

# INTERNAL REVENUE BULLETIN



## HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

**Bulletin No. 2020-38**  
**September 14, 2020**

## ADMINISTRATIVE, EMPLOYMENT TAX

### **Notice 2020-65, page 567.**

Notice 2020-65 provides expedited guidance under section 7508A of the Internal Revenue Code to postpone the time for withholding and paying certain payroll taxes to implement directives from an August 8, 2020 Presidential Memorandum. Specifically, Notice 2020-65 provides that the due date for employers to withhold and pay applicable taxes on wages paid to an employee from September 1, 2020, through December 31, 2020, if the wages are below a certain amount, is postponed until the period beginning on January 1, 2021, and ending on April 30, 2021.

## EMPLOYEE PLANS

### **Notice 2020-68, page 567.**

This notice provides information regarding certain provisions of the Setting Every Community Up for Retirement Enhancement Act of 2019, and the Bipartisan American Miners Act of 2019.

### **Rev. Proc. 2020-40, page 575.**

This revenue procedure amends section 15.05 of Rev. Proc. 2016-37 and section 12.02 of Rev. Proc. 2019-39 to provide that a discretionary amendment made to a qualified pre-approved plan or 403(b) pre-approved plan is timely adopted if it is adopted by the deadline set forth in a statutory provision or guidance that is earlier or later than the general deadline applicable to discretionary amendments.

## EXEMPT ORGANIZATIONS

### **Announcement 2020-15, page 577.**

Revocation of IRC 501(c)(3) Organizations for failure to meet the code section requirements. Contributions made to the organizations by individual donors are no longer deductible under IRC 170(b)(1)(A).

### **Announcement 2020-16, page 578.**

Serves notice to potential donors of a stipulated decision by the United States Tax Court in declaratory judgment proceedings under Section 7428.

## INCOME TAX

### **T.D. 9907, page 559.**

This Treasury Decision adopts, with clarifying changes, proposed regulations under sections 162, 164, and 170 of the Internal Revenue Code. First, this Treasury Decision updates the regulations under section 162 to reflect current law regarding the application of section 162 to a taxpayer that makes a payment or transfer to an entity described in section 170(c) for a business purpose. Second, this Treasury Decision amends the regulations under section 162 to provide safe harbors with respect to the treatment of payments made by business entities to an entity described in section 170(c). Third, this Treasury Decision amends the regulations under section 164 to provide a safe harbor for payments made to an entity described in section 170(c) by individuals who itemize deductions and receive or expect to receive a state or local tax credit in return. Fourth, this Treasury Decision amends the regulations under section 170 to reflect past guidance and case law regarding the application of the quid pro quo principle under section 170 to benefits received or expected to be received by a donor from a third party.

# The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

## Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned

against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

### **Part I.—1986 Code.**

This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

### **Part II.—Treaties and Tax Legislation.**

This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

### **Part III.—Administrative, Procedural, and Miscellaneous.**

To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

### **Part IV.—Items of General Interest.**

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

The contents of this publication are not copyrighted and may be reprinted freely. A citation of the Internal Revenue Bulletin as the source would be appropriate.

# Part I

26 CFR 1.162-15 Contributions, dues, etc.; 1.164-3 Definitions and special rules; 1.170A-1 Charitable, etc., contributions and gifts; allowance of deduction; 1.170A-13

## T.D. 9907

### DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

#### Treatment of Payments to Charitable Entities in Return for Consideration

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under sections 162, 164, and 170 of the Internal Revenue Code (Code). First, the final regulations update the regulations under section 162 to reflect current law regarding the application of section 162 to taxpayers that make payments or transfers for business purposes to entities described in section 170(c). Second, the final regulations provide safe harbors under section 162 to provide certainty with respect to the treatment of payments made by business entities to entities described in section 170(c). Third, the final regulations provide a safe harbor under section 164 for payments made to an entity described in section 170(c) by individuals who itemize deductions and receive or expect to receive a state or local tax credit in return. Fourth, the final regulations update the regulations under section 170 to reflect past guidance and case law regarding the application of the *quid pro quo* principle under section 170 to a donor who receives or expects to receive benefits from a third party. These regulations affect taxpayers who make transfers to entities described in section 170(c) for business purposes, and taxpayers who receive state or local tax credits in exchange for transfers to such entities or who receive other third-party benefits in exchange for transfers to such entities.

DATES: *Effective date:* These regulations are effective August 11, 2020.

*Applicability dates:* For dates of applicability, see §§1.162-15(a)(4), 1.164-3(j)(7), and 1.170A-1(h)(4)(iii).

FOR FURTHER INFORMATION CONTACT: Sarah Daya or Stephen Rothandler at (202) 317-4059 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

#### Background

Section 170(a)(1) generally allows an itemized deduction for any “charitable contribution” paid within the taxable year. Section 170(c) defines “charitable contribution” as a “contribution or gift to or for the use of” any entity described in that section. Under section 170(c)(1), such an entity includes a State, a possession of the United States, or any political subdivision of the foregoing, or the District of Columbia. Entities described in section 170(c)(2) include certain corporations, trusts, or community chests, funds, or foundations, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals. Section 1.170A-1(c)(5) of the Income Tax Regulations provides that transfers of property to an organization described in section 170(c) that bear a direct relationship to the taxpayer’s trade or business and that are made with a reasonable expectation of financial return commensurate with the amount of the transfer may constitute allowable deductions as trade or business expenses rather than as charitable contributions.

Section 162(a) allows a deduction for all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Section 162(b) provides that no deduction shall be allowed under section 162(a) for any contribution or gift that would be allowable as a deduction under section 170 were it not for the percentage limitations, the dollar

limitations, or the requirements as to the time of payment set forth in that section.

Section 1.162-15(a) applies to contributions to entities described in section 170(c). Prior to amendment by this final regulation, §1.162-15(a)(1) provided that no deduction is allowable under section 162(a) for a contribution or gift by an individual or a corporation if any part thereof is deductible under section 170. For example, if a taxpayer makes a contribution of \$5,000 and only \$4,000 of this amount is deductible under section 170(a) (whether because of the percentage limitation under either section 170(b)(1) or (2), the requirement as to time of payment, or both), no deduction is allowable under section 162(a) for the remaining \$1,000. Section 1.162-15(a)(2) clarified that the limitations provided in section 162(b) and §1.162-15(a)(1) applied only to payments that are in fact contributions or gifts to organizations described in section 170. For example, payments by a transit company to a local hospital (which is a charitable organization within the meaning of section 170) in consideration of a binding obligation on the part of the hospital to provide hospital services and facilities for the company’s employees are not contributions or gifts within the meaning of section 170 and may be deductible under section 162(a) if the requirements of section 162(a) are otherwise satisfied.

Section 164(a) allows a deduction for the payment of certain taxes, including: (1) state and local, and foreign, real property taxes; (2) state and local personal property taxes; and (3) state and local, and foreign, income, war profits, and excess profits taxes. In addition, section 164 allows a deduction for taxes not described in the preceding sentence that are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212. Moreover, under section 164(b)(5), taxpayers may elect to deduct state and local general sales taxes in lieu of state and local income taxes.

Section 164(b)(6), as added by section 11042(a) of Public Law No. 115-97, commonly referred to as the Tax Cuts and Jobs Act (TCJA), 131 Stat. 2054, 2085 (2017), provides, in the case of an individual, that deductions for foreign real

property taxes are not allowable under section 164(a)(1), and that the deduction for the aggregate amount of the following state and local taxes paid during the calendar year is limited to \$10,000 (\$5,000 in the case of a married individual filing a separate return): (1) real property taxes; (2) personal property taxes; (3) income, war profits, and excess profits taxes; and (4) general sales taxes. This limitation applies to taxable years beginning after December 31, 2017, and before January 1, 2026, and does not apply to foreign taxes described in section 164(a)(3) or to any taxes described in section 164(a)(1) and (2) that are paid or accrued in carrying on a trade or business or an activity described in section 212. In response to the limitation in section 164(b)(6), some taxpayers have considered tax planning strategies to avoid or mitigate its effects. Some of these strategies rely on state and local tax credit programs under which states provide tax credits in return for contributions by taxpayers to entities described in section 170(c), and some state and local governments have created new programs intended to facilitate use of these strategies.

On June 11, 2018, the Department of the Treasury (Treasury Department) and the IRS announced their intention to propose regulations addressing the proper application of sections 164 and 170 to taxpayers who make contributions under state and local tax credit programs to entities described in section 170(c). See Notice 2018-54, 2018-24 I.R.B. 750. On August 27, 2018, proposed regulations (REG-112176-18) under sections 170 and 642(c) were published in the **Federal Register** (83 FR 43563) (2018 proposed regulations). The 2018 proposed regulations proposed amending §1.170A-1(h)(3) to provide, in general, that if a taxpayer makes a payment or transfers property to or for the use of an entity described in section 170(c), and the taxpayer receives or expects to receive a state or local tax credit in return for such payment or transfer, the tax credit constitutes a return benefit to the taxpayer and reduces the taxpayer's charitable contribution deduction. The 2018 proposed regulations also proposed amending regulations under section 642(c) to provide a similar rule for payments made by a trust or decedent's estate.

In response to the 2018 proposed regulations, commenters raised concerns regarding the treatment of business entity payments to entities described in section 170(c). The Treasury Department and the IRS considered these concerns and issued Rev. Proc. 2019-12, 2019-04 I.R.B. 401, on December 28, 2018, providing a safe harbor under section 162 for payments made by a C corporation or specified passthrough entity to or for the use of an organization described in section 170(c) if the C corporation or specified passthrough entity receives or expects to receive state or local tax credits in return. Commenters also raised a concern regarding the treatment of payments by individuals who itemize deductions for Federal income tax purposes and who have total state and local tax liabilities that are less than or equal to the section 164(b)(6) limitation. The Treasury Department and the IRS addressed this concern by issuing Notice 2019-12, 2019-27 I.R.B. 57, on June 11, 2019, providing a safe harbor under section 164 for individuals who make payments to section 170(c) entities in return for state or local tax credits.

On June 13, 2019, the Treasury Department and the IRS published final regulations in the **Federal Register** (T.D. 9864, 84 FR 27513) (2019 final regulations) addressing the proper application of sections 164 and 170 to taxpayers who make contributions under state and local tax credit programs to entities described in section 170(c). The 2019 final regulations provided the general rule that, if a taxpayer makes a payment or transfers property to or for the use of an entity described in section 170(c), and the taxpayer receives or expects to receive a state or local tax credit in return for such transfer, the tax credit constitutes a return benefit to the taxpayer, or *quid pro quo*, reducing the taxpayer's charitable contribution deduction. See §1.170A-1(h)(3). The 2019 final regulations also amended regulations under section 642(c) to provide a similar rule for payments made by a trust or decedent's estate.

On December 17, 2019, the Treasury Department and the IRS issued proposed regulations under sections 162, 164, and 170 (REG-107431-19, 84 FR 68833) to include the safe harbors provided under

Rev. Proc. 2019-12 and Notice 2019-12, to update regulations under section 162 to reflect current law regarding the application of section 162 to a taxpayer that makes a payment or transfer to an entity described in section 170(c) for a business purpose, and to clarify the application of the *quid pro quo* principle under section 170 to benefits received or expected to be received from third parties.

The Treasury Department and the IRS received over 40 comments responding to the proposed regulations and five requests to speak at the public hearing, which was held on February 20, 2020. Copies of written comments received and the list of speakers at the public hearing are available for public inspection at [www.regulations.gov](http://www.regulations.gov) or upon request.

## Explanation of Provisions and Summary of Comments

### *Explanation of Provisions*

The Treasury Department and the IRS adopt the proposed regulations with clarifications in response to the written comments received and testimony provided. First, the final regulations retain the proposed amendments to §1.162-15(a). The final regulations continue to clarify that a taxpayer's payment or transfer to a section 170(c) entity may constitute an allowable deduction as a trade or business expense under section 162, rather than a charitable contribution under section 170. The final regulations also retain the examples demonstrating the application of this rule with minor clarifying changes.

Second, the final regulations retain the safe harbors under section 162 to provide certainty with respect to the treatment of payments made by business entities to an entity described in section 170(c). The final regulations provide safe harbors under section 162 for payments made by a business entity that is a C corporation or specified passthrough entity to or for the use of an organization described in section 170(c) if the C corporation or specified passthrough entity receives or expects to receive state or local tax credits in return. To the extent that a C corporation or specified passthrough entity receives or expects to receive a state or local tax credit in re-



turn for a payment to an organization described in section 170(c), it is reasonable to conclude that there is a direct benefit and a reasonable expectation of commensurate financial return to the C corporation's or specified passthrough entity's business in the form of a reduction in the state or local taxes that the entity would otherwise be required to pay. Thus, the final regulations provide safe harbors that allow a C corporation or specified passthrough entity engaged in a trade or business to treat the portion of the payment that is equal to the amount of the credit received or expected to be received as meeting the requirements of an ordinary and necessary business expense under section 162. The safe harbors for C corporations and specified passthrough entities apply only to payments of cash and cash equivalents. The safe harbor for specified passthrough entities does not apply if the credit received or expected to be received reduces a state or local income tax.

Third, the final regulations retain the safe harbor under section 164 for payments made to an entity described in section 170(c) by individuals who itemize deductions and receive or expect to receive a state or local tax credit in return. The final regulations provide that an individual who itemizes deductions and who makes a payment to a section 170(c) entity in exchange for a state or local tax credit may treat as a payment of state or local tax for purposes of section 164 the portion of such payment for which a charitable contribution deduction under section 170 is or will be disallowed under §1.170A-1(h)(3). This treatment is allowed in the taxable year in which the payment is made, but only to the extent that the resulting credit is applied pursuant to applicable state or local law to offset the individual's state or local tax liability for such taxable year or the preceding taxable year. Any unused credit permitted to be carried forward may be treated as a payment of state or local tax under section 164 in the taxable year or years for which the carryover credit is applied in accordance with state or local law. The safe harbor for individuals applies only to payments of cash and cash equivalents.

The final regulations are not intended to permit a taxpayer to avoid the limitation of section 164(b)(6). Therefore, the

final regulations provide that any payment treated as a state or local tax under section 164, pursuant to the safe harbor provided in §1.164-3(j) of the final regulations, is subject to the limitation on deductions in section 164(b)(6). Furthermore, the final regulations are not intended to permit deductions of the same payments under more than one provision. Thus, the final regulations provide that an individual who relies on the safe harbor in §1.164-3(j) to deduct qualifying payments under section 164 may not also deduct the same payments under any other section of the Code.

Lastly, the final regulations retain the amendments to the regulations under section 170 to reflect past guidance and case law regarding the application of the *quid pro quo* principle under section 170 to a donor who receives or expects to receive benefits from a third party. The final regulations clarify that the *quid pro quo* principle applies regardless of whether the party providing the *quid pro quo* is the donee or a third party. To reflect existing law, the final regulations amend the rules in §1.170A-1(h) that address a donor's payments in exchange for consideration. Specifically, the final regulations revise §1.170A-1(h)(4) to provide definitions of "in consideration for" and "goods and services" for purposes of applying the rules in §1.170A-1(h). Under the final regulations, a taxpayer will be treated as receiving goods and services in consideration for a taxpayer's payment or transfer to an entity described in section 170(c) if, at the time the taxpayer makes the payment or transfer, the taxpayer receives or expects to receive goods or services in return.

For additional clarity, the final regulations amend the language in §1.170A-1(h)(2)(i)(B) to state that the fair market value of goods and services includes the value of goods and services provided by parties other than the donee. Also, the final regulations add a definition of "goods and services" that is the same as the definition in §1.170A-13(f)(5). Finally, the final regulations revise the cross-references defining "in consideration for" and "goods and services" in §1.170A-1(h)(1) and (h)(3)(iii) to be consistent with the definitions provided in paragraph §1.170A-1(h)(4).

## Summary of Comments

### 1. General Comments

As discussed previously in this preamble, the Treasury Department and the IRS received over 40 comments responding to the proposed regulations and five requests to speak at the public hearing. Approximately half of the commenters expressed support for the proposed regulations and recommended that the Treasury Department and the IRS finalize the proposed regulations. Many of these commenters expressed support for the clarification of the regulations under section 162 regarding business payments to section 170(c) entities and the incorporation of safe harbors previously provided in Rev. Proc. 2019-12 and Notice 2019-12. However, some of these commenters expressed concerns about the impact of the 2019 final regulations on state and local programs granting tax credits for contributions by individuals and businesses to scholarship granting organizations (SGOs). SGOs are entities described in section 170(c) that receive contributions from individuals and businesses and then disburse these funds as scholarships to enable eligible students to attend qualified private schools. Additional commenters were concerned that, even with the clarifications in the proposed regulations, the 2019 final regulations have resulted in and will continue to result in decreased contributions to SGOs and other section 170(c) entities.

### 2. Payments by Business Entities in Exchange for State or Local Tax Credits

Multiple commenters expressed concern that passthrough entity owners may circumvent the section 164(b)(6) limitation by recharacterizing the portion of the payment that is not deductible under section 170 as a business expense deductible under section 162. One commenter requested clarification regarding whether a business entity may deduct payments to SGOs under section 162 as ordinary and necessary business expenses incurred in carrying on a trade or business. A few commenters expressed concern that the regulations may incentivize payments to education programs that discriminate against students with disabilities or that

divert tax dollars from public schools to private schools. One commenter opined that state and local programs providing tax credits to businesses that donate to certain charitable organizations run counter to the concept of charity because donors should expect nothing in return for a donation.

Several commenters suggested revising Example 2 in §1.162-15(a)(2)(ii) to clarify that individuals are not allowed to generate partnership tax deductions under section 162 in addition to state or local tax credits that flow through to partners. Some commenters asserted that Example 2 is inconsistent with the safe harbor provided for passthrough entities in §1.162-15(a)(3), which expressly excludes situations in which passthrough entities receive state or local income tax credits. A commenter suggested including a general rule stating that in any case where a state or local tax credit has the effect of reducing an otherwise nondeductible state or local tax liability, the payment giving rise to the state or local tax credit cannot itself be deductible.

While the Treasury Department and the IRS acknowledge these concerns, the regulations retain the clarifications to §1.162-15(a)(1) and (a)(2) regarding section 162 deductions for business payments to section 170(c) entities, as well as examples illustrating the rule. Section 1.162-15(a)(1) mirrors the language of §1.170A-1(c)(5), which has been in effect since 1970. Section 1.170A-1(c)(5) provided that if the taxpayer's payment or transfer bears a direct relationship to its trade or business, and the payment is made with a reasonable expectation of commensurate financial return, the payment or transfer may constitute an allowable deduction as a trade or business expense under section 162, rather than a charitable contribution under section 170. See also *Marquis v. Commissioner*, 49 T.C. 695 (1968). Section 1.162-15(a)(1) applies the same standard. Thus, a passthrough entity may deduct a payment under §1.162-15(a)(1) only if the entity can demonstrate that the payment satisfies these requirements, which limits the possibility of abuse.

Moreover, the revisions to §1.162-15(a)(1) are not inconsistent with the safe harbor provided for passthrough entities under §1.162-15(a)(3), which expressly

excludes situations in which passthrough entities receive state or local income tax credits. The scope of §1.162-15(a)(3) is more limited because it provides safe harbor relief for taxpayers that receive a state or local tax credit in return for a payment to charity, rather than an application of the law. As a safe harbor, this section sets forth a simplified analysis of a passthrough entity's expenditure—requiring merely the receipt or expectation of receipt of a state or local business tax credit. In contrast, §1.162-15(a)(1) reiterates the current law, which requires more than the receipt of a credit against a business-related tax. Section 1.162-15(a)(1) requires a direct business relationship to the trade or business and a reasonable expectation of commensurate financial return. If a passthrough entity meets these requirements, then the payment or transfer to the section 170(c) entity may be properly treated as a business expense under section 162.

Another commenter also expressed concern that the examples under §1.162-15(a)(2) create confusion about deductions for institutional or "good will" advertising under §1.162-20(a)(2) because both examples contain facts that could describe advertising addressed in §1.162-20(a)(2). The commenter suggested that the examples be moved from §1.162-15(a)(2) to §1.162-20(a)(2). In addition, the commenter suggested that the Treasury Department and the IRS revise the examples to clarify the relationship between §1.162-15(a)(2) and §1.162-20(a)(2) and address the requirement under §1.162-20(a)(2) that deductible institutional and good will advertising expenditures must relate to patronage that the taxpayer might reasonably expect in the future. This commenter also requested that the cross-reference to §1.162-20 in §1.162-15(d) of the existing regulations be modified to provide additional explanation.

The Treasury Department and the IRS considered these comments but have determined that changes to §1.162-15(a)(1) and (2) to clarify the distinctions between §1.162-15 and §1.162-20 are beyond the scope of these final regulations. Section 1.162-20(a)(2) provides rules for deducting expenditures for institutional or good will advertising that keeps the taxpayer's name before the public, including by encouraging actions or presenting

views on various subjects. For example, §1.162-20(a)(2) refers to the costs of advertising that encourages contributions to organizations such as the Red Cross, encourages the purchase of savings bonds, encourages participation in similar causes, or presents views on subjects of a general nature.

In contrast, §1.162-15(a) addresses only payments made to entities described in section 170(c). Section 1.162-15(a)(1) provides that payments to section 170(c) entities may be deducted under section 162 if they bear a direct relationship to the taxpayer's trade or business and are made with a reasonable expectation of financial return commensurate with the amount paid. The examples in §1.162-15(a)(2) of the final regulations are not intended to demonstrate the application of §1.162-20(a)(2), which serves a different purpose.

The final regulations revise Example 1 under §1.162-15(a)(2)(i) to refer to "supporters," rather than "sponsors," to avoid any potential confusion with the rules governing qualified sponsorship payments under section 513. In addition, the final regulations revise the cross-reference in §1.162-15(d) to specify that the deductibility of expenditures for institutional and good will advertising is addressed in §1.162-20(a)(2).

### 3. Quid Pro Quo Provided by a Third Party

Some commenters expressed a belief that under current law a *quid pro quo* received or expected to be received by a taxpayer does not reduce the taxpayer's charitable contribution deduction if the *quid pro quo* comes from a party that is not the donee. The commenters emphasized that the use of state or local tax credits in exchange for donations to SGOs is not intended to subvert federal tax law. These commenters concluded that a tax credit from a state or local government should not reduce the charitable contribution deduction for a payment to a section 170(c)(2) entity. The commenters suggested that the *quid pro quo* principle should be applied only to contributions to entities described in section 170(c)(1). One commenter recommended that if a contribution is made to section 170(c)(2) entities in exchange for a state or local tax credit,

the credit should be treated as income to the donor.

The Treasury Department and the IRS considered these comments, but did not adopt the suggested changes because the established tax law does not support them. As discussed in the preamble to the proposed regulations, both the courts and the IRS have concluded that the *quid pro quo* principle is equally applicable, regardless of whether the donor expects to receive the benefit from the donee or from a third party. *See, e.g., Singer v. United States*, 449 F.2d 413 (Ct. Cl. 1971) (rejecting the taxpayer's argument that an expected benefit should be ignored because it would be received from a third party); Rev. Rul. 67-246, 1967-2 C.B. 104 (concluding that the donor's charitable contribution deduction must be reduced by the value of a transistor radio provided by a local store). Moreover, the courts have concluded that a taxpayer's expectation of a substantial benefit in return, from any source, reflects a lack of requisite charitable intent on the part of the donor. *See, e.g., Ottawa Silica Co. v. United States*, 699 F.2d 1124 (Fed. Cir. 1983) (denying a charitable contribution deduction for the value of land donated for the construction of a school, where the taxpayer had reason to believe such construction would ultimately increase the value of its land). Thus, the source of the consideration is immaterial in determining whether a donor has received or expects to receive a return benefit that reduces its charitable contribution deduction.

#### 4. Concerns About Reduced Charitable Giving

Several commenters expressed concerns about the impact of the regulations on donations to SGOs and other section 170(c)(2) entities that provide education opportunities for impoverished and special needs children in grades K-12. These commenters expressed concern that the 2019 final regulations have resulted in a decrease in donations to SGOs. Several commenters noted that these organizations improve the lives of students and criticized the proposed regulations as undermining the policy goals of school choice.

Some commenters stated that individual taxpayers should be able to claim a

charitable contribution deduction for all payments made pursuant to a charitable state tax credit program. Other commenters suggested exempting payments and transfers to charitable entities if the payments and transfers are made pursuant to tax credit programs that were established before the enactment of the TCJA. Many commenters suggested providing an exception for state or local tax credits provided in exchange for payments to only non-governmental entities described under section 170(c). A few commenters suggested revoking the 2019 final regulations or developing a more narrowly targeted approach.

As noted in the preamble to the 2019 final regulations, the Treasury Department and the IRS recognize the importance of the federal charitable contribution deduction, as well as state and local tax credit programs, in encouraging charitable giving. However, the concerns expressed by these commenters relate more directly to the 2019 final regulations, and the statutory limitation on individuals' deductions of state and local taxes under section 164, than to the amendments that are the subject of this rulemaking. The 2019 final regulations continue to allow a charitable contribution deduction for the portion of a taxpayer's contribution that is a gratuitous transfer, and do not affect the ability of states or localities to provide state or local tax incentives. In addition, the final regulations provide additional clarity to businesses that make payments or transfers to or for the use of SGOs and other entities described in section 170(c). Similarly, the safe harbor provided under §1.164-3(j) of the final regulations for individuals who itemize deductions will ensure equitable treatment for taxpayers whose deductions for state and local tax payments would not have exceeded the section 164(b)(6) limitation.

In addition, for the reasons cited in the preamble to the 2019 final regulations, those regulations do not distinguish between taxpayers who make payments or transfers to state and local tax credit programs established after enactment of the TCJA and those who make payments or transfers to credit programs established prior to the enactment of the TCJA. Similarly, these final regulations apply the *quid pro quo* principle under section 170

equally to all state and local tax credit programs, and the final regulations do not adopt commenter recommendations to create exceptions for various types of state tax credit programs.

#### Applicability Dates

The amendments to §1.162-15 apply to payments or transfers made on or after December 17, 2019. However, taxpayers may choose to apply the amendments to payments or transfers made on or after January 1, 2018.

Section 1.164-3(j) applies to payments made to section 170(c) entities on or after June 11, 2019. However, taxpayers may choose to apply paragraph (j) to payments made to section 170(c) entities after August 27, 2018.

The definitions provided in §1.170A-1(h)(4) are applicable to amounts paid or property transferred on or after December 17, 2019.

#### Special Analyses

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Administrator of the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, has waived review of this rule in accordance with section 6(a)(3)(A) of Executive Order 12866.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. Although data are not readily available for the IRS and the Treasury Department to assess the number of small entities that are likely to be directly affected by the regulations, the economic impact is unlikely to be significant.

As discussed elsewhere in this preamble, the rule largely updates the reg-



ulations to reflect existing law and policy. The amendments update the section 162 and section 170 regulations to reflect current law. In addition, the amendments add to the regulations safe harbors under section 162 and section 164, regarding deductions when payments are made to entities described in section 170(c) and the donor receives or expects to receive a state or local tax credit in return; these safe harbors were provided previously in Internal Revenue Bulletin guidance. These regulations are expected to provide some additional certainty to taxpayers but are not expected to result in any noticeable change in taxpayer behavior. The increased certainty, and in particular the provision of safe harbors, is expected to reduce compliance burdens. Accordingly, the Treasury Department and the IRS certify that the rule will not have a significant economic impact on a substantial number of small entities. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

#### Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, Notices, and other guidance cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <http://www.irs.gov>.

#### Drafting Information

The principal author of these regulations is the Office of the Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and the Treasury Department participated in their development.

#### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and record-keeping requirements.

### Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

#### PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 2. Section 1.162-15 is amended by revising paragraphs (a) and (d) to read as follows:

##### *§1.162-15 Contributions, dues, etc.*

(a) *Payments and transfers to entities described in section 170(c)*—(1) *In general.* A payment or transfer to or for the use of an entity described in section 170(c) that bears a direct relationship to the taxpayer's trade or business and that is made with a reasonable expectation of financial return commensurate with the amount of the payment or transfer may constitute an allowable deduction as a trade or business expense rather than a charitable contribution deduction under section 170. For payments or transfers in excess of the amount deductible under section 162(a), see §1.170A-1(h).

(2) *Examples.* The following examples illustrate the rules of paragraph (a)(1) of this section:

(i) *Example 1. A*, an individual, is a sole proprietor who manufactures musical instruments and sells them through a website. *A* makes a \$1,000 payment to a local church (which is a charitable organization described in section 170(c)) for a half-page advertisement in the church's program for a concert. In the program, the church thanks its concert supporters, including *A*. *A*'s advertisement includes the URL for the website through which *A* sells its instruments. *A* reasonably expects that the advertisement will attract new customers to *A*'s website and will help *A* to sell more musical instruments. *A* may treat the \$1,000 payment as an expense of carrying on a trade or business under section 162.

(ii) *Example 2. P*, a partnership, operates a chain of supermarkets, some of which are located in State N. *P* operates a promotional program in which it sets aside the proceeds from one percent of its sales each year, which it pays to one or more charities described in section 170(c). The funds are earmarked for use in projects that improve conditions in State N. *P* makes the final determination on which charities receive payments. *P* advertises the program. *P* reasonably believes the program will generate a significant degree of name recognition and goodwill in the communities where it operates and thereby increase its

revenue. As part of the program, *P* makes a \$1,000 payment to a charity described in section 170(c). *P* may treat the \$1,000 payment as an expense of carrying on a trade or business under section 162. This result is unchanged if, under State N's tax credit program, *P* expects to receive a \$1,000 income tax credit on account of *P*'s payment, and under State N law, the credit can be passed through to *P*'s partners.

(3) *Safe harbors for C corporations and specified passthrough entities making payments in exchange for state or local tax credits*—(i) *Safe harbor for C corporations.* If a C corporation makes a payment to or for the use of an entity described in section 170(c) and receives or expects to receive in return a state or local tax credit that reduces a state or local tax imposed on the C corporation, the C corporation may treat such payment as meeting the requirements of an ordinary and necessary business expense for purposes of section 162(a) to the extent of the amount of the credit received or expected to be received.

(ii) *Safe harbor for specified passthrough entities*—(A) *Definition of specified passthrough entity.* For purposes of this paragraph (a)(3)(ii), an entity is a specified passthrough entity if each of the following requirements is satisfied—

(1) The entity is a business entity other than a C corporation and is regarded for all Federal income tax purposes as separate from its owners under §301.7701-3 of this chapter;

(2) The entity operates a trade or business within the meaning of section 162;

(3) The entity is subject to a state or local tax incurred in carrying on its trade or business that is imposed directly on the entity; and

(4) In return for a payment to an entity described in section 170(c), the entity described in paragraph (a)(3)(ii)(A)(1) of this section receives or expects to receive a state or local tax credit that the entity applies or expects to apply to offset a state or local tax described in paragraph (a)(3)(ii)(A)(3) of this section.

(B) *Safe harbor.* Except as provided in paragraph (a)(3)(ii)(C) of this section, if a specified passthrough entity makes a payment to or for the use of an entity described in section 170(c), and receives or expects to receive in return a state or local tax credit that reduces a state or local tax described in paragraph (a)(3)(ii)(A)(3) of this section, the specified passthrough entity may treat such payment as an ordi-



nary and necessary business expense for purposes of section 162(a) to the extent of the amount of credit received or expected to be received.

(C) *Exception.* The safe harbor described in this paragraph (a)(3)(ii) does not apply if the credit received or expected to be received reduces a state or local income tax.

(iii) *Definition of payment.* For purposes of this paragraph (a)(3), payment is defined as a payment of cash or cash equivalent.

(iv) *Examples.* The following examples illustrate the rules of paragraph (a)(3) of this section.

(A) *Example 1. C corporation that receives or expects to receive dollar-for-dollar state or local tax credit.* A, a C corporation engaged in a trade or business, makes a payment of \$1,000 to an entity described in section 170(c). In return for the payment, A expects to receive a dollar-for-dollar state tax credit to be applied to A's state corporate income tax liability. Under paragraph (a)(3)(i) of this section, A may treat the \$1,000 payment as an expense of carrying on a trade or business under section 162.

(B) *Example 2. C corporation that receives or expects to receive percentage-based state or local tax credit.* B, a C corporation engaged in a trade or business, makes a payment of \$1,000 to an entity described in section 170(c). In return for the payment, B expects to receive a local tax credit equal to 80 percent of the amount of this payment (\$800) to be applied to B's local real property tax liability. Under paragraph (a)(3)(i) of this section, B may treat \$800 as an expense of carrying on a trade or business under section 162. The treatment of the remaining \$200 will depend upon the facts and circumstances and is not affected by paragraph (a)(3)(i) of this section.

(C) *Example 3. Partnership that receives or expects to receive dollar-for-dollar state or local tax credit.* P is a limited liability company classified as a partnership for Federal income tax purposes under §301.7701-3 of this chapter. P is engaged in a trade or business and makes a payment of \$1,000 to an entity described in section 170(c). In return for the payment, P expects to receive a dollar-for-dollar state tax credit to be applied to P's state excise tax liability incurred by P in carrying on its trade or business. Under applicable state law, the state's excise tax is imposed at the entity level (not the owner level). Under paragraph (a)(3)(ii) of this section, P may treat the \$1,000 as an expense of carrying on a trade or business under section 162.

(D) *Example 4. S corporation that receives or expects to receive percentage-based state or local tax credit.* S is an S corporation engaged in a trade or business and is owned by individuals C and D. S makes a payment of \$1,000 to an entity described in section 170(c). In return for the payment, S expects to receive a local tax credit equal to 80 percent of the amount of this payment (\$800) to be applied to S's local real property tax liability incurred by S in carrying on its trade or business. Under applicable

local law, the real property tax is imposed at the entity level (not the owner level). Under paragraph (a)(3)(ii) of this section, S may treat \$800 of the payment as an expense of carrying on a trade or business under section 162. The treatment of the remaining \$200 will depend upon the facts and circumstances and is not affected by paragraph (a)(3)(ii) of this section.

(v) *Applicability of section 170 to payments in exchange for state or local tax benefits.* For rules regarding the availability of a charitable contribution deduction under section 170 where a taxpayer makes a payment or transfers property to or for the use of an entity described in section 170(c) and receives or expects to receive a state or local tax benefit in return for such payment, see §1.170A-1(h)(3).

(4) *Applicability dates.* Paragraphs (a)(1) and (2) of this section, regarding the application of section 162 to taxpayers making payments or transfers to entities described in section 170(c), apply to payments or transfers made on or after December 17, 2019. Section 1.162-15(a), as it appeared in the April 1, 2020 edition of 26 CFR part 1, generally applies to payments or transfers made prior to December 17, 2019. However, taxpayers may choose to apply paragraphs (a)(1) and (2) of this section to payments and transfers made on or after January 1, 2018. Paragraph (a)(3) of this section, regarding the safe harbors for C corporations and specified passthrough entities making payments to section 170(c) entities in exchange for state or local tax credits, applies to payments made by these entities on or after December 17, 2019. However, taxpayers may choose to apply the safe harbors of paragraph (a)(3) to payments made on or after January 1, 2018.

\* \* \* \* \*

(d) *Cross reference.* – For provisions dealing with expenditures for institutional or “good will” advertising, see §1.162-20(a)(2).

Par. 3. Section 1.164-3 is amended by adding paragraph (j) to read as follows:

*§1.164-3 Definitions and special rules.*

\* \* \* \* \*

(j) *Safe harbor for payments made by individuals in exchange for state or local tax credits--(1) In general.* An individual who itemizes deductions and who makes a payment to or for the use of an entity described in section 170(c) in consideration

for a state or local tax credit may treat as a payment of state or local tax for purposes of section 164 the portion of such payment for which a charitable contribution deduction under section 170 is disallowed under §1.170A-1(h)(3). This treatment as payment of a state or local tax is allowed in the taxable year in which the payment is made to the extent that the resulting credit is applied, consistent with applicable state or local law, to offset the individual's state or local tax liability for such taxable year or the preceding taxable year.

(2) *Credits carried forward.* To the extent that a state or local tax credit described in paragraph (j)(1) of this section is not applied to offset the individual's applicable state or local tax liability for the taxable year of the payment or the preceding taxable year, any excess state or local tax credit permitted to be carried forward may be treated as a payment of state or local tax under section 164(a) in the taxable year or years for which the carryover credit is applied in accordance with state or local law.

(3) *Limitation on individual deductions.* Nothing in this paragraph (j) may be construed as permitting a taxpayer who applies this safe harbor to avoid the limitation of section 164(b)(6) for any amount paid as a tax or treated under this paragraph (j) as a payment of tax.

(4) *No safe harbor for transfers of property.* The safe harbor provided in this paragraph (j) applies only to a payment of cash or cash equivalent.

(5) *Coordination with other deductions.* An individual who deducts a payment under section 164 may not also deduct the same payment under any other Code section.

(6) *Examples.* In the following examples, the taxpayer is an individual who itemizes deductions for Federal income tax purposes.

(i) *Example 1.* In year 1, Taxpayer A makes a payment of \$500 to an entity described in section 170(c). In return for the payment, A receives a dollar-for-dollar state income tax credit. Prior to application of the credit, A's state income tax liability for year 1 was more than \$500. A applies the \$500 credit to A's year 1 state income tax liability. Under paragraph (j)(1) of this section, A treats the \$500 payment as a payment of state income tax in year 1. To determine A's deduction amount, A must apply the provisions of section 164 applicable to payments of state and local taxes, including the limitation in section 164(b)(6). See paragraph (j)(3) of this section.

(ii) *Example 2.* In year 1, Taxpayer *B* makes a payment of \$7,000 to an entity described in section 170(c). In return for the payment, *B* receives a dollar-for-dollar state income tax credit, which under state law may be carried forward for three taxable years. Prior to application of the credit, *B*'s state income tax liability for year 1 was \$5,000; *B* applies \$5,000 of the \$7,000 credit to *B*'s year 1 state income tax liability. Under paragraph (j)(1) of this section, *B* treats \$5,000 of the \$7,000 payment as a payment of state income tax in year 1. Prior to application of the remaining credit, *B*'s state income tax liability for year 2 exceeds \$2,000. *B* applies the excess credit of \$2,000 to *B*'s year 2 state income tax liability. For year 2, under paragraph (j)(2) of this section, *B* treats the \$2,000 as a payment of state income tax under section 164. To determine *B*'s deduction amounts in years 1 and 2, *B* must apply the provisions of section 164 applicable to payments of state and local taxes, including the limitation under section 164(b)(6). See paragraph (j)(3) of this section.

(iii) *Example 3.* In year 1, Taxpayer *C* makes a payment of \$7,000 to an entity described in section 170(c). In return for the payment, *C* receives a local real property tax credit equal to 25 percent of the amount of this payment (\$1,750). Prior to application of the credit, *C*'s local real property tax liability in year 1 was more than \$1,750. *C* applies the \$1,750 credit to *C*'s year 1 local real property tax liability. Under paragraph (j)(1) of this section, for year 1, *C* treats \$1,750 of the \$7,000 payment as a payment of local real property tax for purposes of section 164. To determine *C*'s deduction amount, *C* must apply the provisions of section 164 applicable to payments of state and local taxes, including the limitation under section 164(b)(6). See paragraph (j)(3) of this section.

(7) *Applicability date.* This paragraph (j) applies to payments made to section 170(c) entities on or after June 11, 2019. However, a taxpayer may choose to apply this paragraph (j) to payments made to section 170(c) entities after August 27, 2018.

Par. 4. Section 1.170A-1 is amended as follows:

1. Paragraph (c)(5) is revised.

2. In paragraph (h)(1), remove the cross-references to “§1.170A-13(f)(6)” and “§1.170A-13(f)(5)” and add in their places “paragraph (h)(4)(i) of this section” and “paragraph (h)(4)(ii) of this section”, respectively.

3. Paragraphs (h)(2)(i)(B) and (h)(3)(iii) are revised.

4. Paragraph (h)(3)(viii) is redesignated as paragraph (h)(3)(x).

5. New paragraph (h)(3)(viii) and paragraph (h)(3)(ix) are added.

6. Paragraphs (h)(4) through (6) are redesignated as paragraphs (h)(5) through (7).

7. New paragraph (h)(4) is added.

The revisions and additions read as follows:

§1.170A-1 *Charitable, etc., contributions and gifts; allowance of deduction.*

\*\*\*\*\*

(c) \*\*\*

(5) For payments or transfers to an entity described in section 170(c) by a taxpayer carrying on a trade or business, see §1.162-15(a).

\*\*\*\*\*

(h) \*\*\*

(2) \*\*\*

(i) \*\*\*

(B) The fair market value of the goods or services received or expected to be received in return.

\*\*\*\*\*

(3) \*\*\*

(iii) *In consideration for.* For purposes of paragraph (h) of this section, the term *in consideration for* has the meaning set forth in paragraph (h)(4)(i) of this section.

\*\*\*\*\*

(viii) *Safe harbor for payments by C corporations and specified passthrough entities.* For payments by a C corporation or by a specified passthrough entity to an entity described in section 170(c), where the C corporation or specified passthrough entity receives or expects to receive a state or local tax credit that reduces the charitable contribution deduction for such payments under paragraph (h)(3) of this section, see §1.162-15(a)(3) (providing safe harbors under section 162(a) to the extent of that reduction).

(ix) *Safe harbor for individuals.* Under certain circumstances, an individual who itemizes deductions and makes a payment to an entity described in section 170(c) in consideration for a state or local tax credit

may treat the portion of such payment for which a charitable contribution deduction is disallowed under paragraph (h)(3) of this section as a payment of state or local taxes under section 164. See §1.164-3(j), providing a safe harbor for certain payments by individuals in exchange for state or local tax credits.

\*\*\*\*\*

(4) *Definitions.* For purposes of this paragraph (h), the following definitions apply:

(i) *In consideration for.* A taxpayer receives goods or services in consideration for a taxpayer's payment or transfer to an entity described in section 170(c) if, at the time the taxpayer makes the payment to such entity, the taxpayer receives or expects to receive goods or services from that entity or any other party in return.

(ii) *Goods or services.* Goods or services means cash, property, services, benefits, and privileges.

(iii) *Applicability date.* The definitions provided in this paragraph (h)(4) are applicable to amounts paid or property transferred on or after December 17, 2019.

\*\*\*\*\*

#### §1.170A-13 [Amended]

Par. 5. Section 1.170A-13(f)(7) is amended by removing the cross-reference to “§1.170A-1(h)(5)” and adding in its place “§1.170A-1(h)(6).”

Sunita Lough,  
Deputy Commissioner for Services  
and Enforcement.

Approved: July 27, 2020.

David J. Kautter,  
Assistant Secretary of the Treasury  
(Tax Policy).

(Filed by the Office of the Federal Register on August 7, 2020, 4:15 p.m., and published in the issue of the Federal Register for August 11, 2020, 85 F.R. 48467)

# Part III

## Relief with Respect to Employment Tax Deadlines Applicable to Employers Affected by the Ongoing Coronavirus (COVID-19) Disease 2019 Pandemic

### Notice 2020-65

On August 8, 2020, the President of the United States issued a Presidential Memorandum directing the Secretary of the Treasury (Secretary) to use his authority pursuant to section 7508A of the Internal Revenue Code (Code) to defer the withholding, deposit, and payment of certain payroll tax obligations.<sup>1</sup> Accordingly, the Secretary has determined that employers that are required to withhold and pay the employee share of social security tax under section 3102(a) or the railroad retirement tax equivalent under section 3202(a) are affected by the COVID-19 emergency for purposes of the relief described in the Presidential Memorandum and this notice (Affected Taxpayers). For Affected Taxpayers, the due date for the withholding and payment<sup>2</sup> of the tax imposed by section 3101(a), and so much of the tax imposed by section 3201 as is attributable to the rate in effect under section 3101(a), on Applicable Wages, as defined herein, (collectively Applicable Taxes) is postponed until the period beginning on January 1, 2021, and ending on April 30, 2021.

#### Applicable Wages

For purposes of this notice, Applicable Wages means wages as defined in section 3121(a) or compensation as defined in section 3231(e)<sup>3</sup> paid to an employee on a pay date during the period beginning on September 1, 2020, and ending on De-

ember 31, 2020, but only if the amount of such wages or compensation paid for a bi-weekly pay period is less than the threshold amount of \$4,000, or the equivalent threshold amount with respect to other pay periods. The determination of Applicable Wages is made on a pay period-by-pay period basis. If the amount of wages or compensation payable to an employee for a pay period is less than the corresponding pay period threshold amount, then that amount is considered Applicable Wages for the pay period, and the relief provided in this notice applies to those wages or that compensation paid to that employee for that pay period, irrespective of the amount of wages or compensation paid to the employee for other pay periods.

#### Payment of Deferred Applicable Taxes

An Affected Taxpayer must withhold and pay the total Applicable Taxes that the Affected Taxpayer deferred under this notice ratably from wages and compensation paid between January 1, 2021 and April 30, 2021 or interest, penalties, and additions to tax will begin to accrue on May 1, 2021, with respect to any unpaid Applicable Taxes. If necessary, the Affected Taxpayer may make arrangements to otherwise collect the total Applicable Taxes from the employee.

#### Drafting Information

The principal authors of this notice are attorneys of the Office of Associate Chief Counsel, Employee Benefits, Exempt Organizations, and Employment Taxes, with the participation of staff from other offices. For further information regarding the guidance under this notice, please call the Notice 2020-65 Hotline at (202) 317-5436 (not a toll-free number).

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

### Notice 2020-68

#### I. PURPOSE

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

This notice is not intended to provide comprehensive guidance as to the specific provisions of the SECURE Act and the

<sup>1</sup> The Presidential Memorandum is available at <https://www.federalregister.gov/d/2020-17899>.

<sup>2</sup> The deposit obligation for employee social security tax does not arise until the tax is withheld. Accordingly, by postponing the time for withholding the employee social security tax, the deposit obligation is delayed by operation of the regulations. Thus, this notice does not separately postpone the deposit obligation.

<sup>3</sup> Because Applicable Wages are defined as wages as defined in section 3121(a) and compensation as defined in section 3231(e), any amounts excluded from wages or compensation under these sections are not included when determining Applicable Wages.



Miners Act it addresses, but rather is intended to provide guidance on particular issues to assist in the implementation of these provisions. The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) continue to analyze the various provisions of the SECURE Act and the Miners Act and anticipate issuing further guidance, including regulations, as appropriate.

## II. PROVISIONS OF THE SECURE ACT AND THE MINERS ACT

### TABLE OF CONTENTS:

- A - Section 105 of the SECURE Act
- B - Section 107 of the SECURE Act
- C - Section 112 of the SECURE Act
- D - Section 113 of the SECURE Act
- E - Section 116 of the SECURE Act
- F - Section 104 of the Miners Act
- G - Provisions Relating to Plan Amendments

### A. SECTION 105 OF THE SECURE ACT

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

Section 45T(c) provides that the term “eligible employer” has the meaning given that term in § 408(p)(2)(C)(i), which requires that an employer have had no more than 100 employees who received at least \$5,000 of compensation from the employer for the preceding year. Section B of IRS Notice 98-4, 1998-2 I.R.B. 25, 1998-1 C.B. 269, provides guidance regarding this eligible employer definition, including rules under which certain related employers (trades or businesses under common control) are treated as a single employer.

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

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

A. A-1: No. An eligible employer may receive a credit for taxable years only during a single 3-year credit period that begins when the employer first includes an EACA in any qualified employer plan. For example, if an eligible employer, Employer W, first includes an EACA in one of its qualified employer plans, Plan A, during Employer W’s 2021 taxable year (so that the 2021, 2022, and 2023 taxable years included in Employer W’s 3-year credit period are all taxable years after § 45T is applicable), and also includes an EACA in a second qualified employer plan, Plan B, during the 2022, 2023, and 2024 taxable years, Employer W may receive no more than a \$500 credit for each taxable year during the 3-year credit period that begins with the 2021 taxable year and is not permitted to receive the credit for the 2024 taxable year. As another example, if a different eligible employer, Employer X, first included an EACA in one of its qualified employer plans, Plan C, during Employer X’s 2018 taxable year (so that the only taxable year included in Employer X’s 3-year credit period after § 45T is applicable is 2020) and also includes an EACA in a second qualified employer plan, Plan D, during the 2020, 2021, and 2022 taxable years, Employer X may receive only

a \$500 credit for the 2020 taxable year and no credit for subsequent taxable years.

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

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

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

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



sisting of the 2020, 2021, and 2022 taxable years would apply to Employer Z. In addition, Employer Z would continue to be eligible for the credit for the 2021 and 2022 taxable years if Plan G spun off the assets attributable to Employer Z to Plan H, a single-employer plan maintained by Employer Z, and Employer Z continued to include an EACA in Plan H for the 2021 and 2022 taxable years.

## **B. SECTION 107 OF THE SECURE ACT**

Section 107(a) of the SECURE Act repeals § 219(d)(1) of the Code. Prior to the repeal of § 219(d)(1), an individual was not permitted to make contributions to the individual's traditional Individual Retirement Arrangement (IRA) for a taxable year if the individual had attained age 70½ by the last day of the year.

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

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

Q. B-1: Is a financial institution that serves as trustee, issuer, or custodian for an IRA (financial institution) required to

accept post-age 70½ contributions in 2020 or subsequent taxable years?

A. B-1: No. A financial institution is not required to accept post-age 70½ contributions. However, a financial institution may choose to accept post-age 70½ contributions beginning on a date after December 31, 2019, as selected by the financial institution.

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

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

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

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

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

A. B-4: No. An individual may not offset the amount of required minimum distributions from the individual's IRA by the amount of post-age 70½ contributions for the same taxable year. Contributions

and distributions are each separate transactions and are independently reported by the financial institution to the IRS.

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

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

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

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

(b) The excludable amount of the qualified charitable distributions for 2022 is the \$6,500 of qualified charitable distributions reduced by the portion of the \$10,000 aggregate amount of post-age 70½ contributions deducted that did not reduce the excludable portion of the qualified charitable distributions for earlier taxable years. Thus, \$6,000 of the aggregate amount of post-age 70½ contributions deducted does not apply for 2022 because that amount has reduced the excludable amount of qualified charitable distributions for 2021. The remaining \$4,000 of the aggregate amount of post-age 70½ contributions deducted reduces the excludable amount of any qualified charitable distributions for subsequent taxable years. Accordingly, the excludable amount of the qualified charitable distributions for 2022 is \$2,500 (\$6,500 - \$4,000 = \$2,500).

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

qualified charitable distributions for subsequent taxable years.

### C. SECTION 112 OF THE SECURE ACT

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

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

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

Section 401(k)(15)(B)(iii) provides special vesting rules for an employee who becomes eligible to participate in a CODA solely by reason of having completed three consecutive 12-month periods during each of which the employee completed at least 500 hours of service (long-term, part-time employee). Under §

401(k)(15)(B)(iii), a long-term, part-time employee must be credited with a year of service for purposes of determining whether the employee has a nonforfeitable right to employer contributions (other than elective deferrals) for each 12-month period during which the employee completes at least 500 hours of service. In addition, § 401(k)(15)(B)(iii) modifies the break-in-service rules of § 411(a)(6) for a long-term, part-time employee. Under § 401(k)(15)(B)(iv), the special vesting rules of § 401(k)(15)(B)(iii) continue to apply to a long-term, part-time employee even if the long-term, part-time employee subsequently completes a 12-month period during which the employee completes at least 1,000 hours of service.

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

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

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

Section 401(k)(15)(B)(iii) provides that, for purposes of determining whether a long-term, part-time employee has a nonforfeitable right to employer contributions (other than elective deferrals) under the arrangement, each 12-month period for which the employee has at least 500 hours of service is treated as a year of service. Section 411(a)(4) generally requires that all years of service with the employer or employers maintaining the plan be tak-

en into account for purposes of determining an employee's nonforfeitable right to employer contributions, subject to certain exceptions. Those exceptions include, for example, years of service before the employee attains age 18 (see § 411(a)(4)(A)).

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

### D. SECTION 113 OF THE SECURE ACT

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

Section 113 of the SECURE Act amended § 72(t)(2) of the Code to add a new exception to the 10% additional tax for any qualified birth or adoption distribution. Section 72(t)(2)(H) permits an individual to receive a distribution from an applicable eligible retirement plan of up to \$5,000 without application of the 10% additional tax if the distribution meets the requirements to be a qualified birth or adoption distribution. An applicable retirement plan is defined in § 72(t)(2)(H)(vi)(I) as an eligible retirement plan described in § 402(c)(8)(B) other than a defined benefit plan. A qualified birth or adoption distri-

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

bution is includible in gross income, but is not subject to the 10% additional tax under § 72(t)(1). A qualified birth or adoption distribution is defined as any distribution from an applicable eligible retirement plan to an individual if made during the 1-year period beginning on the date on which the child of the individual is born or the legal adoption by the individual of an eligible adoptee is finalized.

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

### Questions and Answers Relating to Individuals Receiving Distributions

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

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

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

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

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

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

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

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

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

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

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

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

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

A. D-7: Yes. Each parent may receive a qualified birth or adoption distribution of

up to \$5,000 with respect to the same child or eligible adoptee.

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

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

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

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

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

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

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



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

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

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

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

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

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

- (a) the plan permits qualified birth or adoption distributions;
- (b) the individual received a qualified birth or adoption distribution from that plan; and
- (c) the individual is eligible to make a rollover contribution to that plan at the time the individual wishes to recontribute the qualified birth or adoption distribution to the plan.

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

A. D-14: Qualified birth or adoption distributions are treated as meeting the distribution restrictions for qualified cash or deferred arrangements under § 401(k)(2)(B)(i), custodial accounts under § 403(b)(7)(A)(i), annuity contracts under § 403(b)(11), and governmental deferred compensation plans under § 457(d)(1)

(A). Thus, for example, an employer may expand the distribution options under its plan to allow an amount attributable to an elective, qualified nonelective, qualified matching, or safe harbor contribution under a § 401(k) plan to be distributed as a qualified birth or adoption distribution even though it is distributed before an otherwise permitted distributable event, such as severance from employment, disability, or attainment of age 59½.

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

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

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

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

Q. D-17: Is a recontribution made with respect to a qualified birth or adoption dis-

tribution from an IRA treated as the direct transfer of an eligible rollover distribution as defined in § 408(d)(3)?

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

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

A. D-18: Yes. If an applicable eligible retirement plan does not permit qualified birth or adoption distributions and an individual receives an otherwise permissible in-service distribution that meets the requirements of a qualified birth or adoption distribution, the individual may treat the distribution as a qualified birth or adoption distribution on the individual's federal income tax return. The distribution, while includible in gross income, is not subject to the 10% additional tax under § 72(t)(1). If the individual decides to recontribute the amount to an eligible retirement plan, the individual may recontribute the amount to an IRA.

## E. SECTION 116 OF THE SECURE ACT

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

Section 415(c) provides limitations on annual additions under a defined contribution plan. Under § 415(c)(1), annual additions may not exceed the lesser of (A) \$40,000 (increased by cost-of-living



adjustments under § 415(d)(1)(C)), or (B) 100% of the participant's compensation as defined in § 415(c)(3). Section 415(c)(2) provides that annual additions are the sum of employer contributions, employee contributions, and forfeitures.

A difficulty of care payment is a type of qualified foster care payment that is excludable from gross income under § 131. Because a difficulty of care payment is excludable from gross income, it was not, prior to the SECURE Act, included in a participant's compensation for purposes of calculating the annual additions limit of § 415(c)(1). Accordingly, an employee who received difficulty of care payments from an employer was not permitted to make contributions to, or receive allocations under, the employer's plan based on the difficulty of care payments.

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

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

Q. E-1: Are difficulty of care payments received by an employee from a person

other than his or her employer includible in the definition of compensation under that employer's plan?

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

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

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

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

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

## F. SECTION 104 OF THE MINERS ACT

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

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

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

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

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

Q. F-2: If a pension plan is amended to lower its minimum age for an in-service distribution from age 62 to age 59½ pursuant to § 401(a)(36), may the plan also change its definition of normal retirement age to age 59½ or later without violating

other qualification requirements, such as the definitely determinable benefit requirement in § 1.401(a)-1(b)(1)(i)?

A. F-2: The in-service distribution rule in § 401(a)(36) is separate from the definitely determinable benefit requirement in § 1.401(a)-1(b)(1)(i). A plan does not fail to satisfy the requirements in § 1.401(a)-1(b)(1)(i) merely because the plan provides for in-service distributions in accordance with § 401(a)(36). In addition to satisfying other applicable qualification requirements (such as § 411(d)(6)), any change to a pension plan's definition of normal retirement age must satisfy the requirements in § 1.401(a)-1(b)(2), including the requirement that a normal retirement age must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. A normal retirement age of age 62 or later is deemed to satisfy the reasonably representative requirement (see § 1.401(a)-1(b)(2)(ii)). For purposes of the reasonably representative requirement, governmental pension plans may continue to rely on proposed regulations that were published in the Federal Register on January 27, 2016 (81 FR 4599).

## G. PROVISIONS RELATING TO PLAN AMENDMENTS

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

(1) the amendment is adopted no later than the last day of the first plan year beginning on or after January 1, 2022, or, for an applicable collectively bargained plan (a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before December 20, 2019) or a § 414(d) governmental plan, the last day of the first plan year beginning on or after January 1, 2024, or such later date as the Secretary may prescribe (the § 601 date);

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

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

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

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

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

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

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

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

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

that is issued by an insurance company and that meets certain requirements.

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

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

#### (a) *Qualified plans*

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

A sponsor of a qualified plan may amend its plan to reflect the SECURE Act, the regulations thereunder, or § 104 of the Miners Act after the dates set forth in the preceding paragraph, in accordance with Rev. Proc. 2016-37, as modified by Rev. Proc. 2017-41 and Rev. Proc. 2020-40. However, under Rev. Proc. 2016-37, amendments made after the dates set forth in the preceding paragraph, are not entitled to the anti-cutback relief provided by § 411(d)(6) of the Code or § 204(g) of ERISA.

#### (b) *Section 403(b) plans*

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

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

#### (c) *Section 457(b) governmental plans*

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

#### (d) *Individual retirement plans*

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

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

### III. REQUEST FOR COMMENTS

The Treasury Department and the IRS invite comments and suggestions regarding the matters discussed in this notice. In particular, in connection with section II.C. of this notice, the Treasury Department and the IRS request comments on how to reduce potential administrative burdens related to counting years of service begin-

ning before January 1, 2021, for purposes of determining a long-term, part-time employee's nonforfeitable right to employer contributions pursuant to § 112 of the SECURE Act, while still complying with the requirements of §§ 401(k)(15)(B)(iii) and 411(a)(4) of the Code.

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

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

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

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

### IV. DRAFTING INFORMATION

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

---

## Revenue Procedure 2020-40

### SECTION 1. PURPOSE

This revenue procedure modifies section 15.05 of Rev. Proc. 2016-37, 2016-

29 I.R.B. 136, and section 12.02 of Rev. Proc. 2019-39, 2019-42 I.R.B. 945, to expand the situations in which the plan amendment deadline for discretionary amendments made to qualified pre-approved plans and § 403(b) pre-approved plans may be extended. These modifications are consistent with the extensions of the plan amendment deadlines for discretionary amendments set forth in section 8.02 of Rev. Proc. 2016-37 with respect to qualified individually designed plans and section 6.02 of Rev. Proc. 2019-39 with respect to § 403(b) individually designed plans.

## **SECTION 2. BACKGROUND**

.01 Rev. Proc. 2016-37 sets forth procedures for obtaining determination letters for qualified individually designed plans and opinion letters for qualified pre-approved plans submitted to the Internal Revenue Service (IRS), including providing plan amendment deadlines for interim and discretionary amendments made to these plans.

.02 Section 15.04(2) of Rev. Proc. 2016-37 sets forth the deadline for the timely adoption of a discretionary amendment to a qualified pre-approved plan. In general, a discretionary amendment is considered to have been adopted timely if the plan amendment is adopted by the end of the plan year in which the plan amendment is operationally put into effect.

.03 Section 15.05 of Rev. Proc. 2016-37 provides that the deadline set forth in section 15.04 applies unless a statutory provision or guidance issued by the IRS sets forth an earlier deadline to timely adopt a discretionary amendment with respect to a plan year.

.04 Rev. Proc. 2019-39 sets forth procedures for obtaining opinion and advisory letters for § 403(b) pre-approved plans submitted to the IRS and provides plan amendment deadlines for interim and discretionary amendments made to § 403(b) pre-approved plans and for discretionary amendments made to § 403(b) individually designed plans.

.05 Section 12.01 of Rev. Proc. 2019-39 sets forth the deadline for the timely adoption of a discretionary amendment to a § 403(b) pre-approved plan. In general, a discretionary amendment is considered to have been adopted timely if the plan amendment is adopted by the end of the plan year in which the plan amendment is operationally put into effect.

.06 Section 12.02 of Rev. Proc. 2019-39 provides that section 12.01 applies unless a statutory provision or guidance issued by the IRS sets forth an earlier deadline to timely adopt a discretionary amendment with respect to a plan year.

## **SECTION 3. MODIFICATION OF REV. PROC. 2016-37**

.01 Section 15.05 of Rev. Proc. 2016-37 is revised to read as follows:

Section 15.04 of this revenue procedure applies unless (1) a statutory provision, or regulations or other guidance published in the Internal Revenue Bulletin, sets forth a deadline to timely adopt a discretionary amendment with respect to a plan year that is either earlier or later than the deadlines under section 15.04, or (2) a statutory provision or guidance provides another specific deadline for the adoption of a particular type of interim amendment that is either earlier or later than the deadlines under section 15.04.

## **SECTION 4. MODIFICATION OF REV. PROC. 2019-39**

.01 Section 12.02 of Rev. Proc. 2019-39 is revised to read as follows:

*Exceptions to section 12.01 plan amendment deadlines.* Section 12.01 applies unless (1) a statutory provision, or regulations or other guidance published in the Internal Revenue Bulletin, sets forth a deadline to timely adopt a discretionary amendment with respect to a plan year that is either earlier or later than the deadlines under section 12.01, or (2) a statutory provision or guidance provides another specific deadline for the adoption of a particular type of interim amendment that is either earlier or later than the deadlines under section 12.01.

## **SECTION 5. EFFECT ON OTHER DOCUMENTS**

Rev. Proc. 2016-37 and Rev. Proc. 2019-39 are modified.

## **SECTION 6. EFFECTIVE DATE**

The modifications in this revenue procedure are effective as of September 2, 2020.

## **SECTION 7. DRAFTING INFORMATION**

The principal author of this revenue procedure is Arslan Malik of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). For further information regarding this revenue procedure contact Employee Plans at (513) 975-6319 (not a toll-free number).



## Part IV

### Deletions From Cumulative List of Organizations, Contributions to Which are Deductible Under Section 170 of the Code

#### Announcement 2020-15

The Internal Revenue Service has revoked its determination that the organizations listed below qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1986.

Generally, the IRS will not disallow deductions for contributions made to a listed organization on or before the date of announcement in the Internal Revenue Bulletin that an organization no longer qualifies. However, the IRS is not precluded from disallowing a deduction for any contributions made after an organization ceases to qualify under section 170(c)(2) if the organization has not timely filed a suit for declaratory judgment under section 7428 and if the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for or was aware of the activities or omissions of the organization that brought about this revocation.

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organizations described in section 170(c)(2) that are otherwise allowable will continue to be deductible. Protection under section 7428(c) would begin on September 14, 2020 and would end on the date the court first determines the organization is not described in section 170(c)(2) as more particularly set for in section 7428(c)(1). For individual contributors, the maximum deduction protected is \$1,000, with a husband and wife treated as one contributor. This benefit is not extended to any individual, in whole or in part, for the acts or omissions of the organization that were the basis for revocation.

<b>NAME OF ORGANIZATION</b>	<b>Effective Date of Revocation</b>	<b>LOCATION</b>
National Outreach Foundation, Inc.	1/01/2012	Banning, CA

## Announcement 2020-16

### Section 7428(c) Validation of Certain Contributions Made During Pendency of Declaratory Judgment Proceedings

This announcement serves notice to potential donors that the organization listed below has recently filed a timely declaratory judgment suit under section

7428 of the Code, challenging revocation of its status as an eligible donee under section 170(c)(2).

Protection under section 7428(c) of the Code begins on the date that the notice of revocation is published in the Internal Revenue Bulletin and ends on the date on which a court first determines that an organization is not described in section 170(c)(2), as more particularly set forth in section 7428(c)(1).

In the case of individual contributors, the maximum amount of contributions protected during this period is limited to

\$1,000.00, with a husband and wife being treated as one contributor. This protection is not extended to any individual who was responsible, in whole or in part, for the acts or omissions of the organization that were the basis for the revocation. This protection also applies (but without limitation as to amount) to organizations described in section 170(c)(2) which are exempt from tax under section 501(a). If the organization ultimately prevails in its declaratory judgment suit, deductibility of contributions would be subject to the normal limitations set forth under section 170.

Name of Organization	Date Suit Filed	Effective Date of Revocation	Location
National Outreach Foundation, Inc.	11/20/2019	1/01/2012	Banning, CA

# Definition of Terms

*Revenue rulings and revenue procedures (hereinafter referred to as “rulings”) that have an effect on previous rulings use the following defined terms to describe the effect:*

*Amplified* describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

*Clarified* is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

*Distinguished* describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

*Modified* is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the

new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

*Obsoleted* describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

*Revoked* describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

*Superseded* describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the

new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

*Supplemented* is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

*Suspended* is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

## Abbreviations

*The following abbreviations in current use and formerly used will appear in material published in the Bulletin.*

A—Individual.  
Acq.—Acquiescence.  
B—Individual.  
BE—Beneficiary.  
BK—Bank.  
B.T.A.—Board of Tax Appeals.  
C—Individual.  
C.B.—Cumulative Bulletin.  
CFR—Code of Federal Regulations.  
CI—City.  
COOP—Cooperative.  
Ct.D.—Court Decision.  
CY—County.  
D—Decedent.  
DC—Dummy Corporation.  
DE—Donee.  
Del. Order—Delegation Order.  
DISC—Domestic International Sales Corporation.  
DR—Donor.  
E—Estate.  
EE—Employee.  
E.O.—Executive Order.  
ER—Employer.

ERISA—Employee Retirement Income Security Act.  
EX—Executor.  
F—Fiduciary.  
FC—Foreign Country.  
FICA—Federal Insurance Contributions Act.  
FISC—Foreign International Sales Company.  
FPH—Foreign Personal Holding Company.  
FR.—Federal Register.  
FUTA—Federal Unemployment Tax Act.  
FX—Foreign corporation.  
G.C.M.—Chief Counsel’s Memorandum.  
GE—Grantee.  
GP—General Partner.  
GR—Grantor.  
IC—Insurance Company.  
I.R.B.—Internal Revenue Bulletin.  
LE—Lessee.  
LP—Limited Partner.  
LR—Lessor.  
M—Minor.  
Nonacq.—Nonacquiescence.  
O—Organization.  
P—Parent Corporation.  
PHC—Personal Holding Company.  
PO—Possession of the U.S.  
PR—Partner.  
PRS—Partnership.

PTE—Prohibited Transaction Exemption.  
Pub. L.—Public Law.  
REIT—Real Estate Investment Trust.  
Rev. Proc.—Revenue Procedure.  
Rev. Rul.—Revenue Ruling.  
S—Subsidiary.  
S.P.R.—Statement of Procedural Rules.  
Stat.—Statutes at Large.  
T—Target Corporation.  
T.C.—Tax Court.  
T.D.—Treasury Decision.  
TFE—Transferee.  
TFR—Transferor.  
T.I.R.—Technical Information Release.  
TP—Taxpayer.  
TR—Trust.  
TT—Trustee.  
U.S.C.—United States Code.  
X—Corporation.  
Y—Corporation.  
Z—Corporation.



## Numerical Finding List<sup>1</sup>

Bulletin 2020–38

### Announcements:

2020-8, 2020-32 I.R.B. 244  
2020-9, 2020-32 I.R.B. 244  
2020-10, 2020-33 I.R.B. 385  
2020-11, 2020-33 I.R.B. 385  
2020-13, 2020-35 I.R.B. 492  
2020-14, 2020-36 I.R.B. 549  
2020-15, 2020-38 I.R.B. 577  
2020-16, 2020-38 I.R.B. 578

### Notices:

2020-43, 2020-27 I.R.B. 1  
2020-45, 2020-27 I.R.B. 3  
2020-46, 2020-27 I.R.B. 7  
2020-47, 2020-27 I.R.B. 7  
2020-49, 2020-27 I.R.B. 8  
2020-50, 2020-28 I.R.B. 35  
2020-48, 2020-29 I.R.B. 72  
2020-51, 2020-29 I.R.B. 73  
2020-52, 2020-29 I.R.B. 79  
2020-53, 2020-30 I.R.B. 151  
2020-54, 2020-31 I.R.B. 226  
2020-56, 2020-32 I.R.B. 239  
2020-57, 2020-32 I.R.B. 240  
2020-58, 2020-34 I.R.B. 419  
2020-55, 2020-35 I.R.B. 467  
2020-61, 2020-35 I.R.B. 468  
2020-62, 2020-35 I.R.B. 476  
2020-63, 2020-35 I.R.B. 491  
2020-60, 2020-36 I.R.B. 514  
2020-64, 2020-36 I.R.B. 519  
2020-65, 2020-38 I.R.B. 567  
2020-68, 2020-38 I.R.B. 567

### Proposed Regulations:

REG-119307-19, 2020-28 I.R.B. 44  
REG-112339-19, 2020-30 I.R.B. 155  
REG-117589-18, 2020-30 I.R.B. 184  
REG-125716-18, 2020-30 I.R.B. 197  
REG-123027-19, 2020-31 I.R.B. 229  
REG-130081-19, 2020-32 I.R.B. 246  
REG-127732-19, 2020-33 I.R.B. 385  
REG-111879-20, 2020-34 I.R.B. 421  
REG-112042-19, 2020-34 I.R.B. 422  
REG-132766-18, 2020-34 I.R.B. 436  
REG-132434-17, 2020-35 I.R.B. 508  
REG-116475-19, 2020-37 I.R.B. 553

### Revenue Procedures:

2020-16, 2020-27 I.R.B. 10  
2020-31, 2020-27 I.R.B. 12  
2020-35, 2020-29 I.R.B. 82

## Revenue Procedures:—Continued

2020-36, 2020-32 I.R.B. 243  
2020-37, 2020-33 I.R.B. 381  
2020-38, 2020-36 I.R.B. 522  
2020-39, 2020-36 I.R.B. 546  
2020-40, 2020-38 I.R.B. 575

### Revenue Rulings:

2020-14, 2020-28 I.R.B. 33  
2020-15, 2020-32 I.R.B. 233  
2020-16, 2020-37 I.R.B. 550  
2020-17, 2020-37 I.R.B. 552

### Treasury Decisions:

9899, 2020-29 I.R.B. 62  
9900, 2020-30 I.R.B. 143  
9903, 2020-32 I.R.B. 235  
9901, 2020-33 I.R.B. 266  
9902, 2020-33 I.R.B. 349  
9904, 2020-34 I.R.B. 413  
9907, 2020-38 I.R.B. 559

<sup>1</sup> A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2019–27 through 2019–52 is in Internal Revenue Bulletin 2019–52, dated December 27, 2019.

## **Finding List of Current Actions on Previously Published Items<sup>1</sup>**

Bulletin 2020–38

---

<sup>1</sup> A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2019–27 through 2019–52 is in Internal Revenue Bulletin 2019–52, dated December 27, 2019.

# **Internal Revenue Service**

## **Washington, DC 20224**

---

Official Business  
Penalty for Private Use, \$300

---

## **INTERNAL REVENUE BULLETIN**

The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletins are available at [www.irs.gov/irb/](http://www.irs.gov/irb/).

---

## **We Welcome Comments About the Internal Revenue Bulletin**

If you have comments concerning the format or production of the Internal Revenue Bulletin or suggestions for improving it, we would be pleased to hear from you. You can email us your suggestions or comments through the IRS Internet Home Page ([www.irs.gov](http://www.irs.gov)) or write to the Internal Revenue Service, Publishing Division, IRB Publishing Program Desk, 1111 Constitution Ave. NW, IR-6230 Washington, DC 20224.