiums for CSEC plans.

TITLE III—OTHER BENEFITS

Sec. 301. Benefits provided to volunteer firefighters and emergency medical responders.
Sec. 302. Expansion of section 529 plans.

TITLE IV—REVENUE PROVISIONS

Sec. 401. Modification of required distribution rules for designated beneficiaries.
Sec. 402. Increase in penalty for failure to file.
Sec. 403. Increased penalties for failure to file retirement plan returns.
Sec. 404. Increase information sharing to administer excise taxes.

1 TITLE I—EXPANDING AND PRESERVING RETIREMENT SAVINGS

4 SEC. 101. MULTIPLE EMPLOYER PLANS; POOLED EMPLOYER PLANS.

6 (a) Qualification Requirements.—

7 (1) In general.—Section 413 of the Internal Code of 1986 is amended by adding at the end the following new subsection:

“(e) Application of Qualification Requirements for Certain Multiple Employer Plans With

Poole Plan Providers.—

g:\VHLC\040119\040119.004.xml (7229072) April 1, 2019 (9:21 a.m.)
“(1) IN GENERAL.—Except as provided in paragraph (2), if a defined contribution plan to which subsection (c) applies—

“(A) is maintained by employers which have a common interest other than having adopted the plan, or

“(B) in the case of a plan not described in subparagraph (A), has a pooled plan provider, then the plan shall not be treated as failing to meet the requirements under this title applicable to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408 (including by reason of subsection (c) thereof), whichever is applicable, merely because one or more employers of employees covered by the plan fail to take such actions as are required of such employers for the plan to meet such requirements.

“(2) LIMITATIONS.—

“(A) IN GENERAL.—Paragraph (1) shall not apply to any plan unless the terms of the plan provide that in the case of any employer in the plan failing to take the actions described in paragraph (1)—

“(i) the assets of the plan attributable to employees of such employer (or bene-
ficiaries of such employees) will be trans-
ferred to a plan maintained only by such
employer (or its successor), to an eligible
retirement plan as defined in section
402(c)(8)(B) for each individual whose ac-
count is transferred, or to any other ar-
range ment that the Secretary determines is
appropriate, unless the Secretary deter-
mines it is in the best interests of the em-
ployees of such employer (and the bene-
ficiaries of such employees) to retain the
assets in the plan, and

“(ii) such employer (and not the plan
with respect to which the failure occurred
or any other employer in such plan) shall,
except to the extent provided by the Sec-
retary, be liable for any liabilities with re-
spect to such plan attributable to employ-
ees of such employer (or beneficiaries of
such employees).

“(B) Failures by pooled plan pro-
viders.—If the pooled plan provider of a plan
described in paragraph (1)(B) does not perform
substantially all of the administrative duties
which are required of the provider under para-
graph (3)(A)(i) for any plan year, the Secretary may provide that the determination as to whether the plan meets the requirements under this title applicable to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408 (including by reason of subsection (c) thereof), whichever is applicable, shall be made in the same manner as would be made without regard to paragraph (1).

“(3) POOLED PLAN PROVIDER.—

“(A) IN GENERAL.—For purposes of this subsection, the term ‘pooled plan provider’ means, with respect to any plan, a person who—

“(i) is designated by the terms of the plan as a named fiduciary (within the meaning of section 402(a)(2) of the Employee Retirement Income Security Act of 1974), as the plan administrator, and as the person responsible to perform all administrative duties (including conducting proper testing with respect to the plan and the employees of each employer in the
plan) which are reasonably necessary to ensure that—

“(I) the plan meets any requirement applicable under the Employee Retirement Income Security Act of 1974 or this title to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408 (including by reason of subsection (c) thereof), whichever is applicable, and

“(II) each employer in the plan takes such actions as the Secretary or such person determines are necessary for the plan to meet the requirements described in subclause (I), including providing to such person any disclosures or other information which the Secretary may require or which such person otherwise determines are necessary to administer the plan or to allow the plan to meet such requirements,

“(ii) registers as a pooled plan provider with the Secretary, and provides such
other information to the Secretary as the Secretary may require, before beginning operations as a pooled plan provider,

“(iii) acknowledges in writing that such person is a named fiduciary (within the meaning of section 402(a)(2) of the Employee Retirement Income Security Act of 1974), and the plan administrator, with respect to the plan, and

“(iv) is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the plan are bonded in accordance with section 412 of the Employee Retirement Income Security Act of 1974.

“(B) AUDITS, EXAMINATIONS AND INVESTIGATIONS.—The Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of this subsection.

“(C) AGGREGATION RULES.—For purposes of this paragraph, in determining whether a person meets the requirements of this paragraph to be a pooled plan provider with respect to any plan, all persons who perform services
for the plan and who are treated as a single employer under subsection (b), (e), (m), or (o) of section 414 shall be treated as one person.

“(D) TREATMENT OF EMPLOYERS AS PLAN SPONSORS.—Except with respect to the administrative duties of the pooled plan provider described in subparagraph (A)(i), each employer in a plan which has a pooled plan provider shall be treated as the plan sponsor with respect to the portion of the plan attributable to employees of such employer (or beneficiaries of such employees).

“(4) GUIDANCE.—

“(A) IN GENERAL.—The Secretary shall issue such guidance as the Secretary determines appropriate to carry out this subsection, including guidance—

“(i) to identify the administrative duties and other actions required to be performed by a pooled plan provider under this subsection,

“(ii) which describes the procedures to be taken to terminate a plan which fails to meet the requirements to be a plan described in paragraph (1), including the
proper treatment of, and actions needed to
be taken by, any employer in the plan and
the assets and liabilities of the plan attrib-
utable to employees of such employer (or
beneficiaries of such employees), and

“(iii) identifying appropriate cases to
which the rules of paragraph (2)(A) will
apply to employers in the plan failing to
take the actions described in paragraph
(1).

The Secretary shall take into account under
clause (iii) whether the failure of an employer
or pooled plan provider to provide any disclo-
sures or other information, or to take any other
action, necessary to administer a plan or to
allow a plan to meet requirements applicable to
the plan under section 401(a) or 408, whichever
is applicable, has continued over a period of
time that demonstrates a lack of commitment
to compliance.

“(B) GOOD FAITH COMPLIANCE WITH LAW
BEFORE GUIDANCE.—An employer or pooled
plan provider shall not be treated as failing to
meet a requirement of guidance issued by the
Secretary under this paragraph if, before the
issuance of such guidance, the employer or
pooled plan provider complies in good faith with
a reasonable interpretation of the provisions of
this subsection to which such guidance relates.

“(5) MODEL PLAN.—The Secretary shall pub-
lish model plan language which meets the require-
ments of this subsection and of paragraphs (43) and
(44) of section 3 of the Employee Retirement In-
come Security Act of 1974 and which may be adopt-
ed in order for a plan to be treated as a plan de-
scribed in paragraph (1)(B).”.

(2) CONFORMING AMENDMENT.—Section
413(c)(2) of such Code is amended by striking “sec-
tion 401(a)” and inserting “sections 401(a) and
408(c)”.

(3) TECHNICAL AMENDMENT.—Section 408(c)
of such Code is amended by inserting after para-
graph (2) the following new paragraph:

“(3) There is a separate accounting for any in-
terest of an employee or member (or spouse of an
employee or member) in a Roth IRA.”.

(b) NO COMMON INTEREST REQUIRED FOR POOLED
EMPLOYER PLANS.—Section 3(2) of the Employee Retire-
is amended by adding at the end the following:
“(C) A pooled employer plan shall be treated as—

“(i) a single employee pension benefit plan or single pension plan; and

“(ii) a plan to which section 210(a) applies.”.

(c) POOLED EMPLOYER PLAN AND PROVIDER DEFINED.—

(1) IN GENERAL.—Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) is amended by adding at the end the following:

“(43) POOLED EMPLOYER PLAN.—

“(A) IN GENERAL.—The term ‘pooled employer plan’ means a plan—

“(i) which is an individual account plan established or maintained for the purpose of providing benefits to the employees of 2 or more employers;

“(ii) which is a plan described in section 401(a) of the Internal Revenue Code of 1986 which includes a trust exempt from tax under section 501(a) of such Code or a plan that consists of individual retirement accounts described in section
408 of such Code (including by reason of subsection (e) thereof); and

“(iii) the terms of which meet the requirements of subparagraph (B).

Such term shall not include a plan maintained by employers which have a common interest other than having adopted the plan.

“(B) REQUIREMENTS FOR PLAN TERMS.—

The requirements of this subparagraph are met with respect to any plan if the terms of the plan—

“(i) designate a pooled plan provider and provide that the pooled plan provider is a named fiduciary of the plan;

“(ii) designate one or more trustees meeting the requirements of section 408(a)(2) of the Internal Revenue Code of 1986 (other than an employer in the plan) to be responsible for collecting contributions to, and holding the assets of, the plan and require such trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic;
“(iii) provide that each employer in
the plan retains fiduciary responsibility
for—

“(I) the selection and monitoring
in accordance with section 404(a) of
the person designated as the pooled
plan provider and any other person
who, in addition to the pooled plan
provider, is designated as a named fi-
duciary of the plan; and

“(II) to the extent not otherwise
delegated to another fiduciary by the
pooled plan provider and subject to
the provisions of section 404(c), the
investment and management of the
portion of the plan’s assets attrib-
utable to the employees of the em-
ployer (or beneficiaries of such em-
ployees);

“(iv) provide that employers in the
plan, and participants and beneficiaries,
are not subject to unreasonable restric-
tions, fees, or penalties with regard to
ceasing participation, receipt of distribu-
tions, or otherwise transferring assets of
the plan in accordance with section 208 or paragraph (44)(C)(i)(II);

“(v) require—

“(I) the pooled plan provider to provide to employers in the plan any disclosures or other information which the Secretary may require, including any disclosures or other information to facilitate the selection or any monitoring of the pooled plan provider by employers in the plan; and

“(II) each employer in the plan to take such actions as the Secretary or the pooled plan provider determines are necessary to administer the plan or for the plan to meet any requirement applicable under this Act or the Internal Revenue Code of 1986 to a plan described in section 401(a) of such Code or to a plan that consists of individual retirement accounts described in section 408 of such Code (including by reason of subsection (e) thereof), whichever is applicable, including providing any disclosures or
other information which the Secretary may require or which the pooled plan provider otherwise determines are necessary to administer the plan or to allow the plan to meet such requirements; and

“(vi) provide that any disclosure or other information required to be provided under clause (v) may be provided in electronic form and will be designed to ensure only reasonable costs are imposed on pooled plan providers and employers in the plan.

“(C) EXCEPTIONS.—The term ‘pooled employer plan’ does not include—

“(i) a multiemployer plan; or

“(ii) a plan established before the date of the enactment of the Setting Every Community Up for Retirement Enhancement Act of 2019 unless the plan administrator elects that the plan will be treated as a pooled employer plan and the plan meets the requirements of this title applicable to a pooled employer plan established on or after such date.
“(D) TREATMENT OF EMPLOYERS AS PLAN SPONSORS.—Except with respect to the administrative duties of the pooled plan provider described in paragraph (44)(A)(i), each employer in a pooled employer plan shall be treated as the plan sponsor with respect to the portion of the plan attributable to employees of such employer (or beneficiaries of such employees).

“(44) POOLED PLAN PROVIDER.—

“(A) IN GENERAL.—The term ‘pooled plan provider’ means a person who—

“(i) is designated by the terms of a pooled employer plan as a named fiduciary, as the plan administrator, and as the person responsible for the performance of all administrative duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan) which are reasonably necessary to ensure that—

“(I) the plan meets any requirement applicable under this Act or the Internal Revenue Code of 1986 to a plan described in section 401(a) of such Code or to a plan that consists
of individual retirement accounts described in section 408 of such Code (including by reason of subsection (c) thereof), whichever is applicable; and

“(II) each employer in the plan takes such actions as the Secretary or pooled plan provider determines are necessary for the plan to meet the requirements described in subclause (I), including providing the disclosures and information described in paragraph (43)(B)(v)(II);

“(ii) registers as a pooled plan provider with the Secretary, and provides to the Secretary such other information as the Secretary may require, before beginning operations as a pooled plan provider;

“(iii) acknowledges in writing that such person is a named fiduciary, and the plan administrator, with respect to the pooled employer plan; and

“(iv) is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the pooled employer plan are bonded in accordance with section 412.
“(B) AUDITS, EXAMINATIONS AND INVESTIGATIONS.—The Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of this paragraph and paragraph (43).

“(C) GUIDANCE.—The Secretary shall issue such guidance as the Secretary determines appropriate to carry out this paragraph and paragraph (43), including guidance—

“(i) to identify the administrative duties and other actions required to be performed by a pooled plan provider under either such paragraph; and

“(ii) which requires in appropriate cases that if an employer in the plan fails to take the actions required under subparagraph (A)(i)(II)—

“(I) the assets of the plan attributable to employees of such employer (or beneficiaries of such employees) are transferred to a plan maintained only by such employer (or its successor), to an eligible retirement plan as defined in section 402(c)(8)(B) of
the Internal Revenue Code of 1986
for each individual whose account is
transferred, or to any other arrange-
ment that the Secretary determines is
appropriate in such guidance; and

“(II) such employer (and not the
plan with respect to which the failure
occurred or any other employer in
such plan) shall, except to the extent
provided in such guidance, be liable
for any liabilities with respect to such
plan attributable to employees of such
employer (or beneficiaries of such em-
ployees).

The Secretary shall take into account
under clause (ii) whether the failure of an
employer or pooled plan provider to provide
any disclosures or other information, or to
take any other action, necessary to admin-
ister a plan or to allow a plan to meet re-
quirements described in subparagraph
(A)(i)(II) has continued over a period of
time that demonstrates a lack of commit-
ment to compliance. The Secretary may
waive the requirements of subclause (ii)(I)
in appropriate circumstances if the Secretary determines it is in the best interests of the employees of the employer referred to in such clause (and the beneficiaries of such employees) to retain the assets in the plan with respect to which the employer’s failure occurred.

“(D) Good faith compliance with law before guidance.—An employer or pooled plan provider shall not be treated as failing to meet a requirement of guidance issued by the Secretary under subparagraph (C) if, before the issuance of such guidance, the employer or pooled plan provider complies in good faith with a reasonable interpretation of the provisions of this paragraph, or paragraph (43), to which such guidance relates.

“(E) Aggregation rules.—For purposes of this paragraph, in determining whether a person meets the requirements of this paragraph to be a pooled plan provider with respect to any plan, all persons who perform services for the plan and who are treated as a single employer under subsection (b), (c), (m), or (o)
of section 414 of the Internal Revenue Code of 1986 shall be treated as one person.”.

(2) Bonding requirements for pooled employer plans.—The last sentence of section 412(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1112(a)) is amended by inserting “or in the case of a pooled employer plan (as defined in section 3(43))” after “section 407(d)(1))”.

(3) Conforming and technical amendments.—Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) is amended—

(A) in paragraph (16)(B)—

(i) by striking “or” at the end of clause (ii); and

(ii) by striking the period at the end and inserting “, or (iv) in the case of a pooled employer plan, the pooled plan provider.”; and

(B) by striking the second paragraph (41).

(d) Pooled employer and multiple employer plan reporting.—

(1) Additional information.—Section 103 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1023) is amended—
(A) in subsection (a)(1)(B), by striking “applicable subsections (d), (e), and (f)” and inserting “applicable subsections (d), (e), (f), and (g)” ; and

(B) by amending subsection (g) to read as follows:

“(g) ADDITIONAL INFORMATION WITH RESPECT TO POOLED EMPLOYER AND MULTIPLE EMPLOYER PLANS.—An annual report under this section for a plan year shall include—

“(1) with respect to any plan to which section 210(a) applies (including a pooled employer plan), a list of employers in the plan and a good faith estimate of the percentage of total contributions made by such employers during the plan year and the aggregate account balances attributable to each employer in the plan (determined as the sum of the account balances of the employees of such employer (and the beneficiaries of such employees)); and

“(2) with respect to a pooled employer plan, the identifying information for the person designated under the terms of the plan as the pooled plan provider.”.

(2) SIMPLIFIED ANNUAL REPORTS.—Section 104(a) of the Employee Retirement Income Security
Act of 1974 (29 U.S.C. 1024(a)) is amended by striking paragraph (2)(A) and inserting the following:

“(2)(A) With respect to annual reports required to be filed with the Secretary under this part, the Secretary may by regulation prescribe simplified annual reports for any pension plan that—

“(i) covers fewer than 100 participants; or

“(ii) is a plan described in section 210(a) that covers fewer than 1,000 participants, but only if no single employer in the plan has 100 or more participants covered by the plan.”.

(e) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to plan years beginning after December 31, 2020.

(2) RULE OF CONSTRUCTION.—Nothing in the amendments made by subsection (a) shall be construed as limiting the authority of the Secretary of the Treasury or the Secretary’s delegate (determined without regard to such amendment) to provide for the proper treatment of a failure to meet any requirement applicable under the Internal Revenue Code of 1986 with respect to one employer (and its employees) in a multiple employer plan.
SEC. 102. INCREASE IN 10 PERCENT CAP FOR AUTOMATIC ENROLLMENT SAFE HARBOR AFTER 1ST PLAN YEAR.

(a) IN GENERAL.—Section 401(k)(13)(C)(iii) of the Internal Revenue Code of 1986 is amended by striking “does not exceed 10 percent” and inserting “does not exceed 15 percent (10 percent during the period described in subclause (I))”.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2019.

SEC. 103. RULES RELATING TO ELECTION OF SAFE HARBOR 401(k) STATUS.

(a) LIMITATION OF ANNUAL SAFE HARBOR NOTICE TO MATCHING CONTRIBUTION PLANS.—

(1) IN GENERAL.—Subparagraph (A) of section 401(k)(12) of the Internal Revenue Code of 1986 is amended by striking “if such arrangement” and all that follows and inserting “if such arrangement—

“(i) meets the contribution requirements of subparagraph (B) and the notice requirements of subparagraph (D), or

“(ii) meets the contribution requirements of subparagraph (C).”.

(2) AUTOMATIC CONTRIBUTION ARRANGE-
such Code is amended by striking “means” and all that follows and inserting “means a cash or deferred arrangement—

“(A) which is described in subparagraph (D)(i)(I) and meets the applicable requirements of subparagraphs (C) through (E), or

“(B) which is described in subparagraph (D)(i)(II) and meets the applicable requirements of subparagraphs (C) and (D).”.

(b) NONELECTIVE CONTRIBUTIONS.—Section 401(k)(12) of the Internal Revenue Code of 1986 is amended by redesignating subparagraph (F) as subparagraph (G), and by inserting after subparagraph (E) the following new subparagraph:

“(F) TIMING OF PLAN AMENDMENT FOR EMPLOYER MAKING NONELECTIVE CONTRIBUTIONS.—

“(i) IN GENERAL.—Except as provided in clause (ii), a plan may be amended after the beginning of a plan year to provide that the requirements of subparagraph (C) shall apply to the arrangement for the plan year, but only if the amendment is adopted—
“(I) at any time before the 30th day before the close of the plan year, or
“(II) at any time before the last day under paragraph (8)(A) for distributing excess contributions for the plan year.
“(ii) Exception where plan provided for matching contributions.—Clause (i) shall not apply to any plan year if the plan provided at any time during the plan year that the requirements of subparagraph (B) or paragraph (13)(D)(i)(I) applied to the plan year.
“(iii) 4-percent contribution requirement.—Clause (i)(II) shall not apply to an arrangement unless the amount of the contributions described in subparagraph (C) which the employer is required to make under the arrangement for the plan year with respect to any employee is an amount equal to at least 4 percent of the employee’s compensation.”.
(c) Automatic Contribution Arrangements.—

Section 401(k)(13) of the Internal Revenue Code of 1986 is amended by adding at the end the following:

“(F) Timing of plan amendment for employer making nonelective contributions.—

“(i) In general.—Except as provided in clause (ii), a plan may be amended after the beginning of a plan year to provide that the requirements of subparagraph (D)(i)(II) shall apply to the arrangement for the plan year, but only if the amendment is adopted—

“(I) at any time before the 30th day before the close of the plan year, or

“(II) at any time before the last day under paragraph (8)(A) for distributing excess contributions for the plan year.

“(ii) Exception where plan provided for matching contributions.—

Clause (i) shall not apply to any plan year if the plan provided at any time during the plan year that the requirements of sub-
paragraph (D)(i)(I) or paragraph (12)(B) applied to the plan year.

“(iii) 4-PERCENT CONTRIBUTION REQUIREMENT.—Clause (i)(II) shall not apply to an arrangement unless the amount of the contributions described in subparagraph (D)(i)(II) which the employer is required to make under the arrangement for the plan year with respect to any employee is an amount equal to at least 4 percent of the employee’s compensation.”.

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2019.

SEC. 104. INCREASE IN CREDIT LIMITATION FOR SMALL EMPLOYER PENSION PLAN STARTUP COSTS.

(a) IN GENERAL.—Paragraph (1) of section 45E(b) of the Internal Revenue Code of 1986 is amended to read as follows:

“(1) for the first credit year and each of the 2 taxable years immediately following the first credit year, the greater of—

“(A) $500, or

“(B) the lesser of—
“(i) $250 for each employee of the eligible employer who is not a highly compensated employee (as defined in section 414(q)) and who is eligible to participate in the eligible employer plan maintained by the eligible employer, or
“(ii) $5,000, and”.

(b) Effective Date.—The amendment made by this section shall apply to taxable years beginning after December 31, 2019.

SEC. 105. SMALL EMPLOYER AUTOMATIC ENROLLMENT CREDIT.

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

“SEC. 45T. AUTO-ENROLLMENT OPTION FOR RETIREMENT SAVINGS OPTIONS PROVIDED BY SMALL EMPLOYERS.

“(a) In General.—For purposes of section 38, in the case of an eligible employer, the retirement auto-enrollment credit determined under this section for any taxable year is an amount equal to—
“(1) $500 for any taxable year occurring during the credit period, and
“(2) zero for any other taxable year.

“(b) CREDIT PERIOD.—For purposes of subsection (a)—

“(1) IN GENERAL.—The credit period with respect to any eligible employer is the 3-taxable-year period beginning with the first taxable year for which the employer includes an eligible automatic contribution arrangement (as defined in section 414(w)(3)) in a qualified employer plan (as defined in section 4972(d)) sponsored by the employer.

“(2) MAINTENANCE OF ARRANGEMENT.—No taxable year with respect to an employer shall be treated as occurring within the credit period unless the arrangement described in paragraph (1) is included in the plan for such year.

“(c) ELIGIBLE EMPLOYER.—For purposes of this section, the term ‘eligible employer’ has the meaning given such term in section 408(p)(2)(C)(i).”.

(b) CREDIT TO BE PART OF GENERAL BUSINESS CREDIT.—Subsection (b) of section 38 of the Internal Revenue Code of 1986 is amended by striking “plus” at the end of paragraph (31), by striking the period at the end of paragraph (32) and inserting “, plus”, and by adding at the end the following new paragraph:
“(33) in the case of an eligible employer (as defined in section 45T(c)), the retirement auto-enrollment credit determined under section 45T(a).”.

c) CLERICAL AMENDMENT.—The table of sections for subpart D of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1986 is amended by inserting after the item relating to section 45S the following new item:

“Sec. 45T. Auto-enrollment option for retirement savings options provided by small employers.”.

d) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2019.

SEC. 106. CERTAIN TAXABLE NON-TUITION FELLOWSHIP AND STIPEND PAYMENTS TREATED AS COMPENSATION FOR IRA PURPOSES.

(a) IN GENERAL.—Paragraph (1) of section 219(f) of the Internal Revenue Code of 1986 is amended by adding at the end the following: “The term ‘compensation’ shall include any amount which is included in the individual’s gross income and paid to the individual to aid the individual in the pursuit of graduate or postdoctoral study.”.

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years beginning after December 31, 2019.
SEC. 107. REPEAL OF MAXIMUM AGE FOR TRADITIONAL IRA CONTRIBUTIONS.

(a) In General.—Paragraph (1) of section 219(d) of the Internal Revenue Code of 1986 is repealed.

(b) Conforming Amendment.—Subsection (e) of section 408A of the Internal Revenue Code of 1986 is amended by striking paragraph (4) and by redesignating paragraphs (5), (6), and (7) as paragraphs (4), (5), and (6), respectively.

(e) Effective Date.—The amendments made by this section shall apply to contributions made for taxable years beginning after December 31, 2019.

SEC. 108. QUALIFIED EMPLOYER PLANS PROHIBITED FROM MAKING LOANS THROUGH CREDIT CARDS AND OTHER SIMILAR ARRANGEMENTS.

(a) In General.—Paragraph (2) of section 72(p) of the Internal Revenue Code of 1986 is amended by redesignating subparagraph (D) as subparagraph (E) and by inserting after subparagraph (C) the following new subparagraph:

“(D) Prohibition of loans through credit cards and other similar arrangements.—Subparagraph (A) shall not apply to any loan which is made through the use of any credit card or any other similar arrangement.”.
(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply to loans made after the date of the enactment of this Act.

SEC. 109. PORTABILITY OF LIFETIME INCOME OPTIONS.

(a) IN GENERAL.—Subsection (a) of section 401 of the Internal Revenue Code of 1986 is amended by inserting after paragraph (37) the following new paragraph:

“(38) PORTABILITY OF LIFETIME INCOME.—

“(A) IN GENERAL.—Except as may be otherwise provided by regulations, a trust forming part of a defined contribution plan shall not be treated as failing to constitute a qualified trust under this section solely by reason of allowing—

“(i) qualified distributions of a lifetime income investment, or

“(ii) distributions of a lifetime income investment in the form of a qualified plan distribution annuity contract, on or after the date that is 90 days prior to the date on which such lifetime income investment is no longer authorized to be held as an investment option under the plan.

“(B) DEFINITIONS.—For purposes of this subsection—
“(i) the term ‘qualified distribution’ means a direct trustee-to-trustee transfer described in paragraph (31)(A) to an eligible retirement plan (as defined in section 402(c)(8)(B)),

“(ii) the term ‘lifetime income investment’ means an investment option which is designed to provide an employee with election rights—

“(I) which are not uniformly available with respect to other investment options under the plan, and

“(II) which are to a lifetime income feature available through a contract or other arrangement offered under the plan (or under another eligible retirement plan (as so defined), if paid by means of a direct trustee-to-trustee transfer described in paragraph (31)(A) to such other eligible retirement plan),

“(iii) the term ‘lifetime income feature’ means—

“(I) a feature which guarantees a minimum level of income annually (or
more frequently) for at least the remainder of the life of the employee or the joint lives of the employee and the employee’s designated beneficiary, or

“(II) an annuity payable on behalf of the employee under which payments are made in substantially equal periodic payments (not less frequently than annually) over the life of the employee or the joint lives of the employee and the employee’s designated beneficiary, and

“(iv) the term ‘qualified plan distribution annuity contract’ means an annuity contract purchased for a participant and distributed to the participant by a plan or contract described in subparagraph (B) of section 402(c)(8) (without regard to clauses (i) and (ii) thereof).”.

(b) CASH OR DEFERRED ARRANGEMENT.—

(1) IN GENERAL.—Clause (i) of section 401(k)(2)(B) of the Internal Revenue Code of 1986 is amended by striking “or” at the end of subclause (IV), by striking “and” at the end of subclause (V)
and inserting “or”, and by adding at the end the follow- 
ning new subclause:

“(VI) except as may be otherwise provided by regulations, with respect to amounts invested in a lifetime income investment (as defined in subsection (a)(38)(B)(ii)), the date that is 90 days prior to the date that such lifetime income investment may no longer be held as an investment option under the arrangement, and”.

(2) DISTRIBUTION REQUIREMENT.—Subpar- 
graph (B) of section 401(k)(2) of such Code, as amended by paragraph (1), is amended by striking “and” at the end of clause (i), by striking the semi- colon at the end of clause (ii) and inserting “, and”, and by adding at the end the following new clause:

“(iii) except as may be otherwise pro- 
vided by regulations, in the case of amounts described in clause (i)(VI), will be distributed only in the form of a qualified distribution (as defined in subsection (a)(38)(B)(i)) or a qualified plan distribu- 
tion annuity contract (as defined in sub-
section (a)(38)(B)(iv)),”.
(c) SECTION 403(b) PLANS.—

(1) Annuity Contracts.—Paragraph (11) of section 403(b) of the Internal Revenue Code of 1986 is amended by striking “or” at the end of subparagraph (B), by striking the period at the end of subparagraph (C) and inserting “, or”, and by inserting after subparagraph (C) the following new subparagraph:

“(D) except as may be otherwise provided by regulations, with respect to amounts invested in a lifetime income investment (as defined in section 401(a)(38)(B)(ii))—

“(i) on or after the date that is 90 days prior to the date that such lifetime income investment may no longer be held as an investment option under the contract, and

“(ii) in the form of a qualified distribution (as defined in section 401(a)(38)(B)(i)) or a qualified plan distribution annuity contract (as defined in section 401(a)(38)(B)(iv)).”.

(2) Custodial Accounts.—Subparagraph (A) of section 403(b)(7) of such Code is amended by striking “if—” and all that follows and inserting “if
the amounts are to be invested in regulated investment company stock to be held in that custodial account, and under the custodial account—

“(i) no such amounts may be paid or made available to any distributee (unless such amount is a distribution to which section 72(t)(2)(G) applies) before—

“(I) the employee dies,

“(II) the employee attains age 59½,

“(III) the employee has a severance from employment,

“(IV) the employee becomes disabled (within the meaning of section 72(m)(7)),

“(V) in the case of contributions made pursuant to a salary reduction agreement (within the meaning of section 3121(a)(5)(D)), the employee encounters financial hardship, or

“(VI) except as may be otherwise provided by regulations, with respect to amounts invested in a lifetime income investment (as defined in section 401(a)(38)(B)(ii)), the date that is 90
days prior to the date that such lifetime income investment may no longer be held as an investment option under the contract, and

“(ii) in the case of amounts described in clause (i)(VI), such amounts will be distributed only in the form of a qualified distribution (as defined in section 401(a)(38)(B)(i)) or a qualified plan distribution annuity contract (as defined in section 401(a)(38)(B)(iv)).”

(d) ELIGIBLE DEFERRED COMPENSATION PLANS.—

(1) IN GENERAL.—Subparagraph (A) of section 457(d)(1) of the Internal Revenue Code of 1986 is amended by striking “or” at the end of clause (ii), by inserting “or” at the end of clause (iii), and by adding after clause (iii) the following:

“(iv) except as may be otherwise provided by regulations, in the case of a plan maintained by an employer described in subsection (e)(1)(A), with respect to amounts invested in a lifetime income investment (as defined in section 401(a)(38)(B)(ii)), the date that is 90 days prior to the date that such lifetime
income investment may no longer be held as an investment option under the plan,”.

(2) DISTRIBUTION REQUIREMENT.—Paragraph (1) of section 457(d) of such Code is amended by striking “and” at the end of subparagraph (B), by striking the period at the end of subparagraph (C) and inserting “, and”, and by inserting after subparagraph (C) the following new subparagraph:

“(D) except as may be otherwise provided by regulations, in the case of amounts described in subparagraph (A)(iv), such amounts will be distributed only in the form of a qualified distribution (as defined in section 401(a)(38)(B)(i)) or a qualified plan distribution annuity contract (as defined in section 401(a)(38)(B)(iv)).”.

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2019.

SEC. 110. TREATMENT OF CUSTODIAL ACCOUNTS ON TERMINATION OF SECTION 403(b) PLANS.

Not later than six months after the date of enactment of this Act, the Secretary of the Treasury shall issue guidance to provide that, if an employer terminates the plan under which amounts are contributed to a custodial ac-
count under subparagraph (A) of section 403(b)(7), the plan administrator or custodian may distribute an individual custodial account in kind to a participant or beneficiary of the plan and the distributed custodial account shall be maintained by the custodian on a tax-deferred basis as a section 403(b)(7) custodial account, similar to the treatment of fully-paid individual annuity contracts under Revenue Ruling 2011–7, until amounts are actually paid to the participant or beneficiary. The guidance shall provide further (i) that the section 403(b)(7) status of the distributed custodial account is generally maintained if the custodial account thereafter adheres to the requirements of section 403(b) that are in effect at the time of the distribution of the account and (ii) that a custodial account would not be considered distributed to the participant or beneficiary if the employer has any material retained rights under the account (but the employer would not be treated as retaining material rights simply because the custodial account was originally opened under a group contract). Such guidance shall be retroactively effective for taxable years beginning after December 31, 2008.
SEC. 111. CLARIFICATION OF RETIREMENT INCOME ACCOUNT RULES RELATING TO CHURCH-CONTROLLED ORGANIZATIONS.

(a) In General.—Subparagraph (B) of section 403(b)(9) of the Internal Revenue Code of 1986 is amended by inserting “(including an employee described in section 414(e)(3)(B))” after “employee described in paragraph (1)”.

(b) Effective Date.—The amendment made by this section shall apply to years beginning before, on, or after the date of the enactment of this Act.

SEC. 112. QUALIFIED CASH OR DEFERRED ARRANGEMENTS MUST ALLOW LONG-TERM EMPLOYEES WORKING MORE THAN 500 BUT LESS THAN 1,000 HOURS PER YEAR TO PARTICIPATE.

(a) Participation Requirement.—

(1) In General.—Section 401(k)(2)(D) of the Internal Revenue Code of 1986 is amended to read as follows:

“(D) which does not require, as a condition of participation in the arrangement, that an employee complete a period of service with the employer (or employers) maintaining the plan extending beyond the close of the earlier of—
“(i) the period permitted under section 410(a)(1) (determined without regard to subparagraph (B)(i) thereof), or

“(ii) subject to the provisions of paragraph (15), the first period of 3 consecutive 12-month periods during each of which the employee has at least 500 hours of service.”.

(2) Special rules.—Section 401(k) of such Code is amended by adding at the end the following new paragraph:

“(15) Special rules for participation requirement for long-term, part-time workers.—For purposes of paragraph (2)(D)(ii)—

“(A) Age requirement must be met.—Paragraph (2)(D)(ii) shall not apply to an employee unless the employee has met the requirement of section 410(a)(1)(A)(i) by the close of the last of the 12-month periods described in such paragraph.

“(B) Nondiscrimination and top-heavy rules not to apply.—

“(i) Nondiscrimination rules.—In the case of employees who are eligible to
participate in the arrangement solely by
reason of paragraph (2)(D)(ii)—

“(I) notwithstanding subsection
(a)(4), an employer shall not be re-
quired to make nonelective or match-
ing contributions on behalf of such
employees even if such contributions
are made on behalf of other employees
eligible to participate in the arrange-
ment, and

“(II) an employer may elect to
exclude such employees from the ap-
plication of subsection (a)(4), para-
graphs (3), (12), and (13), subsection
(m)(2), and section 410(b).

“(ii) Top-heavy Rules.—An em-
ployer may elect to exclude all employees
who are eligible to participate in a plan
maintained by the employer solely by rea-
son of paragraph (2)(D)(ii) from the appli-
cation of the vesting and benefit require-
ments under subsections (b) and (c) of sec-
section 416.

“(iii) Vesting.—For purposes of de-
termining whether an employee described
in clause (i) has a nonforfeitable right to employer contributions (other than contributions described in paragraph (3)(D)(i)) under the arrangement, each 12-month period for which the employee has at least 500 hours of service shall be treated as a year of service.

“(iv) Employees who become full-time employees.—This subparagraph shall cease to apply to any employee as of the first plan year beginning after the plan year in which the employee meets the requirements of section 410(a)(1)(A)(ii) without regard to paragraph (2)(D)(ii).

“(C) Exception for employees under collectively bargained plans, etc.—Paragraph (2)(D)(ii) shall not apply to employees described in section 410(b)(3).

“(D) Special rules.—

“(i) Time of participation.—The rules of section 410(a)(4) shall apply to an employee eligible to participate in an arrangement solely by reason of paragraph (2)(D)(ii).
“(ii) 12-MONTH PERIODS.—12-month periods shall be determined in the same manner as under the last sentence of section 410(a)(3)(A).”.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after December 31, 2020, except that, for purposes of section 401(k)(2)(D)(ii) of the Internal Revenue Code of 1986 (as added by such amendments), 12-month periods beginning before January 1, 2021, shall not be taken into account.

SEC. 113. PENALTY-FREE WITHDRAWALS FROM RETIREMENT PLANS FOR INDIVIDUALS IN CASE OF BIRTH OF CHILD OR ADOPTION.

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

“(H) DISTRIBUTIONS FROM RETIREMENT PLANS IN CASE OF BIRTH OF CHILD OR ADOPTION.—

“(i) IN GENERAL.—Any qualified birth or adoption distribution.

“(ii) LIMITATION.—The aggregate amount which may be treated as qualified birth or adoption distributions by any indi-
vidual with respect to any birth or adoption shall not exceed $5,000.

“(iii) QUALIFIED BIRTH OR ADOPTION DISTRIBUTION.—For purposes of this sub-
paragraph—

“(I) IN GENERAL.—The term ‘qualified birth or adoption distribution’ means any distribution from an applicable eligible retirement plan to an individual if made during the 1-year period beginning on the date on which a child of the individual is born or on which the legal adoption by the individual of an eligible adoptee is finalized.

“(II) ELIGIBLE ADOPTEE.—The term ‘eligible adoptee’ means any individual (other than a child of the taxpayer’s spouse) who has not attained age 18 or is physically or mentally incapable of self-support.

“(iv) TREATMENT OF PLAN DISTRIBUTIONS.—

“(I) IN GENERAL.—If a distribution to an individual would (without
regard to clause (ii)) be a qualified birth or adoption distribution, a plan shall not be treated as failing to meet any requirement of this title merely because the plan treats the distribution as a qualified birth or adoption distribution, unless the aggregate amount of such distributions from all plans maintained by the employer (and any member of any controlled group which includes the employer) to such individual exceeds $5,000.

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

“(v) AMOUNT DISTRIBUTED MAY BE REPAYED.—

“(I) IN GENERAL.—Any individual who receives a qualified birth or adoption distribution may make one or more contributions in an aggregate amount not to exceed the
amount of such distribution to an applicable eligible retirement plan of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made under section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), as the case may be.

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

“(III) Treatment of repayments of distributions from applicable eligible retirement plans other than IRAs.—If a contribution is made under subclause (I) with respect to a qualified birth or adoption distribution from an applicable eligible retirement plan other than an individual retirement plan, then the taxpayer shall, to the extent of the amount of the contribution, be treated as having received such distribution in an eligible rollover distribution (as defined in section 402(c)(4)) and as having transferred the amount to the applicable eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.

“(IV) Treatment of repayments for distributions from IRAs.—If a contribution is made under subclause (I) with respect to a qualified birth or adoption distribution
from an individual retirement plan,
then, to the extent of the amount of
the contribution, such distribution
shall be treated as a distribution de-
dcribed in section 408(d)(3) and as
having been transferred to the appli-
cable eligible retirement plan in a di-
rect trustee to trustee transfer within
60 days of the distribution.

“(vi) Definition and special rules.—For purposes of this subpara-
graph—

“(I) Applicable eligible retire-
ment plan.—The term ‘applica-
ble eligible retirement plan’ means an
eligible retirement plan (as defined in
section 402(c)(8)(B)) other than a de-
fined benefit plan.

“(II) Exemption of distribu-
tions from trustee to trustee
transfer and withholding
rules.—For purposes of sections
401(a)(31), 402(f), and 3405, a quali-
ified birth or adoption distribution
shall not be treated as an eligible rollover distribution.

“(III) TAXPAYER MUST INCLUDE TIN.—A distribution shall not be treated as a qualified birth or adoption distribution with respect to any child or eligible adoptee unless the taxpayer includes the name, age, and TIN of such child or eligible adoptee on the taxpayer’s return of tax for the taxable year.

“(IV) DISTRIBUTIONS TREATED AS MEETING PLAN DISTRIBUTION REQUIREMENTS.—Any qualified birth or adoption distribution shall be treated as meeting the requirements of sections 401(k)(2)(B)(i), 403(b)(7)(A)(ii), 403(b)(11), and 457(d)(1)(A).”.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to distributions made after December 31, 2019.
SEC. 114. INCREASE IN AGE FOR REQUIRED BEGINNING DATE FOR MANDATORY DISTRIBUTIONS.

(a) In General.—Section 401(a)(9)(C)(i)(I) of the Internal Revenue Code of 1986 is amended by striking “age 70½” and inserting “age 72”.

(b) Spouse Beneficiaries; Special Rule for Owners.—Subparagraphs (B)(iv)(I) and (C)(ii)(I) of section 401(a)(9) of such Code are each amended by striking “age 70½” and inserting “age 72”.

(c) Conforming Amendments.—

(1) The last sentence of section 408(b) of such Code is amended by striking “age 70½” and inserting “age 72”.

(2) Section 457(d)(1)(A)(i) of such Code is amended by striking “age 70½” and inserting “age 72”.

(d) Effective Date.—The amendments made by this section shall apply to distributions required to be made after December 31, 2019, with respect to individuals who attain age 70½ after such date.

SEC. 115. SPECIAL RULES FOR MINIMUM FUNDING STANDARDS FOR COMMUNITY NEWSPAPER PLANS.

(a) Amendment to Internal Revenue Code of 1986.—Section 430 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection:
“(m) SPECIAL RULES FOR COMMUNITY NEWSPAPER PLANS.—

“(1) IN GENERAL.—The plan sponsor of a community newspaper plan under which no participant has had the participant’s accrued benefit increased (whether because of service or compensation) after December 31, 2017, may elect to have the alternative standards described in paragraph (3) apply to such plan, and any plan sponsored by any member of the same controlled group.

“(2) ELECTION.—An election under paragraph (1) shall be made at such time and in such manner as prescribed by the Secretary. Such election, once made with respect to a plan year, shall apply to all subsequent plan years unless revoked with the consent of the Secretary.

“(3) ALTERNATIVE MINIMUM FUNDING STANDARDS.—The alternative standards described in this paragraph are the following:

“(A) INTEREST RATES.—

“(i) IN GENERAL.—Notwithstanding subsection (h)(2)(C) and except as provided in clause (ii), the first, second, and third segment rates in effect for any
month for purposes of this section shall be 8 percent.

“(ii) NEW BENEFIT ACCRUALS.—Notwithstanding subsection (h)(2), for purposes of determining the funding target and normal cost of a plan for any plan year, the present value of any benefits accrued or earned under the plan for a plan year with respect to which an election under paragraph (1) is in effect shall be determined on the basis of the U.S. Treasury obligation yield curve for the day that is the valuation date of such plan for such plan year.

“(iii) U.S. TREASURY OBLIGATION YIELD CURVE.—For purposes of this subsection, the term ‘U.S. Treasury obligation yield curve’ means, with respect to any day, a yield curve which shall be prescribed by the Secretary for such day on interest-bearing obligations of the United States.

“(B) SHORTFALL AMORTIZATION BASE.—

“(i) PREVIOUS SHORTFALL AMORTIZATION BASES.—The shortfall amortization bases determined under subsection (c)(3)
for all plan years preceding the first plan year to which the election under paragraph (1) applies (and all shortfall amortization installments determined with respect to such bases) shall be reduced to zero under rules similar to the rules of subsection (c)(6).

“(ii) New Shortfall Amortization Base.—Notwithstanding subsection (c)(3), the shortfall amortization base for the first plan year to which the election under paragraph (1) applies shall be the funding shortfall of such plan for such plan year (determined using the interest rates as modified under subparagraph (A)).

“(C) Determination of Shortfall Amortization Installments.—

“(i) 30-Year Period.—Subparagraphs (A) and (B) of subsection (c)(2) shall be applied by substituting ‘30-plan-year’ for ‘7-plan-year’ each place it appears.

“(ii) No Special Election.—The election under subparagraph (D) of subsection (c)(2) shall not apply to any plan
year to which the election under paragraph (1) applies.

“(D) Exemption from At-risk Treatment.—Subsection (i) shall not apply.

“(4) Community Newspaper Plan.—For purposes of this subsection—

“(A) In General.—The term ‘community newspaper plan’ means a plan to which this section applies maintained by an employer which, as of December 31, 2017—

“(i) publishes and distributes daily, either electronically or in printed form, 1 or more community newspapers in a single State,

“(ii) is not a company the stock of which is publicly traded (on a stock exchange or in an over-the-counter market), and is not controlled, directly or indirectly, by such a company,

“(iii) is controlled, directly or indirectly—

“(I) by 1 or more persons residing primarily in the State in which the community newspaper is published,
“(II) for not less than 30 years by individuals who are members of the same family,

“(III) by a trust created or organized in the State in which the community newspaper is published, the sole trustees of which are persons described in subclause (I) or (II),

“(IV) by an entity which is described in section 501(c)(3) and exempt from taxation under section 501(a), which is organized and operated in the State in which the community newspaper is published, and the primary purpose of which is to benefit communities in such State, or

“(V) by a combination of persons described in subclause (I), (III), or (IV), and

“(iv) does not control, directly or indirectly, any newspaper in any other State.

“(B) COMMUNITY NEWSPAPER.—The term ‘community newspaper’ means a newspaper which primarily serves a metropolitan statistical area, as determined by the Office of Manage-
ment and Budget, with a population of not less than 100,000.

“(C) CONTROL.—A person shall be treated as controlled by another person if such other person possesses, directly or indirectly, the power to direct or cause the direction and management of such person (including the power to elect a majority of the members of the board of directors of such person) through the ownership of voting securities.

“(5) CONTROLLED GROUP.—For purposes of this subsection, the term ‘controlled group’ means all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 as of the date of the enactment of this subsection.”.

(b) AMENDMENT TO EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—Section 303 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1083) is amended by adding at the end the following new subsection:

“(m) SPECIAL RULES FOR COMMUNITY NEWSPAPER PLANS.—

“(1) IN GENERAL.—The plan sponsor of a community newspaper plan under which no participant has had the participant’s accrued benefit increased
(whether because of service or compensation) after December 31, 2017, may elect to have the alternative standards described in paragraph (3) apply to such plan, and any plan sponsored by any member of the same controlled group.

“(2) ELECTION.—An election under paragraph (1) shall be made at such time and in such manner as prescribed by the Secretary of the Treasury. Such election, once made with respect to a plan year, shall apply to all subsequent plan years unless revoked with the consent of the Secretary of the Treasury.

“(3) ALTERNATIVE MINIMUM FUNDING STANDARDS.—The alternative standards described in this paragraph are the following:

“(A) INTEREST RATES.—

“(i) IN GENERAL.—Notwithstanding subsection (h)(2)(C) and except as provided in clause (ii), the first, second, and third segment rates in effect for any month for purposes of this section shall be 8 percent.

“(ii) NEW BENEFIT ACCRUALS.—Notwithstanding subsection (h)(2), for purposes of determining the funding target and normal cost of a plan for any plan...
year, the present value of any benefits accrued or earned under the plan for a plan year with respect to which an election under paragraph (1) is in effect shall be determined on the basis of the U.S. Treasury obligation yield curve for the day that is the valuation date of such plan for such plan year.

“(iii) U.S. TREASURY OBLIGATION YIELD CURVE.—For purposes of this subsection, the term ‘U.S. Treasury obligation yield curve’ means, with respect to any day, a yield curve which shall be prescribed by the Secretary of the Treasury for such day on interest-bearing obligations of the United States.

“(B) SHORTFALL AMORTIZATION BASE.—

“(i) PREVIOUS SHORTFALL AMORTIZATION BASES.—The shortfall amortization bases determined under subsection (c)(3) for all plan years preceding the first plan year to which the election under paragraph (1) applies (and all shortfall amortization installments determined with respect to such bases) shall be reduced to zero under
rules similar to the rules of subsection (c)(6).

“(ii) NEW SHORTFALL AMORTIZATION BASE.—Notwithstanding subsection (c)(3), the shortfall amortization base for the first plan year to which the election under paragraph (1) applies shall be the funding shortfall of such plan for such plan year (determined using the interest rates as modified under subparagraph (A)).

“(C) DETERMINATION OF SHORTFALL AMORTIZATION INSTALLMENTS.—

“(i) 30-YEAR PERIOD.—Subparagraphs (A) and (B) of subsection (c)(2) shall be applied by substituting ‘30-plan-year’ for ‘7-plan-year’ each place it appears.

“(ii) NO SPECIAL ELECTION.—The election under subparagraph (D) of subsection (c)(2) shall not apply to any plan year to which the election under paragraph (1) applies.

“(D) EXEMPTION FROM AT-RISK TREATMENT.—Subsection (i) shall not apply.
“(4) COMMUNITY NEWSPAPER PLAN.—For purposes of this subsection—

“(A) IN GENERAL.—The term ‘community newspaper plan’ means a plan to which this section applies maintained by an employer which, as of December 31, 2017—

“(i) publishes and distributes daily, either electronically or in printed form—

“(I) a community newspaper, or

“(II) 1 or more community newspapers in the same State,

“(ii) is not a company the stock of which is publicly traded (on a stock exchange or in an over-the-counter market), and is not controlled, directly or indirectly, by such a company,

“(iii) is controlled, directly or indirectly—

“(I) by 1 or more persons residing primarily in the State in which the community newspaper is published,

“(II) for not less than 30 years by individuals who are members of the same family,
“(III) by a trust created or organized in the State in which the community newspaper is published, the sole trustees of which are persons described in subclause (I) or (II),

“(IV) by an entity which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code, which is organized and operated in the State in which the community newspaper is published, and the primary purpose of which is to benefit communities in such State, or

“(V) by a combination of persons described in subclause (I), (III), or (IV), and

“(iv) does not control, directly or indirectly, any newspaper in any other State.

“(B) COMMUNITY NEWSPAPER.—The term ‘community newspaper’ means a newspaper which primarily serves a metropolitan statistical area, as determined by the Office of Manage-
ment and Budget, with a population of not less than 100,000.

“(C) CONTROL.—A person shall be treated as controlled by another person if such other person possesses, directly or indirectly, the power to direct or cause the direction and management of such person (including the power to elect a majority of the members of the board of directors of such person) through the ownership of voting securities.

“(5) CONTROLLED GROUP.—For purposes of this subsection, the term ‘controlled group’ means all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 as of the date of the enactment of this subsection.

“(6) EFFECT ON PREMIUM RATE CALCULATION.—Notwithstanding any other provision of law or any regulation issued by the Pension Benefit Guaranty Corporation, in the case of a community newspaper plan which elects the application of the alternative standards described in paragraph (3), the additional premium under section 4006(a)(3)(E) shall be determined as if such election had not been made.”
(c) **Effective Date.**—The amendments made by this section shall apply to plan years ending after December 31, 2017.

**SEC. 116. TREATING EXCLUDED DIFFICULTY OF CARE PAYMENTS AS COMPENSATION FOR DETERMINING RETIREMENT CONTRIBUTION LIMITATIONS.**

(a) **Individual Retirement Accounts.**—

(1) **In general.**—Section 408(o) of the Internal Revenue Code of 1986 is amended by adding at the end the following new paragraph:

“(5) **Special rule for difficulty of care payments excluded from gross income.**—In the case of an individual who for a taxable year excludes from gross income under section 131 a qualified foster care payment which is a difficulty of care payment, if—

“(A) the deductible amount in effect for the taxable year under subsection (b), exceeds

“(B) the amount of compensation includible in the individual’s gross income for the taxable year,

the individual may elect to increase the nondeductible limit under paragraph (2) for the taxable year
by an amount equal to the lesser of such excess or
the amount so excluded.”.

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

(b) DEFINED CONTRIBUTION PLANS.—

(1) IN GENERAL.—Section 415(c) of such Code
is amended by adding at the end the following new
paragraph:

“(8) SPECIAL RULE FOR DIFFICULTY OF CARE
PAYMENTS EXCLUDED FROM GROSS INCOME.—

“(A) IN GENERAL.—For purposes of para-
graph (1)(B), in the case of an individual who
for a taxable year excludes from gross income
under section 131 a qualified foster care pay-
ment which is a difficulty of care payment, the
participant’s compensation, or earned income,
as the case may be, shall be increased by the
amount so excluded.

“(B) CONTRIBUTIONS ALLOCABLE TO DIF-
FICULTY OF CARE PAYMENTS TREATED AS
AFTER-TAX.—Any contribution by the partici-
participant which is allowable due to such increase—

“(i) shall be treated for purposes of
this title as investment in the contract, and
“(ii) shall not cause a plan (and any arrangement which is part of such plan) to be treated as failing to meet any requirements of this chapter solely by reason of allowing any such contributions.”.

(2) Effective Date.—The amendment made by this subsection shall apply to plan years beginning after December 31, 2015.

TITLE II—ADMINISTRATIVE IMPROVEMENTS

SEC. 201. PLAN ADOPTED BY FILING DUE DATE FOR YEAR MAY BE TREATED AS IN EFFECT AS OF CLOSE OF YEAR.

(a) In General.—Subsection (b) of section 401 of the Internal Revenue Code of 1986 is amended—

(1) by striking “RETROACTIVE CHANGES IN PLAN.—A stock bonus” and inserting “PLAN AMENDMENTS.—

“(1) CERTAIN RETROACTIVE CHANGES IN PLAN.—A stock bonus”; and

(2) by adding at the end the following new paragraph:

“(2) ADOPTION OF PLAN.—If an employer adopts a stock bonus, pension, profit-sharing, or annuity plan after the close of a taxable year but be-
fore the time prescribed by law for filing the return of the employer for the taxable year (including extensions thereof), the employer may elect to treat the plan as having been adopted as of the last day of the taxable year.”.

(b) Effective Date.—The amendments made by this section shall apply to plans adopted for taxable years beginning after December 31, 2019.

SEC. 202. COMBINED ANNUAL REPORT FOR GROUP OF PLANS.

(a) In General.—The Secretary of the Treasury and the Secretary of Labor shall, in cooperation, modify the returns required under section 6058 of the Internal Revenue Code of 1986 and the reports required by section 104 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1024) so that all members of a group of plans described in subsection (c) may file a single aggregated annual return or report satisfying the requirements of both such sections.

(b) Administrative Requirements.—In developing the consolidated return or report under subsection (a), the Secretary of the Treasury and the Secretary of Labor may require such return or report to include any information regarding each plan in the group as such Secretaries determine is necessary or appropriate for the en-

(c) PLANS DESCRIBED.—A group of plans is described in this subsection if all plans in the group—

(1) are individual account plans or defined contribution plans (as defined in section 3(34) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(34)) or in section 414(i) of the Internal Revenue Code of 1986);

(2) have—

(A) the same trustee (as described in section 403(a) of such Act (29 U.S.C. 1103(a)));

(B) the same one or more named fiduciaries (as described in section 402(a) of such Act (29 U.S.C. 1102(a)));

(C) the same administrator (as defined in section 3(16)(A) of such Act (29 U.S.C. 1002(16)(A))) and plan administrator (as defined in section 414(g) of the Internal Revenue Code of 1986); and

(D) plan years beginning on the same date; and

(3) provide the same investments or investment options to participants and beneficiaries.
A plan not subject to title I of the Employee Retirement Income Security Act of 1974 shall be treated as meeting the requirements of paragraph (2) as part of a group of plans if the same person that performs each of the functions described in such paragraph, as applicable, for all other plans in such group performs each of such functions for such plan.

(d) CLARIFICATION RELATING TO ELECTRONIC FILING OF RETURNS FOR DEFERRED COMPENSATION PLANS.—

(1) IN GENERAL.—Section 6011(e) of the Internal Revenue Code of 1986 is amended by adding at the end the following new paragraph:

“(6) APPLICATION OF NUMERICAL LIMITATION TO RETURNS RELATING TO DEFERRED COMPENSATION PLANS.—For purposes of applying the numerical limitation under paragraph (2)(A) to any return required under section 6058, information regarding each plan for which information is provided on such return shall be treated as a separate return.”.

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall apply to returns required to be filed with respect to plan years beginning after December 31, 2019.
(e) EFFECTIVE DATE.—The modification required by subsection (a) shall be implemented not later than January 1, 2022, and shall apply to returns and reports for plan years beginning after December 31, 2021.

SEC. 203. DISCLOSURE REGARDING LIFETIME INCOME.

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

(1) in clause (i), by striking “and” at the end;

(2) in clause (ii), by striking “diversification.”

and inserting “diversification, and”; and

(3) by inserting at the end the following:

“(iii) the lifetime income disclosure described in subparagraph (D)(i).

In the case of pension benefit statements described in clause (i) of paragraph (1)(A), a lifetime income disclosure under clause (iii) of this subparagraph shall be required to be included in only one pension benefit statement during any one 12-month period.”.

(b) LIFETIME INCOME.—Paragraph (2) of section 105(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1025(a)) is amended by adding at the end the following new subparagraph:

“(D) LIFETIME INCOME DISCLOSURE.—
“(i) IN GENERAL.—

“(I) DISCLOSURE.—A lifetime income disclosure shall set forth the lifetime income stream equivalent of the total benefits accrued with respect to the participant or beneficiary.

“(II) LIFETIME INCOME STREAM EQUIVALENT OF THE TOTAL BENEFITS ACCRUED.—For purposes of this subparagraph, the term ‘lifetime income stream equivalent of the total benefits accrued’ means the amount of monthly payments the participant or beneficiary would receive if the total accrued benefits of such participant or beneficiary were used to provide lifetime income streams described in subclause (III), based on assumptions specified in rules prescribed by the Secretary.

“(III) LIFETIME INCOME STREAMS.—The lifetime income streams described in this subclause are a qualified joint and survivor annuity (as defined in section 205(d)),
based on assumptions specified in rules prescribed by the Secretary, including the assumption that the participant or beneficiary has a spouse of equal age, and a single life annuity. Such lifetime income streams may have a term certain or other features to the extent permitted under rules prescribed by the Secretary.

“(ii) MODEL DISCLOSURE.—Not later than 1 year after the date of the enactment of the Setting Every Community Up for Retirement Enhancement Act of 2019, the Secretary shall issue a model lifetime income disclosure, written in a manner so as to be understood by the average plan participant, which—

“(I) explains that the lifetime income stream equivalent is only provided as an illustration;

“(II) explains that the actual payments under the lifetime income stream described in clause (i)(III) which may be purchased with the total benefits accrued will depend on
numerous factors and may vary substantially from the lifetime income stream equivalent in the disclosures;

“(III) explains the assumptions upon which the lifetime income stream equivalent was determined; and

“(IV) provides such other similar explanations as the Secretary considers appropriate.

“(iii) ASSUMPTIONS AND RULES.—

Not later than 1 year after the date of the enactment of the Setting Every Community Up for Retirement Enhancement Act of 2019, the Secretary shall—

“(I) prescribe assumptions which administrators of individual account plans may use in converting total accrued benefits into lifetime income stream equivalents for purposes of this subparagraph; and

“(II) issue interim final rules under clause (i).

In prescribing assumptions under subclause (I), the Secretary may prescribe a single set of specific assumptions (in which
case the Secretary may issue tables or fac-
tors which facilitate such conversions), or
ranges of permissible assumptions. To the
extent that an accrued benefit is or may be
invested in a lifetime income stream de-
scribed in clause (i)(III), the assumptions
prescribed under subclause (I) shall, to the
extent appropriate, permit administrators
of individual account plans to use the
amounts payable under such lifetime in-
come stream as a lifetime income stream
equivalent.

“(iv) LIMITATION ON LIABILITY.—No
plan fiduciary, plan sponsor, or other per-
son shall have any liability under this title
solely by reason of the provision of lifetime
income stream equivalents which are de-
derived in accordance with the assumptions
and rules described in clause (iii) and
which include the explanations contained in
the model lifetime income disclosure de-
scribed in clause (ii). This clause shall
apply without regard to whether the provi-
sion of such lifetime income stream equiva-
 lent is required by subparagraph (B)(iii).
“(v) EFFECTIVE DATE.—The requirement in subparagraph (B)(iii) shall apply to pension benefit statements furnished more than 12 months after the latest of the issuance by the Secretary of—

“(I) interim final rules under clause (i);

“(II) the model disclosure under clause (ii); or

“(III) the assumptions under clause (iii).”.

SEC. 204. FIDUCIARY SAFE HARBOR FOR SELECTION OF LIFETIME INCOME PROVIDER.

Section 404 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104) is amended by adding at the end the following:

“(e) SAFE HARBOR FOR ANNUITY SELECTION.—

“(1) IN GENERAL.—With respect to the selection of an insurer for a guaranteed retirement income contract, the requirements of subsection (a)(1)(B) will be deemed to be satisfied if a fiduciary—

“(A) engages in an objective, thorough, and analytical search for the purpose of identi-
fying insurers from which to purchase such contracts;

“(B) with respect to each insurer identified under subparagraph (A)—

“(i) considers the financial capability of such insurer to satisfy its obligations under the guaranteed retirement income contract; and

“(ii) considers the cost (including fees and commissions) of the guaranteed retirement income contract offered by the insurer in relation to the benefits and product features of the contract and administrative services to be provided under such contract; and

“(C) on the basis of such consideration, concludes that—

“(i) at the time of the selection, the insurer is financially capable of satisfying its obligations under the guaranteed retirement income contract; and

“(ii) the relative cost of the selected guaranteed retirement income contract as described in subparagraph (B)(ii) is reasonable.
(2) Financial Capability of the Insurer.—A fiduciary will be deemed to satisfy the requirements of paragraphs (1)(B)(i) and (1)(C)(i) if—

(A) the fiduciary obtains written representations from the insurer that—

(i) the insurer is licensed to offer guaranteed retirement income contracts;

(ii) the insurer, at the time of selection and for each of the immediately preceding 7 plan years—

(I) operates under a certificate of authority from the insurance commissioner of its domiciliary State which has not been revoked or suspended;

(II) has filed audited financial statements in accordance with the laws of its domiciliary State under applicable statutory accounting principles;

(III) maintains (and has maintained) reserves which satisfies all the statutory requirements of all States where the insurer does business; and
“(IV) is not operating under an order of supervision, rehabilitation, or liquidation;

“(iii) the insurer undergoes, at least every 5 years, a financial examination (within the meaning of the law of its domiciliary State) by the insurance commissioner of the domiciliary State (or representative, designee, or other party approved by such commissioner); and

“(iv) the insurer will notify the fiduciary of any change in circumstances occurring after the provision of the representations in clauses (i), (ii), and (iii) which would preclude the insurer from making such representations at the time of issuance of the guaranteed retirement income contract; and

“(B) after receiving such representations and as of the time of selection, the fiduciary has not received any notice described in subparagraph (A)(iv) and is in possession of no other information which would cause the fiduciary to question the representations provided.
“(3) No requirement to select lowest cost.—Nothing in this subsection shall be construed to require a fiduciary to select the lowest cost contract. A fiduciary may consider the value of a contract, including features and benefits of the contract and attributes of the insurer (including, without limitation, the insurer’s financial strength) in conjunction with the cost of the contract.

“(4) Time of selection.—

“(A) In general.—For purposes of this subsection, the time of selection is—

“(i) the time that the insurer and the contract are selected for distribution of benefits to a specific participant or beneficiary; or

“(ii) if the fiduciary periodically reviews the continuing appropriateness of the conclusion described in paragraph (1)(C) with respect to a selected insurer, taking into account the considerations described in such paragraph, the time that the insurer and the contract are selected to provide benefits at future dates to participants or beneficiaries under the plan.
Nothing in the preceding sentence shall be construed to require the fiduciary to review the appropriateness of a selection after the purchase of a contract for a participant or beneficiary.

“(B) Periodic Review.—A fiduciary will be deemed to have conducted the periodic review described in subparagraph (A)(ii) if the fiduciary obtains the written representations described in clauses (i), (ii), and (iii) of paragraph (2)(A) from the insurer on an annual basis, unless the fiduciary receives any notice described in paragraph (2)(A)(iv) or otherwise becomes aware of facts that would cause the fiduciary to question such representations.

“(5) Limited Liability.—A fiduciary which satisfies the requirements of this subsection shall not be liable following the distribution of any benefit, or the investment by or on behalf of a participant or beneficiary pursuant to the selected guaranteed retirement income contract, for any losses that may result to the participant or beneficiary due to an insurer’s inability to satisfy its financial obligations under the terms of such contract.

“(6) Definitions.—For purposes of this subsection—
“(A) INSURER.—The term ‘insurer’ means an insurance company, insurance service, or insurance organization, including affiliates of such companies.

“(B) GUARANTEED RETIREMENT INCOME CONTRACT.—The term ‘guaranteed retirement income contract’ means an annuity contract for a fixed term or a contract (or provision or feature thereof) which provides guaranteed benefits annually (or more frequently) for at least the remainder of the life of the participant or the joint lives of the participant and the participant’s designated beneficiary as part of an individual account plan.”.

SEC. 205. MODIFICATION OF NONDISCRIMINATION RULES TO PROTECT OLDER, LONGER SERVICE PARTICIPANTS.

(a) IN GENERAL.—Section 401 of the Internal Revenue Code of 1986 is amended—

(1) by redesignating subsection (o) as subsection (p); and

(2) by inserting after subsection (n) the following new subsection:
“(o) Special Rules for Applying Non-Discrimination Rules to Protect Older, Longer Service and Grandfathered Participants.—

“(1) Testing of Defined Benefit Plans with Closed Classes of Participants.—

“(A) Benefits, Rights, or Features Provided to Closed Classes.—A defined benefit plan which provides benefits, rights, or features to a closed class of participants shall not fail to satisfy the requirements of subsection (a)(4) by reason of the composition of such closed class or the benefits, rights, or features provided to such closed class, if—

“(i) for the plan year as of which the class closes and the 2 succeeding plan years, such benefits, rights, and features satisfy the requirements of subsection (a)(4) (without regard to this subparagraph but taking into account the rules of subparagraph (I)),

“(ii) after the date as of which the class was closed, any plan amendment which modifies the closed class or the benefits, rights, and features provided to such closed class does not discriminate signifi-
cantly in favor of highly compensated em-
ployees, and

“(iii) the class was closed before April
5, 2017, or the plan is described in sub-
paragraph (C).

“(B) AGGREGATE TESTING WITH DEFINED
CONTRIBUTION PLANS PERMITTED ON A BENE-
FITS BASIS.—

“(i) IN GENERAL.—For purposes of
determining compliance with subsection
(a)(4) and section 410(b), a defined benefit
plan described in clause (iii) may be aggre-
gated and tested on a benefits basis with
1 or more defined contribution plans, in-
cluding with the portion of 1 or more de-
finite contribution plans which—

“(I) provides matching contribu-
tions (as defined in subsection
(m)(4)(A)),

“(II) provides annuity contracts
described in section 403(b) which are
purchased with matching contribu-
tions or nonelective contributions, or

“(III) consists of an employee
stock ownership plan (within the
meaning of section 4975(e)(7)) or a tax credit employee stock ownership plan (within the meaning of section 409(a)).

“(ii) SPECIAL RULES FOR MATCHING CONTRIBUTIONS.—For purposes of clause (i), if a defined benefit plan is aggregated with a portion of a defined contribution plan providing matching contributions—

“(I) such defined benefit plan must also be aggregated with any portion of such defined contribution plan which provides elective deferrals described in subparagraph (A) or (C) of section 402(g)(3), and

“(II) such matching contributions shall be treated in the same manner as nonelective contributions, including for purposes of applying the rules of subsection (I).

“(iii) PLANS DESCRIBED.—A defined benefit plan is described in this clause if—

“(I) the plan provides benefits to a closed class of participants,
“(II) for the plan year as of which the class closes and the 2 succeeding plan years, the plan satisfies the requirements of section 410(b) and subsection (a)(4) (without regard to this subparagraph but taking into account the rules of subparagraph (I)),

“(III) after the date as of which the class was closed, any plan amendment which modifies the closed class or the benefits provided to such closed class does not discriminate significantly in favor of highly compensated employees, and

“(IV) the class was closed before April 5, 2017, or the plan is described in subparagraph (C).

“(C) PLANS DESCRIBED.—A plan is described in this subparagraph if, taking into account any predecessor plan—

“(i) such plan has been in effect for at least 5 years as of the date the class is closed, and
“(ii) during the 5-year period preceding the date the class is closed, there has not been a substantial increase in the coverage or value of the benefits, rights, or features described in subparagraph (A) or in the coverage or benefits under the plan described in subparagraph (B)(iii) (whichever is applicable).

“(D) Determination of substantial increase for benefits, rights, and features.—In applying subparagraph (C)(ii) for purposes of subparagraph (A)(iii), a plan shall be treated as having had a substantial increase in coverage or value of the benefits, rights, or features described in subparagraph (A) during the applicable 5-year period only if, during such period—

“(i) the number of participants covered by such benefits, rights, or features on the date such period ends is more than 50 percent greater than the number of such participants on the first day of the plan year in which such period began, or

“(ii) such benefits, rights, and features have been modified by 1 or more
plan amendments in such a way that, as of the date the class is closed, the value of such benefits, rights, and features to the closed class as a whole is substantially greater than the value as of the first day of such 5-year period, solely as a result of such amendments.

“(E) Determination of substantial increase for aggregate testing on benefits basis.—In applying subparagraph (C)(ii) for purposes of subparagraph (B)(iii)(IV), a plan shall be treated as having had a substantial increase in coverage or benefits during the applicable 5-year period only if, during such period—

“(i) the number of participants benefiting under the plan on the date such period ends is more than 50 percent greater than the number of such participants on the first day of the plan year in which such period began, or

“(ii) the average benefit provided to such participants on the date such period ends is more than 50 percent greater than the average benefit provided on the first
day of the plan year in which such period began.

“(F) Certain Employees Disregarded.—For purposes of subparagraphs (D) and (E), any increase in coverage or value or in coverage or benefits, whichever is applicable, which is attributable to such coverage and value or coverage and benefits provided to employees—

“(i) who became participants as a result of a merger, acquisition, or similar event which occurred during the 7-year period preceding the date the class is closed, or

“(ii) who became participants by reason of a merger of the plan with another plan which had been in effect for at least 5 years as of the date of the merger, shall be disregarded, except that clause (ii) shall apply for purposes of subparagraph (D) only if, under the merger, the benefits, rights, or features under 1 plan are conformed to the benefits, rights, or features of the other plan prospectively.
“(G) Rules relating to average benefit.—For purposes of subparagraph (E)—

“(i) the average benefit provided to participants under the plan will be treated as having remained the same between the 2 dates described in subparagraph (E)(ii) if the benefit formula applicable to such participants has not changed between such dates, and

“(ii) if the benefit formula applicable to 1 or more participants under the plan has changed between such 2 dates, then the average benefit under the plan shall be considered to have increased by more than 50 percent only if—

“(I) the total amount determined under section 430(b)(1)(A)(i) for all participants benefitting under the plan for the plan year in which the 5-year period described in subparagraph (E) ends, exceeds

“(II) the total amount determined under section 430(b)(1)(A)(i) for all such participants for such plan year, by using the benefit formula in
effect for each such participant for
the first plan year in such 5-year pe-
period,
by more than 50 percent. In the case of a
CSEC plan (as defined in section 414(y)),
the normal cost of the plan (as determined
under section 433(j)(1)(B)) shall be used
in lieu of the amount determined under
section 430(b)(1)(A)(i).

“(H) TREATMENT AS SINGLE PLAN.—For
purposes of subparagraphs (E) and (G), a plan
described in section 413(c) shall be treated as
a single plan rather than as separate plans
maintained by each employer in the plan.

“(I) SPECIAL RULES.—For purposes of
subparagraphs (A)(i) and (B)(iii)(II), the fol-
lowing rules shall apply:

“(i) In applying section 410(b)(6)(C),
the closing of the class of participants shall
not be treated as a significant change in
coverage under section 410(b)(6)(C)(i)(II).

“(ii) 2 or more plans shall not fail to
be eligible to be aggregated and treated as
a single plan solely by reason of having dif-
fent plan years.
“(iii) Changes in the employee population shall be disregarded to the extent attributable to individuals who become employees or cease to be employees, after the date the class is closed, by reason of a merger, acquisition, divestiture, or similar event.

“(iv) Aggregation and all other testing methodologies otherwise applicable under subsection (a)(4) and section 410(b) may be taken into account.

The rule of clause (ii) shall also apply for purposes of determining whether plans to which subparagraph (B)(i) applies may be aggregated and treated as 1 plan for purposes of determining whether such plans meet the requirements of subsection (a)(4) and section 410(b).

“(J) SPUN-OFF PLANS.—For purposes of this paragraph, if a portion of a defined benefit plan described in subparagraph (A) or (B)(iii) is spun off to another employer and the spun-off plan continues to satisfy the requirements of—

“(i) subparagraph (A)(i) or (B)(iii)(II), whichever is applicable, if the

“
original plan was still within the 3-year period described in such subparagraph at the time of the spin off, and

“(ii) subparagraph (A)(ii) or (B)(iii)(III), whichever is applicable, the treatment under subparagraph (A) or (B) of the spun-off plan shall continue with respect to such other employer.

“(2) TESTING OF DEFINED CONTRIBUTION PLANS.—

“(A) TESTING ON A BENEFITS BASIS.—A defined contribution plan shall be permitted to be tested on a benefits basis if—

“(i) such defined contribution plan provides make-whole contributions to a closed class of participants whose accruals under a defined benefit plan have been reduced or eliminated,

“(ii) for the plan year of the defined contribution plan as of which the class eligible to receive such make-whole contributions closes and the 2 succeeding plan years, such closed class of participants satisfies the requirements of section
410(b)(2)(A)(i) (determined by applying
the rules of paragraph (1)(I)),

“(iii) after the date as of which the
class was closed, any plan amendment to
the defined contribution plan which modi-
ifies the closed class or the allocations, ben-
efits, rights, and features provided to such
closed class does not discriminate signifi-
cantly in favor of highly compensated em-
ployees, and

“(iv) the class was closed before April
5, 2017, or the defined benefit plan under
clause (i) is described in paragraph (1)(C)
(as applied for purposes of paragraph
(1)(B)(iii)(IV)).

“(B) AGGREGATION WITH PLANS INCLUDING MATCHING CONTRIBUTIONS.—

“(i) IN GENERAL.—With respect to 1
or more defined contribution plans de-
scribed in subparagraph (A), for purposes
of determining compliance with subsection
(a)(4) and section 410(b), the portion of
such plans which provides make-whole con-
tributions or other nonelective contribu-
tions may be aggregated and tested on a
benefits basis with the portion of 1 or
more other defined contribution plans
which—

“(I) provides matching contribu-
tions (as defined in subsection
(m)(4)(A)),

“(II) provides annuity contracts
described in section 403(b) which are
purchased with matching contribu-
tions or nonelective contributions, or

“(III) consists of an employee
stock ownership plan (within the
meaning of section 4975(e)(7)) or a
tax credit employee stock ownership
plan (within the meaning of section
409(a)).

“(ii) Special rules for matching
contributions.—Rules similar to the
rules of paragraph (1)(B)(ii) shall apply
for purposes of clause (i).

“(C) Special rules for testing de-
defined contribution plan features pro-
viding matching contributions to certain
older, longer service participants.—In
the case of a defined contribution plan which
provides benefits, rights, or features to a closed class of participants whose accruals under a defined benefit plan have been reduced or eliminated, the plan shall not fail to satisfy the requirements of subsection (a)(4) solely by reason of the composition of the closed class or the benefits, rights, or features provided to such closed class if the defined contribution plan and defined benefit plan otherwise meet the requirements of subparagraph (A) but for the fact that the make-whole contributions under the defined contribution plan are made in whole or in part through matching contributions.

“(D) SPUN-OFF PLANS.—For purposes of this paragraph, if a portion of a defined contribution plan described in subparagraph (A) or (C) is spun off to another employer, the treatment under subparagraph (A) or (C) of the spun-off plan shall continue with respect to the other employer if such plan continues to comply with the requirements of clauses (ii) (if the original plan was still within the 3-year period described in such clause at the time of the spin off) and (iii) of subparagraph (A), as deter-
mined for purposes of subparagraph (A) or (C), whichever is applicable.

“(3) Definitions and special rule.—For purposes of this subsection—

“(A) Make-whole contributions.—Except as otherwise provided in paragraph (2)(C), the term ‘make-whole contributions’ means non-elective allocations for each employee in the class which are reasonably calculated, in a consistent manner, to replace some or all of the retirement benefits which the employee would have received under the defined benefit plan and any other plan or qualified cash or deferred arrangement under subsection (k)(2) if no change had been made to such defined benefit plan and such other plan or arrangement. For purposes of the preceding sentence, consistency shall not be required with respect to employees who were subject to different benefit formulas under the defined benefit plan.

“(B) References to closed class of participants.—References to a closed class of participants and similar references to a closed class shall include arrangements under which 1 or more classes of participants are closed, ex-
cept that 1 or more classes of participants closed on different dates shall not be aggregated for purposes of determining the date any such class was closed.

“(C) HIGHLY COMPENSATED EMPLOYEE.—

The term ‘highly compensated employee’ has the meaning given such term in section 414(q).”.

(b) PARTICIPATION REQUIREMENTS.—Paragraph (26) of section 401(a) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraph:

“(I) PROTECTED PARTICIPANTS.—

“(i) IN GENERAL.—A plan shall be deemed to satisfy the requirements of subparagraph (A) if—

“(I) the plan is amended—

“(aa) to cease all benefit accruals, or

“(bb) to provide future benefit accruals only to a closed class of participants,

“(II) the plan satisfies subparagraph (A) (without regard to this sub-
paragraph) as of the effective date of
the amendment, and

“(III) the amendment was adopt-
ed before April 5, 2017, or the plan is
described in clause (ii).

“(ii) PLANS DESCRIBED.—A plan is
described in this clause if the plan would
be described in subsection (o)(1)(C), as ap-
plied for purposes of subsection
(o)(1)(B)(iii)(IV) and by treating the effec-
tive date of the amendment as the date the
class was closed for purposes of subsection
(o)(1)(C).

“(iii) SPECIAL RULES.—For purposes
of clause (i)(II), in applying section
410(b)(6)(C), the amendments described in
clause (i) shall not be treated as a signifi-
cant change in coverage under section
410(b)(6)(C)(i)(II).

“(iv) SPUN-OFF PLANS.—For pur-
poses of this subparagraph, if a portion of
a plan described in clause (i) is spun off to
another employer, the treatment under
clause (i) of the spun-off plan shall con-
tinue with respect to the other employer.”.
(c) Effective Date.—

(1) In general.—Except as provided in paragraph (2), the amendments made by this section shall take effect on the date of the enactment of this Act, without regard to whether any plan modifications referred to in such amendments are adopted or effective before, on, or after such date of enactment.

(2) Special rules.—

(A) Election of earlier application.—At the election of the plan sponsor, the amendments made by this section shall apply to plan years beginning after December 31, 2013.

(B) Closed classes of participants.—For purposes of paragraphs (1)(A)(iii), (1)(B)(iii)(IV), and (2)(A)(iv) of section 401(o) of the Internal Revenue Code of 1986 (as added by this section), a closed class of participants shall be treated as being closed before April 5, 2017, if the plan sponsor’s intention to create such closed class is reflected in formal written documents and communicated to participants before such date.

(C) Certain post-enactment plan amendments.—A plan shall not be treated as failing to be eligible for the application of sec-
tion 401(o)(1)(A), 401(o)(1)(B)(iii), or 401(a)(26) of such Code (as added by this section) to such plan solely because in the case of—

(i) such section 401(o)(1)(A), the plan was amended before the date of the enactment of this Act to eliminate 1 or more benefits, rights, or features, and is further amended after such date of enactment to provide such previously eliminated benefits, rights, or features to a closed class of participants, or

(ii) such section 401(o)(1)(B)(iii) or section 401(a)(26), the plan was amended before the date of the enactment of this Act to cease all benefit accruals, and is further amended after such date of enactment to provide benefit accruals to a closed class of participants.

Any such section shall only apply if the plan otherwise meets the requirements of such section and in applying such section, the date the class of participants is closed shall be the effective date of the later amendment.
SEC. 206. MODIFICATION OF PBGC PREMIUMS FOR CSEC PLANS.

(a) Flat Rate Premium.—Subparagraph (A) of section 4006(a)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1306(a)(3)) is amended—

(1) in clause (i), by striking “plan,” and inserting “plan other than a CSEC plan (as defined in section 210(f)(1))”;

(2) in clause (v), by striking “or” at the end;

(3) in clause (vi), by striking the period at the end and inserting “, or”; and

(4) by adding at the end the following new clause:

“(vii) in the case of a CSEC plan (as defined in section 210(f)(1)), for plan years beginning after December 31, 2018, for each individual who is a participant in such plan during the plan year an amount equal to the sum of—

“(I) the additional premium (if any) determined under subparagraph (E), and

“(II) $19.”.

(b) Variable Rate Premium.—

(1) Unfunded vested benefits.—
(A) IN GENERAL.—Subparagraph (E) of section 4006(a)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1306(a)(3)) is amended by adding at the end the following new clause:

“(v) For purposes of clause (ii), in the case of a CSEC plan (as defined in section 210(f)(1)), the term ‘unfunded vested benefits’ means, for plan years beginning after December 31, 2018, the excess (if any) of—

“(I) the funding liability of the plan as determined under section 306(j)(5)(C) for the plan year by only taking into account vested benefits, over

“(II) the fair market value of plan assets for the plan year which are held by the plan on the valuation date.”.

(B) CONFORMING AMENDMENT.—Clause (iii) of section 4006(a)(3)(E) of such Act (29 U.S.C. 1306(a)(3)(E)) is amended by striking “For purposes” and inserting “Except as provided in clause (v), for purposes”.

“
(2) APPLICABLE DOLLAR AMOUNT.—

(A) IN GENERAL.—Paragraph (8) of section 4006(a) of such Act (29 U.S.C. 1306(a)) is amended by adding at the end the following new subparagraph:

“(E) CSEC PLANS.—In the case of a CSEC plan (as defined in section 210(f)(1)), the applicable dollar amount shall be $9.”.

(B) CONFORMING AMENDMENT.—Subparagraph (A) of section 4006(a)(8) of such Act (29 U.S.C. 1306(a)(8)) is amended by striking “(B) and (C)” and inserting “(B), (C), and (E)”.

TITLE III—OTHER BENEFITS

SEC. 301. BENEFITS PROVIDED TO VOLUNTEER FIREFIGHTERS AND EMERGENCY MEDICAL RESPONDERS.

(a) INCREASE IN DOLLAR LIMITATION ON QUALIFIED PAYMENTS.—Subparagraph (B) of section 139B(c)(2) of the Internal Revenue Code of 1986 is amended by striking “$30” and inserting “$50”.

(b) EXTENSION.—Section 139B(d) of the Internal Revenue Code of 1986 is amended by striking “beginning after December 31, 2010.” and inserting “beginning—

“(1) after December 31, 2010, and before January 1, 2020, or
“(2) after December 31, 2020.”.

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2019.

SEC. 302. EXPANSION OF SECTION 529 PLANS.

(a) DISTRIBUTIONS FOR CERTAIN EXPENSES ASSOCIATED WITH REGISTERED APPRENTICESHIP PROGRAMS.—Section 529(c) of the Internal Revenue Code of 1986 is amended by adding at the end the following new paragraph:

“(8) TREATMENT OF CERTAIN EXPENSES ASSOCIATED WITH REGISTERED APPRENTICESHIP PROGRAMS.—Any reference in this subsection to the term ‘qualified higher education expense’ shall include a reference to expenses for fees, books, supplies, and equipment required for the participation of a designated beneficiary in an apprenticeship program registered and certified with the Secretary of Labor under section 1 of the National Apprenticeship Act (29 U.S.C. 50).”

(b) DISTRIBUTIONS FOR CERTAIN HOMESCHOOLING EXPENSES.—Section 529(c)(7) of such Code is amended by striking “include a reference to” and all that follows and inserting: “include a reference to—
“(A) expenses for tuition in connection with enrollment or attendance of a designated beneficiary at an elementary or secondary public, private, or religious school, and

“(B) expenses, with respect to a designated beneficiary, for—

“(i) curriculum and curricular materials,

“(ii) books or other instructional materials,

“(iii) online educational materials,

“(iv) tuition for tutoring or educational classes outside of the home (but only if the tutor or class instructor is not related (within the meaning of section 152(d)(2)) to the student),

“(v) dual enrollment in an institution of higher education, and

“(vi) educational therapies for students with disabilities, in connection with a homeschool (whether treated as a homeschool or a private school for purposes of applicable State law).”.

(c) DISTRIBUTIONS FOR QUALIFIED EDUCATION LOAN REPAYMENTS.—
(1) IN GENERAL.—Section 529(c) of such Code, as amended by subsection (a), is amended by adding at the end the following new paragraph:

“(9) TREATMENT OF QUALIFIED EDUCATION LOAN REPAYMENTS.—

“(A) IN GENERAL.—Any reference in this subsection to the term ‘qualified higher education expense’ shall include a reference to amounts paid as principal or interest on any qualified education loan (as defined in section 221(d)) of the designated beneficiary or a sibling of the designated beneficiary.

“(B) LIMITATION.—The amount of distributions treated as a qualified higher education expense under this paragraph with respect to the loans of any individual shall not exceed $10,000 (reduced by the amount of distributions so treated for all prior taxable years).

“(C) SPECIAL RULES FOR SIBLINGS OF THE DESIGNATED BENEFICIARY.—

“(i) SEPARATE ACCOUNTING.—For purposes of subparagraph (B) and subsection (d), amounts treated as a qualified higher education expense with respect to the loans of a sibling of the designated
beneficiary shall be taken into account with respect to such sibling and not with respect to such designated beneficiary.

“(ii) Sibling defined.—For purposes of this paragraph, the term ‘sibling’ means an individual who bears a relationship to the designated beneficiary which is described in section 152(d)(2)(B).”.

(2) Coordination with deduction for student loan interest.—Section 221(e)(1) of such Code is amended by adding at the end the following:

“The deduction otherwise allowable under subsection (a) (prior to the application of subsection (b)) to the taxpayer for any taxable year shall be reduced (but not below zero) by so much of the distributions treated as a qualified higher education expense under section 529(c)(9) with respect to loans of the taxpayer as would be includible in gross income under section 529(c)(3)(A) for such taxable year but for such treatment.”.

(d) Distributions for certain elementary and secondary school expenses in addition to tuition.—Section 529(e)(7)(A) of such Code, as amended by subsection (b), is amended to read as follows:
“(A) expenses described in section 530(b)(3)(A)(i) in connection with enrollment or attendance of a designated beneficiary at an elementary or secondary public, private, or religious school, and”.

(e) EFFECTIVE DATES.—The amendments made by this section shall apply to distributions made after December 31, 2018.

TITLE IV—REVENUE PROVISIONS

SEC. 401. MODIFICATION OF REQUIRED DISTRIBUTION RULES FOR DESIGNATED BENEFICIARIES.

(a) Modification of Rules Where Employee Dies Before Entire Distribution.—

(1) In general.—Section 401(a)(9) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraph

“(H) SPECIAL RULES FOR CERTAIN DEFINED CONTRIBUTION PLANS.—In the case of a defined contribution plan, if an employee dies before the distribution of the employee’s entire interest—

“(i) In general.—Except in the case of a beneficiary who is not a designated beneficiary, subparagraph (B)(ii)—
“(I) shall be applied by substituting ‘10 years’ for ‘5 years’, and
“(II) shall apply whether or not distributions of the employee’s interests have begun in accordance with subparagraph (A).

“(ii) Exception only for eligible designated beneficiaries.—Subparagraph (B)(iii) shall apply only in the case of an eligible designated beneficiary.

“(iii) Rules upon death of eligible designated beneficiary.—If an eligible designated beneficiary dies before the portion of the employee’s interest to which this subparagraph applies is entirely distributed, the exception under clause (iii) shall not apply to any beneficiary of such eligible designated beneficiary and the remainder of such portion shall be distributed within 10 years after the death of such eligible designated beneficiary.

“(iv) Application to eligible retirement plans.—For purposes of applying the provisions of this subparagraph in determining the amounts required to be
distributed pursuant to this paragraph, all eligi-
ble retirement plans (as defined in sec-
tion 402(c)(8)(B)) other than a defined benefit plan shall be treated as a defined contribution plan.”.

(2) DEFINITION OF ELIGIBLE DESIGNATED BENEFICIARY.—Section 401(a)(9)(E) of such Code is amended to read as follows:

“(E) DEFINITIONS AND RULES RELATING TO DESIGNATED BENEFICIARY.—For purposes of this paragraph—

“(i) DESIGNATED BENEFICIARY.—The term ‘designated beneficiary’ means any individual designated as a beneficiary by the employee.

“(ii) ELIGIBLE DESIGNATED BENEFICIARY.—The term ‘eligible designated beneficiary’ means, with respect to any employee, any designated beneficiary who is—

“(I) the surviving spouse of the employee,

“(II) subject to clause (iii), a child of the employee who has not reached majority (within the meaning of subparagraph (F)),

“(III) a child who has reached majority (within the meaning of subparagraph (F)) as of the date described in section 3401(b)(6) (as in effect on the date of the enactment of this paragraph), or

“(IV) a child who has not reached majority (within the meaning of subparagraph (F)) as of the date described in section 3401(b)(6) (as in effect on the date of the enactment of this paragraph).
“(III) disabled (within the meaning of section 72(m)(7)),

“(IV) a chronically ill individual (within the meaning of section 7702B(c)(2), except that the requirements of subparagraph (A)(i) thereof shall only be treated as met if there is a certification that, as of such date, the period of inability described in such subparagraph with respect to the individual is an indefinite one which is reasonably expected to be lengthy in nature), or

“(V) an individual not described in any of the preceding subclauses who is not more than 10 years younger than the employee.

“(iii) Special rule for children.—Subject to subparagraph (F), an individual described in clause (ii)(II) shall cease to be an eligible designated beneficiary as of the date the individual reaches majority and any remainder of the portion of the individual’s interest to which sub-
paragraph (H)(ii) applies shall be distributed within 10 years after such date.

“(iv) **TIME FOR DETERMINATION OF ELIGIBLE DESIGNATED BENEFICIARY.**—The determination of whether a designated beneficiary is an eligible designated beneficiary shall be made as of the date of death of the employee.”.

(3) **EFFECTIVE DATES.—**

(A) **IN GENERAL.**—Except as provided in this paragraph and paragraphs (4) and (5), the amendments made by this subsection shall apply to distributions with respect to employees who die after December 31, 2019.

(B) **COLLECTIVE BARGAINING EXCEPTION.**—In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified before the date of enactment of this Act, the amendments made by this subsection shall apply to distributions with respect to employees who die in calendar years beginning after the earlier of—

(i) the later of—
(I) the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof agreed to on or after the date of the enactment of this Act), or

(II) December 31, 2019, or


For purposes of clause (i)(I), any plan amendment made pursuant to a collective bargaining agreement relating to the plan which amends the plan solely to conform to any requirement added by this section shall not be treated as a termination of such collective bargaining agreement.

(C) GOVERNMENTAL PLANS.—In the case of a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986), subparagraph (A) shall be applied by substituting “December 31, 2021” for “December 31, 2019”.

(4) EXCEPTION FOR CERTAIN EXISTING ANNUITY CONTRACTS.—

(A) IN GENERAL.—The amendments made by this subsection shall not apply to a qualified
annuity which is a binding annuity contract in
effect on the date of enactment of this Act and
at all times thereafter.

(B) QUALIFIED ANNUITY.—For purposes
of this paragraph, the term “qualified annuity”
means, with respect to an employee, an annu-
ity—

   (i) which is a commercial annuity (as
defined in section 3405(e)(6) of the Inter-
   nal Revenue Code of 1986);

   (ii) under which the annuity payments
are made over the life of the employee or
over the joint lives of such employee and a
designated beneficiary (or over a period
not extending beyond the life expectancy of
such employee or the joint life expectancy
of such employee and a designated bene-
iciary) in accordance with the regulations
described in section 401(a)(9)(A)(ii) of
such Code (as in effect before such amend-
ments) and which meets the other require-
ments of section 401(a)(9) of such Code
(as so in effect) with respect to such pay-
ments; and

   (iii) with respect to which—
(I) annuity payments to the employee have begun before the date of enactment of this Act, and the employee has made an irrevocable election before such date as to the method and amount of the annuity payments to the employee or any designated beneficiaries; or

(II) if subclause (I) does not apply, the employee has made an irrevocable election before the date of enactment of this Act as to the method and amount of the annuity payments to the employee or any designated beneficiaries.

(5) EXCEPTION FOR CERTAIN BENEFICIARIES.—

(A) IN GENERAL.—If an employee dies before the effective date, then, in applying the amendments made by this subsection to such employee’s designated beneficiary who dies after such date—

(i) such amendments shall apply to any beneficiary of such designated beneficiary; and
(ii) the designated beneficiary shall be
treated as an eligible designated bene-
ficiary for purposes of applying section
401(a)(9)(H)(ii) of the Internal Revenue
Code of 1986 (as in effect after such
amendments).

(B) EFFECTIVE DATE.—For purposes of
this paragraph, the term “effective date” means
the first day of the first calendar year to which
the amendments made by this subsection apply
to a plan with respect to employees dying on or
after such date.

(b) PROVISIONS RELATING TO PLAN AMEND-
MENTS.—

(1) IN GENERAL.—If this subsection applies to
any plan amendment—

(A) such plan shall be treated as being op-
erated in accordance with the terms of the plan
during the period described in paragraph
(2)(B)(i); and

(B) except as provided by the Secretary of
the Treasury, such plan shall not fail to meet
the requirements of section 411(d)(6) of the In-
ternal Revenue Code of 1986 and section
204(g) of the Employee Retirement Income Se-
security Act of 1974 by reason of such amend-
ment.

(2) Amendments to which subsection ap-
plies.—

(A) In general.—This subsection shall
apply to any amendment to any plan or which
is made—

(i) pursuant to any amendment made
by this section or pursuant to any regula-
tion issued by the Secretary of the Treas-
ury under this section or such amend-
ments; and

(ii) on or before the last day of the
first plan year beginning after December
31, 2021, or such later date as the Sec-
retary of the Treasury may prescribe.

In the case of a governmental or collectively
bargained plan to which subparagraph (B) or
(C) of subsection (a)(4) applies, clause (ii) shall
be applied by substituting the date which is 2
years after the date otherwise applied under
such clause.

(B) Conditions.—This subsection shall
not apply to any amendment unless—

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

(II) ending on the date described in subparagraph (A)(ii) (or, if earlier, the date the plan amendment is adopted),

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

(ii) such plan amendment applies retroactively for such period.

SEC. 402. INCREASE IN PENALTY FOR FAILURE TO FILE.

(a) IN GENERAL.—The second sentence of subsection (a) of section 6651 of the Internal Revenue Code of 1986 is amended by striking “$205” and inserting “$400”.

(b) INFLATION ADJUSTMENT.—Section 6651(j)(1) of such Code is amended by striking “$205” and inserting “$400”.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to returns the due date for which (including extensions) is after December 31, 2019.
SEC. 403. INCREASED PENALTIES FOR FAILURE TO FILE RETIREMENT PLAN RETURNS.

(a) In general.—Subsection (e) of section 6652 of the Internal Revenue Code of 1986 is amended—

(1) by striking “$25” and inserting “$105”;

and

(2) by striking “$15,000” and inserting “$50,000”.

(b) Annual registration statement and notification of changes.—Subsection (d) of section 6652 of the Internal Revenue Code of 1986 is amended—

(1) by striking “$1” both places it appears in paragraphs (1) and (2) and inserting “$2”;

(2) by striking “$5,000” in paragraph (1) and inserting “$10,000”; and

(3) by striking “$1,000” in paragraph (2) and inserting “$5,000”.

(c) Failure to provide notice.—Subsection (h) of section 6652 of the Internal Revenue Code of 1986 is amended—

(1) by striking “$10” and inserting “$100”;

and

(2) by striking “$5,000” and inserting “$50,000”.

(d) Effective date.—The amendments made by this section shall apply to returns, statements, and notifi-
cations required to be filed, and notices required to be pro-
vided, after December 31, 2019.

SEC. 404. INCREASE INFORMATION SHARING TO ADMIN-
ISTER EXCISE TAXES.

(a) IN GENERAL.—Section 6103(o) of the Internal
Revenue Code of 1986 is amended by adding at the end
the following new paragraph:

“(3) TAXES IMPOSED BY SECTION 4481.—Re-
turns and return information with respect to taxes
imposed by section 4481 shall be open to inspection
by or disclosure to officers and employees of United
States Customs and Border Protection of the De-
partment of Homeland Security whose official duties
require such inspection or disclosure for purposes of
administering such section.”.

(b) CONFORMING AMENDMENTS.—Paragraph (4) of
section 6103(p) of the Internal Revenue Code of 1986 is
amended by striking “or (o)(1)(A)” each place it appears
and inserting “, (o)(1)(A), or (o)(3)”.

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February 22, 2019

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Suite 400
Washington, DC  20210

Re: Request for Guidance to Address Missing and Unresponsive Participant Challenges

Dear Assistant Secretary Rutledge:

The ERISA Industry Committee (“ERIC”) appreciates the opportunity to provide the United States Department of Labor (the “Department”) suggestions for guidance on the important issue of missing retirement plan participants and participants who do not commence benefits at the required beginning date (the latter referred to in this letter as “unresponsive” participants). ERIC shares the Department’s conviction that paying out retirement benefits is the singular purpose of retirement plans. Plan sponsors voluntarily spend time, money, and administrative resources to provide retirement plans in order to achieve the essential goal of paying retirement benefits to their former workers. Therefore, ERIC also shares the Department’s concerns about barriers that may be preventing individuals from commencing their vested retirement benefits, and ERIC is committed to supporting solutions that remove such barriers.

There is a significant need for Departmental guidance on this issue, especially on the fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), that apply to defined benefit plans.¹ Even the most compliance-oriented plan administrators find it difficult to understand and comply with their fiduciary duties in this area due to the lack of applicable guidance from the Department. There is also the practical challenge that plan administrators cannot always do “whatever it takes” to find every last missing participant and nudge every unresponsive participant into payment due to the attendant costs and other challenges.² And even though there is no directly applicable guidance, the Department is aggressively pursuing a Terminated Vested Participant Project (“TVPP”) enforcement initiative and subjecting plan fiduciaries to protracted investigations and, in some cases, findings of ERISA breach, in a manner that appears inconsistent with ERISA’s fiduciary duties.

1 ERIC understands that the Department’s guidance will focus on defined benefit plan issues, and so this letter assumes a focus on such plans. However, most of ERIC’s recommendations also apply to defined contribution plans (should the Department’s forthcoming guidance cover both).

2 This challenge has been compounded by the termination of the Internal Revenue Service (the “IRS”) and the Social Security Administration Letter Forwarding Program. This challenge is also expected to grow, given that today’s workers tend to switch jobs more frequently and that large numbers of “Baby Boomers” are reaching retirement age every year.

ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels.
standards. For all of these reasons, ERIC is extremely supportive of the Department’s efforts to issue
guidance in this area.

ERIC and its member companies are uniquely positioned to provide valuable insight that could
strengthen this forthcoming guidance. ERIC is the only national association that advocates exclusively
for large employers on health, retirement, and compensation public policies at the federal, state, and
local levels. ERIC’s members are leaders in every industry sector and provide comprehensive
retirement benefits to tens of millions of active and retired workers and their families across the country.
ERIC has a strong interest in policies that impact the ability of employers to provide cost-effective
retirement programs and the ability of employees to receive such benefits. Although plans of all sizes
deal with missing participant issues, ERIC’s large employer members are especially likely to face these
challenges because they tend to have larger defined benefit plans, which are inherently more complex
and have more significant acquisition histories (including acquisitions where the plan inherited
incomplete records).

ERIC’s members care greatly about the participants and beneficiaries of their employer-sponsored plans.
These member employers devote tremendous resources to their retirement plans, and they want each
participant to benefit fully from them. This forthcoming guidance is greatly needed—and would be
greatly welcomed—to guide plan fiduciaries in ensuring that retirement plan participants receive their
benefits.

**Executive Summary of ERIC Recommendations and Requested Guidance**

As discussed below in more detail, ERIC supports the Department’s issuance of guidance that affirms
ERISA’s fiduciary standards, including affirming that such standards require plan administrators to take
reasonable steps to locate missing participants and to encourage unresponsive participants to begin
payment on time. In issuing such guidance, we request that the Department seek to assist plan
fiduciaries by providing them with a compliance roadmap to satisfy those duties, not one-size-fits-all
requirements. In particular, the Department should affirm the fact-specific and process-oriented nature
of ERISA’s fiduciary duties and outline a compliance framework that allows fiduciaries the discretion to
select reasonable steps to satisfy those duties. For example, the Department could issue an Interpretive
Bulletin (“IB”) or Field Assistance Bulletin (“FAB”) that identifies Department-endorsed examples of
how plan fiduciaries can fulfill their duties but allows fiduciaries the discretion to select among those
compliance steps (or determine other methods of reasonable compliance) based upon the particular plan
or participant.

ERIC strongly discourages the Department from any approach, or legal standard, that requires the same
fiduciary action in all circumstances, such as a minimum standard checklist. Also, as discussed below,
the Department’s forthcoming guidance should be consistent with—or at least not inconsistent with—
the guidance of other federal agencies, and should distinguish between missing and unresponsive
participants because these two populations present distinct challenges.

In considering this type of fact-specific framework, ERIC makes six specific recommendations to the
Department.

- First, ERIC encourages the Department to extend Field Assistance Bulletin 2014-01 to searches
  for missing participants in nonterminating plans and defined benefit plans, provided the
Department frames these steps as recommendations and allows fiduciaries the discretion to select from among them.

- Second, ERIC recommends that the Department *articulate additional examples of compliance steps* (in addition to extending FAB 2014-01) that fiduciaries can consider in fulfilling their duties with respect to missing participants.

- Third, ERIC recommends that the Department *provide examples of compliance steps* related to unresponsive participants.

- Fourth, ERIC recommends that the Department provide guidance that supports, and provides fiduciary protection for, *additional distribution options*, particularly in the defined contribution plan context.

- Fifth, ERIC recommends that the Department provide some fiduciary protection (and monitoring guidance) for plan administrators that rely upon *third parties* to conduct missing participant search activities.

- Sixth, ERIC encourages the Department to provide additional but separate guidance—i.e., separate from this missing and unresponsive participant guidance—on the related issue of *uncashed checks and returned electronic file transfer payments*.

ERIC is confident that these recommendations—which draw on the deep experience of its members in sponsoring and administering large retirement plans—will help the Department to address the significant challenges of missing and unresponsive participants, and will remove the current confusion that plan fiduciaries face in fulfilling their fiduciary duties in this area.

**ERIC Recommends That the Department Provide a Compliance Roadmap That Is Consistent with ERISA’s Fact-Specific and Process-Focused Fiduciary Standards**

As noted above, in drafting guidance on these missing and unresponsive participant challenges, ERIC expects that the Department will affirm that ERISA’s fiduciary standards require plan administrators to take reasonable steps to locate missing participants and to encourage unresponsive participants to begin payment on time. ERIC agrees with these goals. ERISA’s fiduciary standards require plan administrators to act solely in the interests of the plan, for the exclusive purpose of providing plan benefits and defraying reasonable plan expenses, and with the care, skill, prudence, and diligence of a prudent person. When applied to missing and unresponsive participant issues, these standards clearly require that fiduciaries act appropriately to preserve plan records, locate missing participants, and nudge unresponsive participants into payment.

The Department’s forthcoming guidance should also assist plan fiduciaries in satisfying these duties by providing them with a compliance roadmap. In particular, ERIC asks the Department to consider issuing an IB or FAB that outlines some of the ways that plan fiduciaries can fulfill their duties to search for participants, preserve records and encourage commencements. However, it is critical that the Department avoid a compliance framework that requires the same steps in all circumstances, such as a minimum standard checklist. The challenges of missing and unresponsive participants are not solvable through a single checklist—and ERISA’s legal standards do not require the same action in all contexts.
Instead, the solutions for locating and nudging participants—and the minimum standards required under ERISA’s fiduciary duties—are necessarily fact-specific. They depend upon the particular plan, the individual participant and other variable factors. At a minimum, relevant factors include plan demographics (such as whether the population is older or younger, transient or stable, engaged or not engaged with the Internet etc.); participant account balances (for example, small balances may not warrant search and outreach efforts that exceed the cost of the benefit); and the history of the plan (for example, a plan sponsor with a lengthy acquisition history may have inherited bad records that cannot be fixed or a frozen plan may have already completed many comprehensive participant searches in the process of offering lump-sum payout windows). A single compliance checklist would be inconsistent with long settled principles (affirmed by the Department) that ERISA’s fiduciary duties are fact-specific, and permit consideration of reasonableness factors such as plan costs. Moreover, ERISA’s fiduciary duties should not go so far as to permit a fiduciary to disregard considerations related to a participant’s privacy or the security of the participant’s benefit, such as by requiring a plan administrator to send information about the participant and his or her benefit out to all similarly named individuals and unconfirmed family members. Such actions could cause identity theft and payment to the wrong individual. Any fiduciary duty to locate participants and nudge them into payment must be weighed against the fiduciary’s responsibility to preserve participant privacy and the security of the benefit.

Accordingly, the Department’s guidance should not only acknowledge the fiduciary duties related to missing and unresponsive participants, but also affirm that these duties are fact-specific. And the Department should provide a framework that helps fiduciaries achieve compliance—and helps them successfully locate and nudge more participants into payment—but allows for fiduciary discretion to select steps that suit the particular plan or participant.

For example, the Department’s forthcoming guidance could identify Department-endorsed examples of how plan fiduciaries can fulfill their duties to search for participants, preserve records and encourage commencements, while affirming that plan administrators have the discretion to select among these examples (or determine other methods of reasonable compliance). The failure to implement any particular Department-endorsed step, or a particular number of such steps, would not in and of itself be probative of a lack of sufficient fiduciary process, particularly if the fiduciary engaged in a deliberate analysis of plan and participant-specific facts (such as demographics, account balances, costs, administrative burdens, and privacy and benefit security challenges). This type of flexible framework would allow fiduciaries the discretion to implement a compliance program that reflects the particular plan and the individual participant. It avoids a singular compliance checklist that would be contrary to ERISA’s fact-specific fiduciary duties and less likely to solve the fact-specific challenges of missing and unresponsive participants.

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3 E.g., 29 C.F.R. § 2550.404a-1 (recognizing, and quoting the statutory language that makes ERISA’s fiduciary standards dependent upon, “the circumstances then prevailing”). See also Donovan v. Walton, 609 F. Supp. 1221, 1240 (S.D. Fla. 1985) (prudence “is given meaning by the facts and circumstances of each case”), aff’d sub nom. Brock v. Walton, 794 F.2d 586 (11th Cir. 1986).
4 E.g., Field Assistance Bulletin No. 2006-01 (recognizing in the context of settlement distributions that plan fiduciaries may engage in a cost-benefit analysis and elect to not distribute de minimis amounts or to use omnibus distributions); Field Assistance Bulletin No. 2003-03 (permitting plan costs to be distributed per capita in the appropriate circumstances). If a plan administrator did not consider factors such as plan costs and administrative burdens in order to “do whatever it takes” to find missing participants and to nudge unresponsive ones into payment, this could violate other ERISA requirements such as the duty of loyalty and the requirement that plan expenditures be reasonable.
ERIC also endorses this type of flexible framework because it is process-oriented. In general, ERIC strongly encourages the Department to emphasize in its guidance that fiduciary compliance is measured on the basis of processes rather than outcomes. As the Department has long recognized, ERISA’s fiduciary standards center on process over outcomes judged in hindsight. Under these process-based standards, a fiduciary breach should not be determined by the mere existence of missing and unresponsive participants, or some arbitrary number or percentage of such participants; instead, the measure should primarily be whether the plan has a robust process to locate participants and to communicate with them. Yet, this has been a problem in the Department’s ongoing TVPP investigations. In some of these investigations, ERIC members report that they have been told that a fiduciary breach will be ongoing until all missing participants are located, that the failure of a terminated vested participant to commence benefits at normal retirement age is a fiduciary breach, and that the existence of errors or gaps in plan records is probative of a fiduciary breach. These statements contradict long-settled ERISA authority that emphasizes process over outcomes.

Apart from being legally misguided, these types of outcomes-based conclusions improperly assume that a robust process will provide resolution for all missing and unresponsive participants. This is not true. There can be individuals who are truly impossible to locate, even after numerous search attempts. For example, one ERIC member plan reported having a participant who was not locatable because (the plan later learned) the individual was in the Federal Witness Protection Program. Others have encountered issues with participants who are incarcerated, have left the country, or have gone “off the grid.”

Similarly, ERIC’s members have repeatedly found that there are participants who are not commencing, or even responding to plan mailings, by choice. These individuals prefer to put off starting benefits despite repeated reminders, including in some cases after being repeatedly told about the tax consequences of failing to start payment by their required beginning date. This reluctance to start benefits can occur for any number of reasons, such as a desire to defer payment while still working for another employer, concerns about managing assets, a desire to keep money from third parties such as creditors or ex-spouses, and uncertainty about whether they will remain eligible for other benefits, including government assistance.

For these reasons, the Department’s forthcoming guidance should not measure compliance on the basis of outcomes like the existence of missing or unresponsive participants or the number or percentage of participants in these categories. Instead, the Department should adopt a process-based measure for

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5 E.g., Field Assistance Bulletin No. 2015-02 (“the prudence of a fiduciary decision is evaluated with respect to the information available at the time the decision was made and not based on facts that come to light only with the benefit of hindsight”). See also Bunch v. W.R. Grace & Co., 555 F.3d 1, 10 (1st Cir. 2009) (confirming that hindsight “is not the lens by which we view a fiduciary’s actions under ERISA,” but rather that the fiduciary’s actions are to be evaluated based on the “situation which faced it, based on the facts then known”); DiFelice v. U.S. Airways Inc., 497 F.3d 410, 424 (4th Cir. 2007) (“First and foremost, whether a fiduciary’s actions are prudent cannot be measured in hindsight, whether this hindsight would accrue to the fiduciary’s detriment or benefit.”); Metzler v. Graham, 112 F.3d 207, 209 (5th Cir. 1997) (“Prudence is evaluated at the time of the investment without the benefit of hindsight.”); Katzerov v. Cody, 744 F.2d 270, 279 (2d Cir. 1984), cert. denied, 469 U.S. 1092 (1984) (fiduciary conduct must be viewed “from the perspective of the time of the [challenged decision] rather than from the vantage point of hindsight”); Donovan v. Mazzola, 716 F.2d 1226, 1232 (9th Cir. 1983) (the test of prudence is “whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods”); Marshall v. Glass/Metal Assocs. & Glaziers & Glassworkers Pension Plan, 507 F. Supp. 378, 384 (D. Haw. 1980) (“The application of ERISA’s prudence standard does not depend upon the ultimate outcome of an investment, but upon the prudence of the fiduciaries under the circumstances prevailing when they make their decision and in light of the alternatives available to them.”).
compliance, like the flexible framework suggested by ERIC. Also, in the case of employers that have agreed to take certain actions for a limited period in connection with resolving a TVPP investigation, there should be no inference that these actions are required on an ongoing basis to demonstrate compliance with ERISA. (Indeed, ERIC’s members suspect that with guidance and time, prudent practices will emerge that are more effective than the steps required by the Department to close these TVPP investigations.)

ERIC also recommends that the Department ensure that its forthcoming guidance is consistent with—or at least not inconsistent with—guidance of other federal agencies. Most especially, the Department’s guidance should honor long-standing interpretations of Internal Revenue Code provisions by the IRS that permit plans to wait for benefit applications and to forfeit immediately payable benefits after a reasonable search effort. ERIC’s members have reported Department investigators in TVPP investigations making statements that contradict these IRS interpretations. This is highly detrimental to effective plan administration, as many ERISA plans have long relied on these IRS interpretations to structure benefit programs. When issuing future guidance, the Department should work with other federal agencies (especially the IRS) to avoid positions that contradict other regulators. As discussed below, this would not preclude the Department from providing helpful clarification on the required search and communication steps before a benefit can be forfeited (which ERIC acknowledges is within the Department’s interpretive jurisdiction). Relatedly, ERIC encourages the Department to include in its forthcoming guidance fiduciary protections to support plan administrators that desire to use the newly expanded Pension Benefit Guaranty Corporation (the “PBGC”) missing participant program.

Finally, ERIC recommends that the Department’s guidance distinguish between missing and unresponsive participants. These two populations present distinct challenges. For this purpose, a participant would only be a missing participant if the plan fiduciary has reason to believe that the participant’s contact information, as reflected in the records of the plan, is no longer valid (primarily because a plan mailing to the participant has been returned as undeliverable), whereas an unresponsive participant appears to be receiving plan communications, but is not commencing benefits or otherwise responding to those communications. The types of searches that may be appropriate for missing participants will be a misuse of valuable plan resources for unresponsive participants. Instead, as

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6 See 26 C.F.R. § 1.401(a)-14(d) (Providing, that notwithstanding Section 401(a)(14) of the Internal Revenue Code of 1986, as amended (the “Code”), requiring benefits commencement not later than termination of employment or normal retirement date, if payment is “not possible” because “the plan administrator has been unable to locate the participant after making reasonable efforts to do so,” payment can commence not later than 60 days after the participant is found.); 26 C.F.R. § 1.411(a)-11(c)(7) (Permitting a plan to treat the absence of a benefit application as an election to defer receipt of payments); and 26 C.F.R. § 1.411(a)-4(b)(6) (Permitting an exception to Code Section 411(a) for the forfeiture of an accrued benefit “on account of the inability to find the participant or beneficiary . . . provided that the plan provides for reinstatement of the benefit.”).

These IRS interpretations are not only long settled (and thus long relied on by plan administrators), but are also binding on the Department as provisions for which regulatory interpretation has been reserved to the Secretary of the Treasury. See 29 U.S.C. § 1202(c); 29 C.F.R. § 2530.200a-2; and Reorganization Plan No. 4 of 1978, § 101, reprinted in 5 U.S.C. App. 1 (43 Fed. Reg. 47,713, Oct. 17, 1978) (reserving to the IRS interpretive authority over vesting and forfeiture and any other Parts 2 and 3 of Subtitle B of Title I of ERISA and Sections 404, 410, 411, 412, and 413 of the Internal Revenue Code, unless a provision has been specifically reserved to the Secretary of Labor; Code Sections 401(a)(14) and 411(a), and their corresponding provisions under ERISA, have not been reserved to the Secretary of Labor). See also ERISA Opinion Letter 77 – 08 (April 4, 1977) (noting that the Department is “not commenting on the issues of whether such recovery would constitute a forfeiture for purposes of section 203(a) of ERISA and section 411(a) of the Internal Revenue Code of 1954 . . . because these issues are within the primary jurisdiction of the Internal Revenue Service”).

discussed below, the fiduciary duties around unresponsive participants should generally be limited to communication and outreach. The Department’s forthcoming guidance should recognize this distinction and provide one set of guidelines for missing participants and another set for unresponsive participants focused on appropriate outreach.

**ERIC’s Specific Recommendations for a Department Roadmap**

In formulating an appropriate fact-specific compliance framework (or other guidance), ERIC has six specific recommendations for the Department.

1. **The Department Should Extend the Steps Under FAB 2014-01 as Suggested Steps for Defined Benefit Plan Missing Participant Searches**

ERIC’s first recommendation is that the Department extend Field Assistance Bulletin 2014-01 to searches for missing participants in nonterminating plans and defined benefit plans, provided the Department frames these steps as recommendations and allows fiduciaries the discretion to select among them after consideration of the plan’s best interests.

As the Department is aware, those specific steps require plan administrators to (1) use certified mail; (2) check related plan or plan sponsor records; (3) contact the participant’s beneficiary on file; (4) use free electronic search tools; and (5) utilize a for-cost search tool or service (such as Internet search tools, commercial locator services, credit-reporting agencies, information brokers, and investigation databases).

ERIC believes that in many circumstances, these actions can be appropriate for a fiduciary fulfilling its duties related to missing participants. These steps have also been endorsed (to varying degrees) by the IRS and the PBGC as appropriate missing participant search steps. Accordingly, ERIC encourages the Department to extend them to ongoing administration and defined benefit plans.

That said, in administering plans on a daily basis, ERIC’s members have found that all of these steps are not necessary, or even well-suited, for all plans and all participants. ERIC would therefore strongly caution the Department against requiring all of these steps for ERISA compliance.

For example, in the experience of ERIC’s members, certified mailings are not always the most productive means for reaching unresponsive participants. Some participants are more reluctant to open certified mailings because (for example) they fear that they are attempts to collect a debt or to serve legal process, or are part of a scam. Certified mailings are also not a foolproof way to

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9 For purposes of this letter, and ERIC’s recommendations to the Department, “beneficiaries” may include identified “alternate payees.”
10 Similar search steps have been adopted by the PBGC (identifying the search requirements before a plan can transfer a missing participant benefit to the PBGC; see Missing Participants, 82 Fed. Reg. 60,800 (Dec. 22, 2017); 29 C.F.R. § 4050.104 and 29 C.F.R. § 4050.404) and the IRS (setting out the minimum steps a plan can take to search for a missing participant to avoid a qualification failure under IRC 401(a)(9) for failure to make a required minimum distribution; see I.R.S. Memorandum for Employee Plans (EP) Examinations Employees, “Missing Participants and Beneficiaries and Required Minimum Distributions,” Oct. 19, 2017).
validate an address. An individual who is not the participant can easily sign the certification. Certified mailings are also costly. If they are required for all plan outreach, this could deter a plan from sending more frequent outreach mailings. For these reasons, certified mailings should be an optional compliance step or mandatory only in limited circumstances.

Another example is the use of free electronic search tools. ERIC agrees that when addressing missing participants, in most cases it will be helpful to use free electronic search tools. But ERIC’s members have also found that these sources can have significant limitations. Not every person can be found online. In fact, in most cases, free Internet search engines are overly inclusive and highly unreliable. A common name tends to generate an unwieldy number of results, the vast majority of which have no relevance. A plan administrator then has to expend significant time and resources vetting these results or sending an unending number of letters. The plan administrator also has to consider identity theft concerns (if, for example, the outreach is received by the wrong person). In light of these challenges, the use of free electronic search tools should be a possible compliance step, with plan fiduciaries having the discretion to determine whether and when to run such searches and how to use (or not use) the results.

There are similar challenges with for-cost search services and tools (a point even the Department acknowledges in FAB 2014-01, framing this step as optional). Again, ERIC’s members agree that these types of resources may be helpful in some circumstances, but they have limitations and are not a panacea. A critical factor is cost (especially as weighed against effectiveness). These services can be expensive and therefore do not make sense for every missing participant. For example, it would not make sense to pay for searches that are (alone or cumulatively) more expensive than the participant’s benefit. Similarly, it might not be in the plan’s interest to keep paying for searches if a missing participant has already been searched for many times without success. As noted above, there are some individuals who are truly impossible to locate. A plan fiduciary could find that such repeated expenditures on for-cost searches are an inappropriate and wasteful use of plan resources.

For all of these reasons, ERIC encourages the Department to extend the FAB 2014-01 steps to ongoing and defined benefit plan administration as examples of compliance options, subject to the discretion of the fiduciary to select and implement.

2. **The Department Should Provide Additional Optional Compliance Steps for Missing Participant Searches**

ERIC’s second recommendation is that the Department articulate additional examples of compliance steps (in addition to extending FAB 2014-01) that fiduciaries can consider in fulfilling their duties with respect to missing participants.

ERIC’s members have reported that the Department has presented a number of these suggestions in the course of TVPP investigations and ERIC agrees with the Department that certain of these steps are consistent with ERISA’s fiduciary standards and could help reduce the number of missing and unresponsive participants. But like FAB 2014-01, these types of steps are not going to make sense for every plan and every circumstance, and ERISA’s fiduciary standards should not per se require their application; instead the Department should frame these compliance steps
as suggestions, and allow fiduciaries the discretion to select particular steps after consideration of the plan’s best interests.

In particular, ERIC welcomes the following suggested compliance steps:

- **Periodic missing participant searches.** ERIC recognizes that ERISA’s fiduciary standards may require fiduciaries to engage in periodic missing participant searches. However, ERISA should not be deemed to require a specific minimum number or frequency of searches. Instead, the required number and frequency is highly fact-specific based upon such considerations as cost, plan structure, depth of search, plan population, and average missing participant benefit or account balance, etc. For some plans, a regular search process, such as every few years, will best suit the plan’s administrative programs (for example, in a plan that regularly conducts projects on a calendar basis or if the plan’s recordkeeper has an ongoing search program built into its administrative services). But for other plans (such as a frozen plan that has more limited ongoing administration), it will be a better use of plan resources to focus on a single comprehensive search at certain points, such as when a participant reaches normal retirement age or minimum required distribution age. These factors can also vary from participant to participant. As noted above, there can be participants who truly cannot be located and participants with very small benefit amounts, and it would not be in the plan’s interest to continually search for them.

Accordingly, while ERIC agrees that ERISA’s fiduciary standards may require some reasonable number of searches, the Department’s guidance should recognize that those standards do not require a specific minimum number, or minimum frequency, of searches.

- **Fiduciary discretion to validate an address.** A frequent challenge for plans is determining whether a newly identified address is valid, such as an address found through free Internet searches or a for-cost search service. ERIC’s view is that fiduciaries should have some discretion as to how to utilize such newly identified addresses, and what level of verification to require, based upon factors such as the quality of the search tool, cost and competing privacy considerations. Quite simply, ERIC would caution the Department against a “one size fits all” approach for address validation. For example, as noted above, certified mailings are not a foolproof way to validate an address and should not be mandatory.

Instead, ERIC encourages the Department to endorse a standard for address validation that allows plan fiduciaries the discretion to reasonably determine if an address is valid. A certified mailing or a response to a follow-up confirmation letter could both be examples of reasonable grounds. Another reasonable basis could be if more than one for-

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11 Missing participant searches can be very expensive. For example, one ERIC member reported that for its large pension plan, a third party service provider estimated the cost of a search of all missing deferred vested participants to be approximately $200,000.

12 For example, plans that forfeit benefits after normal retirement age or require retiring participants to commence benefits in order to receive retiree health benefits are not likely to have a large deferred vested population so that frequent searches may be less appropriate.
cost search service identifies the same address. But this should not be a conclusive list of reasonable grounds.

- **Plan sponsor business-record searches.** ERIC would not object to the Department suggesting that if the plan sponsor (or other participating employer) retains address records for business purposes, that the plan consider searching those related business records, provided this is framed as an optional compliance step. While this approach may be helpful for some plans, it should not be a mandatory requirement because of other legal requirements (including privacy laws). Also, many plan sponsors will not have such customer (or similar) address records.

- **Fiduciary action before a benefit forfeiture.** In addition to guidance regarding the ongoing searches a plan fiduciary should conduct for missing participants, a related concern for ERIC is the steps that the fiduciary must take before concluding that a participant cannot be located and the participant’s benefit can be forfeited. ERIC’s members report that Department investigators have expressed disagreement with the IRS rules that permit forfeiture. As explained above, these rules are within the jurisdiction of the IRS and binding on the Department. However, the Department could provide helpful clarification (and has interpretive jurisdiction) on the required search and communication steps before a benefit can be forfeited.

ERIC would welcome guidance on such steps, provided they are sufficiently flexible to allow fiduciary discretion. For example, the Department could interpret ERISA as requiring an “exhaustive” search and outreach before forfeiture of a benefit of sufficient value (e.g., greater than $5,000) but provide fiduciary discretion to interpret the meaning of “exhaustive” for each particular plan and/or participant and endorse forfeiture upon a “limited” search for small account balances (e.g., less than $5,000). Appropriate examples of an “exhaustive” search could include completing all of the FAB 2014-01 steps, or completing multiple for-cost searches (using more than one database and/or service) and sending outreach letters to every current address identified in the multiple searches. But this should not be a conclusive list of “exhaustive searches.” (ERIC also makes specific recommendations below with regards to death confirmations for a forfeiture at death.)

- **Death searches.** A frequent challenge for plans is confirming whether a missing participant has passed away, in order to determine if the participant’s benefit has expired or is now payable to a beneficiary. ERIC agrees that ERISA’s fiduciary duties may require some reasonable effort to search for deceased participants and confirm such deaths. For example, ERISA’s fiduciary standards may indicate that plans check the Social Security Death Master Index (directly or through a search service).

However, as with missing participant searches generally, the necessary level and frequency of such death searches will be fact-specific to the particular plan and participant. Accordingly, ERIC again cautions the Department against a “one size fits all” set of requirements for the scope or frequency of such searches. Again, ERIC believes that a roadmap of compliance steps will best match ERISA’s fiduciary standards. For example, the Department could provide a list of examples of “reasonable
death searches.” Such examples could include a check of the Social Security Death Master Index, the use of a for-cost search service or a check of online obituaries, provided, however, that this is not a conclusive list of the “reasonable” means to search for a death.

- **Death validation.** A related concern for ERIC is what steps are required for a plan administrator to validate that a participant has died (such as after the above death search generates a result indicating a death). While obtaining a death certificate is an ideal way to verify death, in the experience of ERIC’s members, it can be very challenging and costly.\(^ {13} \) And frequently, the plan does not have the ability to locate a family member to provide such a death certificate (or to even verbally confirm the death) if the participant has been long deceased and/or missing before death and there is no beneficiary on file.

For these reasons, ERIC encourages the Department to endorse a standard that allows plan fiduciaries to treat a participant as deceased, even in the absence of a death certificate, if the fiduciary has a reasonable basis for the conclusion.\(^ {14} \) One example of a reasonable basis should be if the participant is found on the Social Security Death Master Index (directly or through a search service). However, this should not be the only example. Other appropriate bases could include an obituary that identifies the participant by first and middle name, or lists some other material identifying information such as a correct birthdate or reference to employment with the plan sponsor. Another reasonable basis could be that a commercial locator service that searches Social Security numbers identifies the participant as deceased.

- **Beneficiary searches.** ERIC recognizes that for plans that pay a benefit to a beneficiary upon a participant’s death, ERISA’s fiduciary standards may require some searches for a deceased participant’s beneficiaries (in order to confirm whether there is a beneficiary to collect a survivor benefit). At minimum, this likely requires outreach to any beneficiary listed in the participant’s file (which, as noted above, is a step under FAB 2014-01).

An unanswered question is whether ERISA requires affirmative efforts to identify and locate beneficiaries (i.e., “beneficiary searches”). ERIC objects to a standard that would require beneficiary searches before a benefit is payable because this would be extremely difficult and costly to administer. In ERIC’s experience, the vast majority of plans are administered to only require identification of the beneficiary when a benefit becomes due. Otherwise, the plan has to constantly request beneficiary designations, regularly monitor those designations for changes (e.g. divorce, death or for non-spousal beneficiaries, a participant’s own desires) and constantly request updates. This creates an unmanageable amount of additional plan administration.

For that reason, ERIC’s position is that such beneficiary searches should only be required when a benefit becomes payable (under the terms of the plan) to a beneficiary, and there is a named beneficiary on file with the plan, and that beneficiary is determined to be

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\(^ {13} \) For example, many states that issue death certificates only do so to family members and/or for an expensive fee.

\(^ {14} \) In recommending this approach, ERIC reminds the Department that in accordance with 26 C.F.R. § 1.411(a)-4(b)(6), a plan must provide for reinstatement of the benefit should the participant, or a beneficiary entitled to a benefit, contact the plan. Accordingly, a forfeiture upon death—and the related validation of death—is always reversible.
missing (primarily on the basis of returned mail). In that situation, ERIC believes the Department’s guidance should treat the beneficiary like any other missing participant.

ERIC does not believe that the Department should require beneficiary searches when the plan’s records do not name a beneficiary unless, and until, the plan receives contact from a confirmed family member of the participant. In the experience of ERIC’s members, if there is no response to mail at the participant’s last known address, and no other affirmative contact by a family member after death, finding a deceased person’s potential beneficiary is like searching for the proverbial needle in a haystack. While there are search tools that suggest an individual’s potential family members, these tools are overly responsive and unreliable. They tend to generate an unwieldy number of possible hits (e.g., dozens of names with many possible addresses) based on unreliable factors (like associated addresses of residence). Moreover, Plan administrators are often hesitant to reach out to these numerous potential hits because of the tremendous resource burdens and also because of identity theft and privacy concerns. For all of these reasons, ERIC strongly objects to a standard that would require beneficiary searches before the plan has a named beneficiary or receives contact from a confirmed family member.

Also, in circumstances where the plan has a beneficiary on file and that beneficiary is not missing but is electing to not commence (or otherwise not responding to plan communications), that beneficiary should be treated like any other unresponsive participant.

- **Periodic data cleanups.** A significant challenge for many plans is that there are often circumstances where the plan has inaccurate or incomplete participant records. These record gaps can result in incomplete participant information (such as incomplete Social Security numbers) and can make locating a lost participant nearly impossible, such as if the gap is a missing or incorrect Social Security number. In most cases, these records were lost or recorded incorrectly a long time ago and through no fault of the current plan administrator. This is especially true in the context of pension plans, as these plans tend to be older and more complex, with more significant acquisition histories.

On the one hand, ERIC understands that it is the Department’s position that ERISA’s fiduciary standards likely require plan fiduciaries to make some reasonable efforts to cure such record gaps when they are discovered. But again, this is an area where there is no conclusive list of “reasonable efforts.” ERIC would welcome suggestions from the Department, so long as they are not framed as required or definitive. For example, one way plans can address participant record gaps is to periodically engage in a data cleanup project. ERIC understands that the Department is supportive of this approach. Again, however, this will not be the case for every plan; for example, a plan with few record gaps or a limited missing participant population, or a plan that has previously undertaken exhaustive participant searches (such as a frozen plan that conducted a comprehensive search project when it was frozen) should not be required to expend valuable resources to conduct such cleanup projects on an ongoing or periodic basis. For similar reasons data cleanup is also not something that should be required on regular timetables, such as every year or two.
The Department’s guidance could also offer suggestions to avoid such errors in the future (such as guidance regarding the appropriate steps to be taken during a plan sponsor transition such as a corporate sale or merger).

Finally, future Department guidance must avoid penalizing plan fiduciaries for inherited record errors (including errors such as missing Social Security numbers that are preventing the plan from locating a participant). So long as a fiduciary makes a reasonable attempt to resolve inherited record errors, the fiduciary should not be held responsible for incurable errors that arose before the fiduciary’s tenure (which is consistent with long-standing ERISA legal authority).15

3. The Department Should Articulate Optional Compliance Steps for Unresponsive Participants

ERIC’s third recommendation is that the Department provide examples of compliance steps related to unresponsive participants. As noted above, unresponsive participants present different challenges—and require different solutions—than missing participants. Chief among the differences is that repeated searches are not appropriate for unresponsive participants. Also, there should be some recognition in the Department’s guidance that certain unresponsive participants do not commence benefits, or even respond to plan outreach, by choice. The guidance should acknowledge that if a plan administrator takes sufficient outreach steps then the administrator should not be penalized if the participant chooses to disregard that outreach and remain out of payment by choice.16

More generally, the Department should frame compliance steps with respect to unresponsive participants as suggestions, and allow fiduciaries the discretion to select particular steps after a consideration of the plan’s and its participants’ best interests.

ERIC’s members have reported that the Department has presented a number of these suggestions in the course of the TVPP investigations, and ERIC agrees with the Department that certain of these steps are consistent with ERISA’s fiduciary standards and could help reduce the number of unresponsive participants. But like the missing participant steps addressed above, these steps are not going to make sense for every plan and every circumstance, and ERISA’s fiduciary standards should not per se require their application; instead, the Department should frame these compliance steps as suggestions, and allow fiduciaries the discretion to select particular steps after consideration of the plan’s and its participants’ best interests.

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15 See, e.g., Davidson v. Cook, 567 F. Supp. 225, 237-38 (E.D. Va. 1983), aff’d, 734 F.2d 10 (4th Cir. 1984), cert. denied, 469 U.S. 899 (1984) (no liability of current fiduciaries for prior fiduciaries’ breaches merely because of “speculative” claims that the successors could have done more to remedy the prior breach); Fernandez v. K-M Indus. Holding Co., 585 F. Supp. 2d 1177, 1184 (N.D. Cal. 2008) (successor fiduciary can only be liable if the breach of fiduciary duty continues); Conner v. Mid S. Ins. Agency, 943 F. Supp. 647, 661 (W.D. La. 1995) (successor fiduciary “may not be held liable with respect to a breach of duty which occurred before he became a fiduciary”; duty is only “to make reasonable efforts to remedy those breaches of which he had actual knowledge” (citations omitted)).

16 Also, under most plans, a participant’s choice to not commence at normal retirement age will not reduce his or her benefit because the plan will pay an actuarial adjustment and/or interest payment (although ERIC recognizes that there may be other consequences, namely the excise tax after required beginning date and the risk of the loss of a contingent benefit that is only available when a participant commences benefits before death).
In particular, ERIC welcomes the following suggested compliance steps:

- **Referencing predecessor employers in communications to deferred vested participants.** ERIC understands that in TVPP investigations, the Department has recommended that some plans include language in plan communications directed to missing and unresponsive participants that refers to predecessor employers under which benefits accrued (and not just the current plan sponsor). This approach may be helpful for plans that have predecessor employers that are unrelated to the plan sponsor. It should not, however, be a mandatory requirement, as there are many plans that do not have unrelated predecessor employers or may not be able to identify the applicable predecessor employer from their currently available records.

- **Communications to deferred vested participants providing instruction on staying in touch with the plan and commencing benefits on time.** ERIC acknowledges that ERISA may require that fiduciaries alert participants to their benefit rights and their obligation to commence at the required beginning date. For example, it may be consistent with ERISA’s duties to ensure that certain plan documents (such as the plan’s summary plan description and any plan communications for terminated participants) remind those participants to keep in touch with the plan, to report address changes, and to start benefits by the required beginning date.

  However, ERIC would object to any language requirement that is too specific or too burdensome and does not allow for adjustment for the particular plan and/or particular document. As a practical matter, plan administrators need flexibility to draft and send such items in the manner they see fit. And as a legal matter, ERISA does not require plan fiduciaries to communicate such concepts in a specific fashion.

- **Periodic mailings to deferred vested participants past normal retirement age and required beginning date.** ERIC recognizes that ERISA’s fiduciary standards may require plan administrators to engage in outreach to participants after they pass normal retirement age and especially after they pass their required beginning date. Of course, this population already receives certain disclosures sent to all plan participants, such as (for defined contribution plans) summary annual reports and (for pension plans) the annual funding notice. There are also communications targeted to terminated participants, namely the vested benefit statement required at legal separation. Even so, ERIC would not disagree with a Department interpretation that ERISA requires additional communications, such as targeted mailings at the significant points of normal retirement age and required beginning date.

  But ERIC would caution the Department on a standard that mandates more frequent communications, such as vested benefit reminders every year after normal retirement age and/or required beginning date. While there may be some plans for whom frequent mailings are productive (for example, because the population tends to respond well to mailings), there may be other populations that are unresponsive to annual mailings. Another factor is that plan mailings are expensive and administratively burdensome; apart from the cost for the mailings themselves, there are also costs and resource burdens on the preparation and follow-up for such mailings. For example, one ERIC member
reported that for its large pension plan, a mass mailing to deferred vested participants can require four to six months of work. A plan administrator may reasonably elect to focus plan resources on a very aggressive outreach at normal retirement age and/or required beginning date, rather than sending ongoing mailings. For these reasons, even if the Department interprets ERISA as requiring additional communications as participants pass normal retirement age and required minimum distribution date, it should avoid a highly structured communication schedule and instead permit fiduciary discretion to design a plan- and/or participant-specific outreach program.

Relatedly, ERIC believes that any mandatory outreach to unresponsive participants should be limited to letters from the plan. Some ERIC member plans utilize limited telephone outreach and even occasional e-mail outreach, and have found some success with these methods. However, these methods have significant limitations and will not make sense for all participants or plans. For example, plan-wide phone outreach can be very time-consuming, labor intensive and expensive. Unlike letters that can be bulk generated, phone calls to large numbers of participants can take a significant amount of time (and cost, if handled by a third-party administrator). Another challenge is that if the information is not in the participant’s file, it can be very difficult to locate an accurate phone number and/or e-mail address. While this contact information can be searched for (both online and through for-cost services), these resources tend to generate an unwieldy number of results, the vast majority of which are not accurate. A plan administrator then has to expend significant time and resources sending letters to numerous potential hits; there are also extremely significant risks of exposing the participant’s benefits to identity theft. Participants also tend to be wary of responding to a “cold” phone call or e-mail (including due to scam/phishing fears). For that reason, phone and e-mail outreach should not be a requirement under ERISA.

ERIC would also caution the Department against requiring plans to get affirmative election deferrals from participants that are past normal retirement age. ERIC has heard of the Department recommending this in TVPP investigations. In the experience of ERIC’s members, these types of plan mailings have a very low return rate while imposing significant costs and burdens.

4. Providing Support, and Fiduciary Protection, for Additional Distribution Options

ERIC’s fourth recommendation is that (particularly in the defined contribution plan context) the Department provide guidance that supports, and provides fiduciary protection for, additional distribution options for missing and unresponsive participant funds, provided such payments are entirely optional in the sole discretion of the plan administrator. Such options could include distributions to IRA rollover accounts, federally insured bank accounts and the like. These types of additional disbursement options would be particularly helpful with respect to participants with small benefit balances. The challenge of small balances17 has been a particular concern for ERIC’s members; plan administrators are frequently hesitant to expend the plan’s valuable financial and administrative resources on costly participant searches and outreach efforts for small benefit amounts. Accordingly, ERIC would welcome the

17 Specifically, small benefit balances that do not qualify for lump sum or small cashout distribution options.
5. **Monitoring of Missing Participant Service Providers**

ERIC’s fifth recommendation is that the Department provide some fiduciary protection for plan administrators that rely upon third parties to conduct missing participant search activities. In the experience of ERIC, plans often use such third parties for these functions, either directly or through the plan’s recordkeeper, in part because these search activities can require unique skills and information access. In issuing guidance, it would be helpful if the Department recognized that plan fiduciaries can use such third parties for these services, and that if they do, their fiduciary duties will be limited to effective monitoring (such that so long as the plan fiduciary engages in sufficient monitoring, the fiduciary will not be liable for any ERISA breaches on the basis of those searches being inadequate or incomplete).

ERIC also welcomes guidance on the required scope of selecting such third-party providers and monitoring them. This is another area that lacks guidance and could benefit from instruction by the Department. For example, the Department could identify the types of questions that would be appropriate during the selection of such third-party providers (and make those questions available on an ongoing basis on the Department’s website). Of course, as ERIC acknowledges, there are general fiduciary standards that apply to a fiduciary’s monitoring of any service provider. Appropriate monitoring could include a plan fiduciary understanding how often its provider runs searches, the scope of the search, and the follow-up thereafter. However, the Department should also recognize that there are unique challenges that limit the ability of plan fiduciaries to monitor search services. Most significantly, these providers often restrict the information they make available to third parties, largely because their search methods are proprietary. Because of this, ERIC would caution the Department against articulating a monitoring standard that would require plan fiduciaries to access information that the search providers treat as proprietary or otherwise confidential.

6. **Uncashed Check Guidance**

ERIC’s sixth recommendation is for the Department to provide additional but separate guidance—i.e., separate from this missing and unresponsive participant guidance—on the related issue of uncashed checks and returned electronic file transfer (“EFT”) payments. This topic presents enormous challenges for plan administrators, in part because there is essentially no existing fiduciary guidance. This area also presents practical difficulties because plan administrators have little control over the check and EFT payment process, and have limited ability after a payment is issued to force the participant to cash the check or update his or her bank account information. There is also applicable law (including under the Uniform Commercial Code) that makes it difficult for plans to frequently cancel uncashed checks. These challenges are compounded for small benefit payments (such as small annuity amounts). ERIC’s members have reported ongoing problems with participants regularly failing to cash very small annuity payment checks (such as for several dollars); at the same time, it is very difficult for a plan administrator to repeatedly monitor, cancel, and reissue these small payments. These are just a few of the complicating challenges related to uncashed checks.

For all these reasons, ERIC welcomes Departmental guidance in this area. But in requesting this guidance, ERIC makes two related requests. The first is that the Department recognize that this topic is
sufficiently complicated in its own right that it should receive its own deliberative attention and consideration. While ERIC is formulating a number of recommendations for the Department in this area, ERIC would like the opportunity to separately address this topic before the Department issues guidance on it. Second, ERIC has received reports that the Department is examining uncashed check issues in at least a few of its TVPP investigations. ERIC is very concerned about this because of the lack of existing fiduciary guidance. For that reason, ERIC asks the Department to refrain from asserting any findings of fiduciary breach related to such uncashed check issues until the Department provides clarifying guidance on the topic.

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ERIC is ready to work with the Department as it develops guidance that addresses the challenges of missing and unresponsive retirement participants, and fully offers its services and knowledge to the Department. We appreciate your consideration of these comments and welcome the opportunity to meet with you to discuss them. If you have any questions or need additional information, please do not hesitate to contact Aliya Robinson, Senior Vice President, Retirement and Compensation Policy, at 202-627-1930 or arobinson@eric.org, or me at 202-627-1910 or aguariscofildes@eric.org.

Sincerely,

Annette Guarisco Fildes
President & CEO
Re: Missing and Unresponsive Retirement Plan Participants

March 8, 2019

Ms. Carol Weiser
Acting Benefits Tax Counsel
Office of Benefits Tax Counsel
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Ms. Victoria A. Judson
Associate Chief Counsel
Tax Exempt and Government Entities
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

Mr. David Horton
Acting Commissioner
Tax Exempt and Government Entities
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

Missing and unresponsive retirement plan participants create significant challenges for retirement plan sponsors seeking to administer their plans in accordance with the Internal Revenue Code (“the Code”) and guidance from the Department of the Treasury and Internal Revenue Service (“IRS”). Most often, missing and unresponsive participants create tax compliance challenges when benefits must be distributed to them in accordance with the Code or the terms of a plan. Challenges also occur, however, when plans are required to furnish notices, report income, and/or withhold taxes in connection with benefits owed to missing and unresponsive participants.

The purpose of this letter is to request guidance from Treasury and IRS to address the common tax compliance challenges created by missing and unresponsive retirement plan participants. The Council appreciates the guidance that Treasury and IRS have already issued in the context of missing and unresponsive participants, but additional guidance is needed. The Council also appreciates recent comments from Treasury officials indicating that they are considering guidance in this area and that they would
like to provide additional guidance on missing participants, especially with respect to common withholding and reporting issues.

The American Benefits Council (the “Council”) is a national nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council’s approximately 440 members are primarily large multistate U.S. employers that provide employee benefits to active and retired workers and their families. The Council’s membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council’s members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

I. Missing and Unresponsive Participant Overview

Because of changing workforce demographics and the rise of automatic enrollment, an employer’s responsibility for dealing with retirement benefits and accounts left behind by former employees has become even more demanding. During career transitions, employees often do not consider how their immediate change in employment will affect their long-term retirement goals. Many employees do not roll over a benefit under a former employer’s plan into their new employer’s plan. And, many workers neglect to update their contact information on file with a former employer, even if they have a defined benefit plan benefit or defined contribution plan account.

In addition to missing participants, there are many participants who the employer does not believe is missing (that is, the contact information appears to be correct) but the participant simply fails to respond to attempts to contact him or her. In fact, many distribution checks go uncashed even though the employer knows that the participant has not moved. These unresponsive participants present related but slightly different challenges than participants who cannot be located.

Employers must deal with defined benefit pension benefits and 401(k) accounts left behind by former employees who are unresponsive or for whom the employer has no reasonable way of notifying the participant about the status of their benefit. From a tax compliance standpoint, this is most challenging when benefits must be distributed from a plan as a matter of plan qualification and when plan administrators must furnish notices, report income, and/or withhold taxes in connection with benefits owed to missing and unresponsive participants.

The IRS has published missing participant guidance on a few discrete issues. And as summarized below, plan sponsors and administrators have largely incorporated this guidance into their standard policies and procedures. Still, missing and unresponsive participants continue to create tax compliance challenges in circumstances that are not
addressed by existing guidance. Accordingly, we are urging Treasury and IRS to publish guidance that provides plan sponsors and service providers with clarity on how they can satisfy their obligations under the Code with respect to missing and unresponsive participants.

II. CURRENT PRACTICES FOR HANDLING BENEFITS OWED TO MISSING PARTICIPANTS

When the Code or the terms of a plan require a distribution to be made to a missing or unresponsive participant, employers handle benefits in a variety of ways depending on the circumstances giving rise to the distribution. The following summary provides an overview of how employers currently handle distributions that are owed to missing and unresponsive participants.

Required Minimum Distributions

Missing and unresponsive participants create significant challenges from a tax compliance standpoint when required minimum distributions ("RMDs") must be taken in accordance with Code Section 401(a)(9) and the terms of the plan. The Council appreciates the recent pair of memoranda instructing Employee Plans examiners on how they should review qualified and 403(b) plans that have not forced out RMDs owed to a missing participant or beneficiary, if the plan has taken certain search steps to locate a missing participant. Our members commend the IRS for issuing guidance that provides retirement plan administrators with a set of appropriate steps for locating missing participants and beneficiaries. Nevertheless, we continue to believe this recent guidance requires additional clarification for 403(b) plans, and as we previously recommended in our January 2, 2019 joint letter with industry partners, Treasury and IRS should clarify that its recent missing participant guidance is not intended to override the rules that treat 403(b) contracts and annuities as IRAs for purposes of the RMD rules.

Since the IRS released its RMD exam guidance, many employers have drafted policies and procedures to comply with its search steps and some plans have even incorporated this guidance into the terms of their plans. At the same time, however, some employers still distribute RMDs owed to missing and unresponsive participants. Because RMDs cannot be rolled over to an IRA, these distributing plans will often transfer benefits owed to missing participants to an after-tax account established for the benefit of the missing participant.

Automatic Cash-Outs

When the terms of a plan require small account balances or plan benefits in excess of $1,000, but less than or equal to $5,000, to be distributed to employees that have separated from service, plans will transfer those amounts to an IRA in accordance with
Code Section 401(a)(31)(B) on behalf of the former employee if the employee is unresponsive to an employer’s request for direction on where the former employee would like such amounts to be transferred.

**Automatic Cash-Outs of $1,000 or Less**

In the case of mandatory cash-outs of $1,000 or less, plans differ on how they handle benefits owed to missing and unresponsive participants. Some plans will transfer these small amounts to an IRA, consistent with the rules applicable to mandatory cash-outs under Code Section 401(a)(31)(B). Other plans, by contrast, will not distribute small benefits of less than $1,000 if a participant does not provide the employer with direction. In that case, a plan will simply forfeit the participant’s benefit, and if the participant ever returns to claim the benefit, the plan will reinstate the benefit. These forfeited amounts are used to offset future contributions and pay reasonable plan expenses. If a participant ever returns to claim the benefit, the plan sponsor will generally make a contribution to the plan to make up any difference.

This “forfeiture and reinstatement” approach is consistent with Treasury Regulation Section 1.411(a)-4(b)(6), which recognizes forfeiture and reinstatement as an acceptable procedure for dealing with benefits owed to missing participants by stating that “a right [will not be treated] as forfeitable – [i]n the case of a benefit which is payable, merely because the benefit is forfeitable on account of the inability to find the participant or beneficiary to whom payment is due, provided that the plan provides for reinstatement of the benefit if a claim is made by the participant or beneficiary for the forfeited benefit.”

**Corrections**

Missing and unresponsive participants also create challenges for plan administrators when attempting to distribute amounts to participants as part of a correction required under the Employee Plans Compliance Resolution System (“EPCRS”). In that circumstance, consistent with EPCRS Section 6.02(5)(d)(i), plan sponsors will typically keep amounts attributable to corrective distributions in the plan if reasonable attempts to locate any missing participants or beneficiaries are unsuccessful. In many respects, this approach is similar to the forfeiture and reinstatement procedures discussed in the prior paragraph, as both methods keep benefits in the plan until a missing participant can be found.

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1 Rev. Proc. 2018-52, Section 6.02(5)(d)(i) (“A Plan Sponsor will not be considered to have failed to correct a failure due to the inability to locate an individual if reasonable actions to locate the individual have been undertaken in accordance with this paragraph; provided that, if the individual is later located, the additional benefits are provided to the individual at that time.”).
III. Notices, Reporting, and Withholding

Missing participants also create tax compliance challenges and confusion when the Code requires plan administrators to furnish notices, report information, and/or withhold taxes on distributions owed to missing participants.

Notices and Reporting to Participants

By definition, plan administrators do not have a correct address or other contact information for missing participants. This fact makes it virtually impossible for a plan administrator to: (a) furnish missing participants with required notices, like the special tax notice required by Code Section 402(f); or (b) furnish tax reporting to missing participants, like the reporting required on Form 1099-R. As further discussed below, Treasury and IRS should issue generally applicable guidance that provides relief to plan administrators that cannot comply with their notice and reporting obligations because a participant has gone missing.

This type of relief is particularly critical in order to reduce uncertainty regarding notice and reporting penalties that could otherwise apply in the context of missing participants. For example, Code Section 6722 imposes a $250 penalty for each failure to furnish correct payee statements when a distribution is made from a plan, unless it is shown that such failure is due to reasonable cause and not to willful neglect. In the context of missing participants, this is most relevant to any plan administrator attempting to furnish a Form 1099-R to a payee who is missing. Similarly, Code Section 6652(i) imposes a tax penalty of $100 for each failure to provide the special tax notice required under Code Section 402(f), which provides an explanation of distributions eligible for rollover treatment. Like the penalty imposed under Code Section 6722, no penalty is owed if it is shown that such failure is due to reasonable cause and not willful neglect.

The Code and current IRS guidance indicate that these penalties can be waived if it is shown that a notice or reporting failure is due to reasonable cause. We understand that the IRS is often willing to waive these reporting penalties because missing participants create the type of “reasonable cause” necessary to trigger the waiver. However, existing guidance is inefficient and confusing because waivers must be requested after the reporting penalty is assessed and it is not always clear what steps a plan administrator must take in order to qualify for the reasonable cause waivers.

Reporting and Withholding to the IRS

Missing participants also create uncertainty for plan administrators when they attempt to satisfy their obligations to report income and withhold taxes to the IRS in relation to benefits owed to missing and unresponsive participants. This problem is
slightly different than the complications that arise for plan administrators when attempting to furnish notices and reports to missing participants because plan administrators are actually able to report income and send withheld taxes to the IRS on behalf of missing and unresponsive participants.

Recent IRS guidance addressing the reporting and withholding requirements for payments from IRAs to state unclaimed property funds has provided some insight into how plan administrators should fulfill their reporting and withholding obligations with respect to missing and unresponsive participants. However, even when applying the logic of that IRA guidance to employer-sponsored retirement plans, additional instruction is needed and the IRS should, regardless of any IRA guidance, expressly clarify how the reporting and withholding rules apply to employer-sponsored retirement plans trying to handle benefits owed to missing and unresponsive participants.

Such guidance should specifically clarify how the reporting and withholding rules apply to each of the most common situations that retirement plan administrators face in handling benefits owed to missing and unresponsive participants. These situations include:

1. A check is sent to the participant or beneficiary and is not returned as undeliverable but never cashed.
2. A check is sent to the participant or beneficiary and returned as undeliverable.
3. In connection with one of the first two situations, the plan distributes benefits to an IRA maintained for the benefit of a participant or beneficiary.
4. In connection with one of the first two situations, the plan distributes the benefits to a taxable account (for example because the amount is not eligible for rollover).
5. In connection with one of the first two situations, the plan distributes the benefits to a state unclaimed property fund.
6. Instead of distributing benefits to an IRA or other source, the plan administrator forfeits the benefit pursuant Treas. Reg. § 1.411(a)-4(b)(6), subject to reinstatement.
7. Instead of distributing benefits to an IRA or other source, the plan administrator (in a defined contribution plan) places the funds back into an account for the missing or unresponsive participant or beneficiary.
8. A plan may owe a participant or beneficiary an RMD but, based on the Service’s guidance, has decided not to distribute it unless and until the participant or beneficiary is found.
In our experience, most plans generate a Form 1099-R whenever (and only when) a check is issued, even if the check is not cashed, since the funds have been “distributed” from the plan, which is what triggers taxable income and thus reporting. (In addition, withholding will generally have occurred, which must be reported to the Service.)

But the foregoing illustrates that there are a variety of situations, and it is not clear what, if anything, would make a difference in when and how a distribution should be reported. For example, does the reporting depend on whether the check is returned as undeliverable? If the amount is reported on a Form 1099-R, but the check is never cashed, is there further reporting if the amount is later sent to an IRA, taxable account, or state unclaimed property fund? How, if at all, should forfeited amounts be reported?

Guidance specifically addressing questions like this would provide greater certainty for plan administrators that are currently, in good faith, trying to comply with their reporting and withholding obligations in the absence of definitive guidance.

Given the uncertainty created by missing and unresponsive participants, any such guidance should also provide appropriate transition relief for plan administrators and their service providers. As we recently witnessed in the context of the IRS guidance addressing the reporting and withholding requirements for payments from IRAs to state unclaimed property funds, this type of guidance could require significant system adjustments and affected entities should be given the appropriate time to make those adjustments.

IV. RECOMMENDATIONS

Broaden Relief and Clarify Rules Applicable to Missing and Unresponsive Participants

We strongly encourage the IRS to use its recent RMD exam guidance as a model for generally applicable guidance for plan sponsors dealing with missing and unresponsive participants. Specifically, the IRS should publish guidance indicating that the IRS will not challenge a plan administrator for any failure to satisfy certain requirements under the Code because a retirement plan participant is missing or unresponsive, if (a): in the case of a missing participant, the plan takes certain search steps to locate the missing participant; or (b) in the case of a unresponsive participant, the plan has a reasonable basis to believe that the participant’s address listed on the plan’s records is correct and has made at least three attempts to solicit a response. Such guidance should expressly cover the inability to pay RMDs, distribute small account balances or plan benefits of $1,000 or less, pay corrective distributions, or otherwise satisfy the Code’s participant
notice and reporting rules.\(^2\) Such steps should also be deemed to be “reasonable efforts” for purposes of the IRS’s informal guidance telling plan administrators that they do not need to report unpaid RMDs on Form 5500, Line 4 as a failure to provide benefits when due, if the participant or beneficiary cannot be located after reasonable search efforts.

In addition to this general relief, we also recommend that Treasury and IRS clarify how the reporting and withholding rules apply to the most common ways that retirement plan administrators handle benefits owed to missing and unresponsive participants. This recommendation is consistent with a recommendation recently made by the Government Accountability Office (“GAO”) in a report examining the transfer of 401(k) accounts to state unclaimed property funds.\(^3\) In that report, GAO concluded that IRS has not clarified what, if any, tax reporting and withholding requirements apply to those transfers and this lack of guidance creates uncertainty for retirement plan service providers. Accordingly, GAO recommended that IRS consider clarifying: (1) if transfers of unclaimed savings from employer-based plans (such as 401(k) plans) to states are distributions; (2) what, if any, tax reporting and withholding requirements apply; and (3) when such requirements, if any, apply. The Council fully supports these GAO recommendations and asks for broader clarification on how the reporting and withholding rules apply to all of the most common ways that retirement plan administrators handle benefits owed to missing and unresponsive participants.

Critically, the requested guidance must account for the unique challenges created by unresponsive participants. While existing IRS guidance for RMDs and corrective distributions under EPCRS provides valuable relief in the case of missing participants, such relief does not directly contemplate the challenges posed by unresponsive participants. Also, while the search methods described in the IRS’s existing missing participant relief make sense if an employer cannot locate a former employee, those same procedures do not make sense as a condition for relief when a participant simply refuses to respond to solicitations from the plan.

Finally, we also encourage IRS to remove any requirement to use certified mail as a condition for any missing participant relief. If a plan’s records indicate that mail sent to a participant has been returned as undeliverable, it does not make sense for a plan administrator to resend additional solicitations by certified mail. Our members find that

\(^2\) With regard to notice and reporting penalties, IRS should develop procedures that allow plan administrators to proactively certify that they have appropriately searched for missing participants who are supposed to receive notices or reports in connection with a distribution. This would avoid the inefficiencies created by the current system for requesting “reasonable cause” reporting relief after penalties have already been assessed and could, for example, be accomplished by adding a new reporting code to the Form 1099-R filed on behalf of a missing participant to the IRS.

certified mail adds unnecessary costs and is an ineffective tool for locating missing participants.

**Forfeiture and Reinstatement**

Treasury and IRS should reaffirm that forfeiture and reinstatement is an acceptable method for handling amounts that must be distributed to missing and unresponsive participants, except as otherwise provided by the Code. This approach is not only consistent with Treasury Regulation Section 1.411(a)-4(b)(6), it is also consistent with IRS guidance on distributing amounts owed to missing participants as part of a correction under EPCRS. In recent years, the Department of Labor (“DOL”) has informally challenged the use of forfeiture and reinstatement as an acceptable method for handling benefits owed to missing participants. We strongly disagree with that position and encourage IRS to coordinate with DOL to clarify that forfeiture and reinstatement procedures are not only consistent with the Code’s qualification requirements, but also consistent with a plan fiduciary’s obligations under Title I of ERISA.

**Missing Spouses**

Although not directly applicable to missing and unresponsive participants, Treasury and IRS should also clarify how the Code’s spousal consent requirements apply to employer-sponsored retirement plans when a spouse reasonably cannot be located. Treasury Regulations expressly clarify that spousal consent is not required for a participant to waive a plan’s qualified joint and survivor annuity (“QJSA”) or qualified preretirement survivor annuity (“QPSA”), when the spouse cannot be located to the satisfaction of the plan administrator. See Treasury Regulation Section 1.401(a)-20, Q&A-27. However, existing Treasury and IRS guidance is not so clear in other cases when spousal consent is required and the spouse cannot reasonably be located. For example, Treasury and IRS should confirm that spousal consent is likewise not required to change a beneficiary, if the spouse cannot be located to the satisfaction of the plan administrator.

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Sincerely,

Jan Jacobson  
Senior Counsel, Retirement Policy  
American Benefits Council
Cc.  Mr. William Evans, Attorney-Advisor  
Mr. Stephen Tackney, Deputy Associate Chief Counsel  
Ms. Cynthia Van Bogaert, Attorney