

## Notice 2022-33

### I. PURPOSE

This notice extends the deadlines for amending a retirement plan or individual retirement arrangement (IRA) to reflect 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 section 104 of Division M of the Further Consolidated Appropriations Act, 2020, known as the Bipartisan American Miners Act of 2019 (Miners Act), by modifying Notice 2020-68, 2020-38 IRB 567, and Notice 2020-86, 2020-53 IRB 1786. In addition, this notice extends the deadline for amending a retirement plan to reflect the provisions of section 2203 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. 116-136, 134 Stat. 281 (2020).

Under this notice, the extended amendment deadline for (1) a qualified retirement plan or section 403(b) plan (including an applicable collectively bargained plan) that is not a governmental plan or (2) an IRA is December 31, 2025. Later deadlines apply with respect to governmental retirement plans (including governmental plans under section 457(b) of the Internal Revenue Code (Code)). Pursuant to these modifications, with respect to an amendment made to reflect provisions of the SECURE Act, the period during which the amendment is eligible, if applicable, for relief from the anti-cutback requirements of section 411(d)(6) of the Code or section 204(g) of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829, as amended (ERISA), is extended to the applicable extended plan amendment deadline.<sup>1</sup>

### II. BACKGROUND

#### A. In General

##### 1. Section 401(b) of the Code

Section 401(b) of the Code provides a remedial amendment period during which a plan may be amended retroactively to comply with the Code's qualification requirements. Section 1.401(b)-1 of the Income Tax Regulations describes the disqualifying provisions that may be amended retroactively and the remedial amendment period during which retroactive amendments may be adopted. The regulations also grant the Commissioner of Internal Revenue (Commissioner) the

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

discretion to designate certain plan provisions as disqualifying provisions and to extend the remedial amendment period.

Section 1.401(b)-1 provides that a plan that fails to satisfy the requirements of section 401(a) solely as a result of a disqualifying provision defined under § 1.401(b)-1(b) need not be amended to comply with those requirements until the last day of the remedial amendment period with respect to the disqualifying provision, provided the amendment is made retroactively effective to the beginning of the remedial amendment period. Under § 1.401(b)-1(b)(3), a disqualifying provision includes a plan provision designated, at the Commissioner's discretion, as a disqualifying provision that either (1) results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements or (2) is integral to a qualification requirement of the Code that has been changed. Section 1.401(b)-1(c)(1) provides that a disqualifying provision under § 1.401(b)-1(b)(3) includes a provision integral to the applicable change in the qualification requirements of the Code, if the plan was in effect on the date the change in those requirements became effective with respect to the plan.

For a disqualifying provision described in § 1.401(b)-1(b)(3), § 1.401(b)-1(d)(1)(iv) and (v) provides that the remedial amendment period begins on the date on which the change becomes effective with respect to the plan or, in the case of a provision that is integral to a qualification requirement that has been changed, the first day on which the plan is operated in accordance with the provision as amended. In the case of a plan maintained by one employer, § 1.401(b)-1(d)(2)(i) and (ii) provides that the remedial amendment period for a disqualifying provision described in § 1.401(b)-1(b)(3) ends on the later of: (1) the due date (including extensions) for filing the income tax return for the employer's taxable year that includes the date on which the remedial amendment period begins or (2) the last day of the plan year that includes the date on which the remedial amendment period begins. In the case of a plan maintained by more than one employer, § 1.401(b)-1(d)(2)(iii) provides that the remedial amendment period ends on the last day of the tenth month following the last day of the plan year in which the remedial amendment period begins.

## 2. Rev. Proc. 2016-37 and Rev. Proc. 2019-39

Rev. Proc. 2016-37, 2016-29 IRB 136,<sup>2</sup> sets forth plan amendment deadlines for qualified plans that apply except as otherwise provided by statute or in regulations or other guidance published in the Internal Revenue Bulletin. For example, for an individually designed qualified plan that is not a governmental plan (within the meaning of section 414(d) of the Code), the plan amendment deadline for a disqualifying provision with respect to a change in qualification requirements is the last day of the second calendar year that begins after the issuance of the Required Amendments List (RA List) in which the change in qualification requirements appears, and the plan amendment deadline for a discretionary amendment is the end of the plan year in which the plan amendment is operationally put into effect. Rev. Proc. 2019-39, 2019-42 IRB

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<sup>2</sup> For purposes of this notice, references to Rev. Proc. 2016-37 are to Rev. Proc. 2016-37, as modified by Rev. Proc. 2017-41, 2017-29 IRB 92, Rev. Proc. 2019-20, 2019-20 IRB 1182, Rev. Proc. 2020-40, 2020-38 IRB 575, and Rev. Proc. 2021-38, 2021-38 IRB 425.

945,<sup>3</sup> sets forth similar plan amendment deadlines for section 403(b) plan form defects first occurring after June 30, 2020, and for discretionary amendments made to section 403(b) plans with respect to plan years beginning on or after January 1, 2020. Although these revenue procedures provide plan amendment deadlines, they do not provide relief from the anti-cutback requirements of section 411(d)(6) of the Code or section 204(g) of ERISA, if applicable, for amendments adopted by those deadlines.

## B. SECURE Act and Miners Act

### 1. Section 601 of the SECURE Act

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 clause (3) of this section II.B.1 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 section 411(d)(6) of the Code or section 204(g) of ERISA,<sup>4</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) in the case of section 401 of the SECURE Act, or for a section 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 section 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 section 601 date or, if earlier, the date the amendment is adopted.

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<sup>3</sup> For purposes of this notice, references to Rev. Proc. 2019-39 are to Rev. Proc. 2019-39, as modified by Notice 2020-35, 2020-25 IRB 948, Rev. Proc. 2020-40, and Rev. Proc. 2021-37, 2021-38 IRB 385.

<sup>4</sup> Section 411(d)(6) provides, generally, that a plan will not satisfy section 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 section 411(d)(6) of the Code. The Internal Revenue Service (IRS) has interpretive authority over section 204(g) of ERISA pursuant to Reorganization Plan No. 4 of 1978, 5 U.S.C. App.

## 2. Section 104 of the Miners Act

Section 104(a) of the Miners Act amends section 401(a)(36) of the Code to lower the minimum age for allowable in-service distributions from a qualified pension plan from age 62 to age 59½. Section 104(b) of the Miners Act amends the distribution requirements of section 457(d)(1)(A)(i) of the Code to provide that, in the case of a governmental plan under section 457(b) of the Code, amounts under the plan may be made available to a participant as early as the calendar year in which the participant attains age 59½.

## 3. Notice 2020-68

Q&A G-1 of Notice 2020-68 sets forth deadlines for adopting retirement plan amendments relating to certain provisions of the SECURE Act, the regulations thereunder, and section 104 of the Miners Act.

Q&A G-1(a) of Notice 2020-68 provides, in part, that, in general, for a qualified plan that is not a governmental plan within the meaning of section 414(d), or an applicable collectively bargained plan, the deadline to amend a plan for provisions of the SECURE Act, the regulations thereunder, or section 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 governmental plan within the meaning of section 414(d) of the Code, or for an applicable collectively bargained plan is the last day of the first plan year beginning on or after January 1, 2024.

Q&A G-1(b) of Notice 2020-68 provides, in part, that, in general, the deadline for a section 403(b) plan that is not maintained by a public school, as described in section 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 section 403(b) plan that is maintained by a public school, as described in section 403(b)(1)(A)(ii), is the last day of the first plan year beginning on or after January 1, 2024.

Q&A G-1(c) of Notice 2020-68 provides that the deadline to amend a governmental plan under section 457(b) for provisions of the SECURE Act, the regulations thereunder, or section 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 section 457(b) of the Code.

Q&A G-1(d) of Notice 2020-68 provides, in part, that 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.

#### 4. Notice 2020-86

Notice 2020-86 provides guidance in the form of questions and answers with respect to sections 102 and 103 of the SECURE Act, including guidance relating to plan amendments. For example, Q&A-2 of Notice 2020-86 generally provides that if a plan incorporates by reference the automatic contribution maximum qualified percentage of section 401(k)(13)(C)(iii) of the Code and the plan continues to apply the maximum qualified percentage of 10 percent that applied before section 401(k)(13)(C)(iii) was amended by section 102(a) of the SECURE Act, then the plan would need to be amended on or before the plan amendment deadline determined under section 601(b) of the SECURE Act, as described in Q&A G-1 of Notice 2020-68. The amendment would need to provide explicitly that the plan's maximum qualified percentage is 10 percent, retroactive to the first day of the first plan year beginning after December 31, 2019.

Q&A-3 of Notice 2020-86 provides that, in general, the plan amendment timing provisions of section 601 of the SECURE Act, as described in Q&A G-1 of Notice 2020-68, apply to a plan amendment adopted under section 102 of the SECURE Act. Q&A-3 of Notice 2020-86 also provides that a plan may be amended to reflect section 102 of the SECURE Act after the applicable plan amendment deadline under section 601 of the SECURE Act, in accordance with the general discretionary amendment deadlines set forth in Rev. Proc. 2016-37.

Q&A-13 of Notice 2020-86 provides that, in general, the plan amendment timing provisions of section 601 of the SECURE Act, as described in Q&A G-1 of Notice 2020-68, apply to a plan amendment adopted under section 103(b) or (c) of the SECURE Act (even if the applicable plan amendment deadline under section 601 of the SECURE Act is later than the deadline under section 103(b) or (c) of the SECURE Act). Q&A-13 of Notice 2020-86 also provides that a plan may be amended after the applicable plan amendment deadline under section 601 of the SECURE Act, in accordance with the plan amendment provisions of section 103(b) or (c) of the SECURE Act (which provide an exception to the general discretionary amendment deadlines set forth in Rev. Proc. 2016-37).

#### C. CARES Act

Section 2203(a) of the CARES Act added section 401(a)(9)(I) to the Code, which provides for a waiver of required minimum distributions for defined contribution plans and IRAs for 2020. Section 2203(c) of the CARES Act provides that a plan or contract may operate in accordance with an expected plan or contract amendment relating to the changes made by section 2203, provided the plan or contract amendment is adopted no later than the last day of the first plan year beginning in 2022 (or, in the case of a governmental plan, 2024). Section 2203(c) of the CARES Act also provides that a plan

or contract will not fail to satisfy section 411(d)(6) of the Code by reason of such an amendment, except as provided by the Secretary.<sup>5</sup>

### **III. EXTENSION OF PLAN AMENDMENT DEADLINE; ANTI-CUTBACK RELIEF<sup>6</sup>**

#### **A. SECURE Act and Miners Act**

Pursuant to the authority of the Secretary under section 601 of the SECURE Act, the deadlines for amending a retirement plan or IRA to reflect the provisions of the SECURE Act, the regulations thereunder, or section 104 of the Miners Act, as set forth in Notice 2020-68 and Notice 2020-86, are hereby extended as follows:

(1) The first paragraph under Q&A G-1(a) of Notice 2020-68 is revised to read as follows:

“In general, for a qualified plan (including an applicable collectively bargained plan) that is not a governmental plan within the meaning of section 414(d) of the Code, the deadline to amend a plan for provisions of the SECURE Act, the regulations thereunder, or section 104 of the Miners Act is December 31, 2025. The plan amendment deadline for a qualified governmental plan, within the meaning of section 414(d), is 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after December 31, 2023.”

(2) The first paragraph under Q&A G-1(b) of Notice 2020-68 is revised to read as follows:

“In general, the deadline for a section 403(b) plan (including an applicable collectively bargained plan) that is not maintained by a public school, as described in section 403(b)(1)(A)(ii), to amend a plan for provisions of the SECURE Act or the regulations thereunder is December 31, 2025. The plan amendment deadline for a section 403(b) plan that is maintained by a public school, as described in section 403(b)(1)(A)(ii), is 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after December 31, 2023.”

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<sup>5</sup> Notice 2020-51, 2020-29 IRB 73, which sets forth guidance relating to a waiver of 2020 required minimum distributions under section 2203 of the CARES Act, provides that an IRA does not have to be amended to reflect the waiver and provides a sample amendment for defined contribution plans that plan sponsors may adopt to implement section 401(a)(9)(I) of the Code. The notice provides that, although employers may adopt amendments pursuant to section 2203 of the CARES Act other than those provided in the sample amendment, the Department of the Treasury and the IRS are exercising their authority under section 2203(c) of the CARES Act to deny Code section 411(d)(6) relief for a plan amendment that eliminates an optional form of benefit.

<sup>6</sup> It is anticipated that certain guidance issued under the SECURE Act will appear on the 2023 RA List. The extended deadlines set forth in this section III are consistent with the deadlines that would apply if the general amendment timing principles set forth in Rev. Proc. 2016-37 and Rev. Proc. 2019-39 were applied to that SECURE Act guidance. Accordingly, it is anticipated that sponsors will be able to adopt all SECURE Act, Miners Act, and CARES Act amendments described in this notice on a single date.

(3) Q&A G-1(c) is revised to read as follows:

“The deadline to amend a governmental plan under section 457(b) of the Code for provisions of the SECURE Act, the regulations thereunder, or section 104 of the Miners Act is the later of (i) 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after December 31, 2023, 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 section 457(b) of the Code.”

(4) The first paragraph under Q&A G-1(d) of Notice 2020-68 is revised to read as follows:

“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, 2025, or such later date as the Secretary prescribes in guidance.”

(5) Q&A-2, Q&A-3, and Q&A-13 of Notice 2020-86 are modified by replacing all references to “Q&A G-1 of Notice 2020-68” with “Q&A G-1 of Notice 2020-68, as modified by Notice 2022-33”.

In addition, amendments to a retirement plan to reflect a provision of the SECURE Act or the regulations thereunder that are made on or before the dates as extended under this section III.A will not cause the retirement plan to fail to satisfy the anti-cutback requirements of section 411(d)(6) of the Code or section 204(g) of ERISA by reason of such amendments.

## B. CARES Act

Pursuant to the authority of the Commissioner under section 1.401(b)-1(f), the deadlines for amending a retirement plan to reflect the provisions of section 2203 of the CARES Act are hereby extended as follows:

(1) the deadline for amending a retirement plan that is not a governmental plan is December 31, 2025; and

(2) the deadline for amending a retirement plan that is a governmental plan is 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after December 31, 2023, or, if later, with respect to a governmental plan under section 457(b) of the Code, the first day of the first plan year beginning more than 180 days after the date of notification by the Secretary that the plan was administered in a manner that is inconsistent with the requirements of section 457(b).

#### **IV. EFFECT ON OTHER DOCUMENTS**

Part G of Notice 2020-68 is modified.

Q&A-2, Q&A-3, and Q&A-13 of Notice 2020-86 are modified.

#### **V. DRAFTING INFORMATION**

The principal author of this notice is Angelique Carrington of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). For further information regarding this notice, contact Ms. Carrington at (202) 317-4148 (not a toll-free number).