THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2020-47) Room 5203
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To Whom It May Concern:

Pursuant to Notice 2020-47 (Notice), The ERISA Industry Committee (ERIC) offers the following recommendations to the Department of Treasury (Treasury) and the Internal Revenue Service (IRS) to be included on the 2020-2021 Priority Guidance Plan.

We appreciate the work of Treasury and IRS during the COVID-19 pandemic. These unprecedented times have created challenges in all walks of life, and we thank you for your responsiveness in helping plan sponsors with the many issues that have arisen. As plan sponsors prepare for a new normal, we ask Treasury and IRS for guidance that has been delayed due to COVID-19. Specifically, we recommend guidance on three provisions of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), which was incorporated as Division O of the Further Consolidated Appropriations Act of 2020 (the "FCAA") and signed into law on December 20, 2019: required minimum distribution rules; withdrawals in the case of a birth or adoption; and nondiscrimination testing rules for closed benefit plans.

I. Requested Guidance - Required Minimum Distribution Rules

ERIC appreciates Internal Revenue Notice 2020-51, which provides guidance on required minimum distribution (RMD) suspensions as well as rollovers of waived RMDs under the Coronavirus Aid, Relief, and Economic Security (CARES Act). Similarly, guidance for the RMD provisions under the SECURE Act is needed to ensure that all of the RMD provisions are implemented entirely and efficiently.

The SECURE Act became law on December 20, 2019, and the changes for RMDs began on December 31, 2019. Therefore, this implementation date was not possible for plans to make needed changes, and caused some distributions made in 2020 to be mistakenly treated as an RMD by administrative systems. RMDs are treated differently from other plan distributions. These distributions cannot be rolled over to another plan, they are not subject to 20 percent withholding, and the plan is not required to provide a Special Tax Notice under Code section 402(f).

We request guidance to address distributions made in 2020 that were incorrectly made due to the timing of the passage of the law. Guidance should clarify a plan should not be disqualified if it

makes a distribution in 2020 for someone who turns 70 ½ in 2020 pursuant to the rules prior to the enactment of the SECURE Act. Furthermore, a distribution that would have been an RMD prior to the SECURE Act should not be subject to 20 percent withholding[1], and a plan that fails to provide a Code section 402(f) notice, in good faith, should not be penalized. Finally, guidance should allow flexibility in the determination of whether a distribution that would have been an RMD prior to the SECURE Act is eligible for a rollover.

In addition to this guidance, we would like to confirm that the remedial amendment provision under section 601 covers any anti-cutback issues that might occur due to the change to the RMD. For example, the extension of the rule might delay in-service distributions for participants that reach 70 ½ after December 31, 2019. Technically, this delay could be a violation of the anti-cutback rule since it was an expected benefit. Presumably, however, this concern is addressed by the remedial amendment provision.

Pursuant to the Notice, IRS and Treasury consider the following when reviewing recommendations and selecting projects for inclusion on the Priority Guidance:

1. Whether the recommended guidance resolves significant issues relevant to many taxpayers;
2. Whether the recommended guidance promotes sound tax administration;
3. Whether the recommended guidance can be drafted in a manner that will enable taxpayers to easily understand and apply the guidance;
4. Whether the recommended guidance involves regulations that are outmoded, ineffective, insufficient, or excessively burdensome and that should be modified, streamlined, expanded, or repealed;
5. Whether the IRS can administer the recommended guidance on a uniform basis; and
6. Whether the recommended guidance reduces controversy and lessens the burden on taxpayers or the IRS.

As described below, we believe that providing additional guidance on the RMD provisions under the SECURE Act meets all these requirements. (1) The recommended guidance is a significant tax issue relevant to many taxpayers because every retirement plan is subject to the RMD rules. The Baby Boom generation includes 73 million people who started turning 70 in 2016.[2] In addition, as noted above, RMDs are treated differently than other distributions - they cannot be rolled over to another plan, they are not subject to 20 percent withholding, and the plan is not required to provide a Special Tax Notice under Code section 402(f). Consequently, changes to the rules for these distributions affect every retirement plan and the millions of people who could possibly qualify for an RMD. (2) Guidance in this area promotes sound tax policy by ensuring that plan sponsors can effectively carry out the intent of the SECURE Act in expanding the age of the RMD. (3) The requested guidance is necessary to ensure uniform implementation of the statute. Therefore, we are certain that this guidance can be drafted not only to be easily understood and applied but also that this guidance is necessary for the statute to be applied. (4) This recommended guidance stems from recently enacted legislation that changed outmoded

[1] 1 Rather than treating the distribution under Code section 3405(c), we recommend applying Code section 3405(a) or (b), as applicable

[2] U.S. Census Bureau, https://www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html.

RMD rules. The RMD rules have not been updated since 1962 when Congress enacted the original RMD rules for Keogh plans.[3] The legislative intent was to ensure that the tax benefits provided by the retirement account were used to fund retirement and not be an indefinite tax shelter.[4] Since then, RMD rules have been imposed on all types of retirement plans, although the 70½ requirement age established in 1962 has remained in place. Given the increases in life expectancy since 1962, it is reasonable that this requirement should be updated.[5] (5) The IRS guidance can provide the requested guidance on a uniform basis through a notice or other form of guidance. (6) Currently, there is confusion among plan administrators about how best to implement the new RMD rules under the SECURE Act. As requested, clarification is needed regarding distributions in 2020 for someone who turns 70 ½ in 2020 pursuant to the rules prior to the enactment of the SECURE Act, including withholding rules, notice requirements, and rollover treatment.

II. Requested Guidance - Withdrawals in case of Birth or Adoption

The SECURE Act allows for withdrawals upon the birth or adoption of a child beginning on January 1, 2020. We request that the Treasury and IRS provide clarifying guidance around this provision. First, there is a question of whether this provision is optional for plan sponsors to include. If the provision is optional and a plan sponsor decides not to include it, guidance is needed on how to treat a distribution for tax purposes when the participant is otherwise eligible for this distribution. For example, if a participant takes a hardship distribution, will the plan sponsor be required to allow repayment of the distribution still if it also qualifies as a distribution for the birth or adoption of a child? Moreover, the tax treatment between plans is unclear. Therefore, guidance is requested confirming that in the case of any distribution otherwise allowed by the plan, the plan administrator can treat the distribution as an eligible rollover distribution even if the participant states that this distribution is being made in connection with a birth or adoption. Further, we urge confirmation that no special code is required on the Form 1099-R.

In addition to the above, we encourage the Treasury and IRS to provide clarification on the time limits for repayment of withdrawals for a birth or adoption. For example, it should not be possible for a participant to repay a birth or adoption distribution 30 years after it was made. It would be difficult or impossible to maintain accurate records of prior distributions for such a period to confirm that the repayment is permitted. Lastly, we request clarification concerning whether a plan that does not otherwise accept after-tax contributions would be compelled to create an after-tax source to hold these repayments.

Pursuant to the Notice, IRS and Treasury consider the following when reviewing recommendations and selecting projects for inclusion on the Priority Guidance:

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[3] Self-Employed Individuals Tax Retirement Act of 1962, P.L. 87-792.

[4] Staff of Joint Committee on Taxation, "Summary of the Provisions of the Self-Employed Individuals Tax Retirement Act of 1962," (October 1962), JCS-14-62, see https://www.jct.gov/publications.html?func=startdown&id=3853. For additional history on the origination and legislative intent of the RMD rules, see Mark Warshawsky, "Optimal Design of Minimum Distribution Requirements for Retirement Plans," TIAA-CREF Institute, Benefits Quarterly, no. 4, (1998).

[5] Social Security Actuarial Publications, Table V.A4- Cohort Life Expectancy, see https://www.ssa.gov/oact/tr/2011/lr5a4.html.

1. Whether the recommended guidance resolves significant issues relevant to many taxpayers;
2. Whether the recommended guidance promotes sound tax administration;
3. Whether the recommended guidance can be drafted in a manner that will enable taxpayers to easily understand and apply the guidance;
4. Whether the recommended guidance involves regulations that are outmoded, ineffective, insufficient, or excessively burdensome and that should be modified, streamlined, expanded, or repealed;
5. Whether the IRS can administer the recommended guidance on a uniform basis; and
6. Whether the recommended guidance reduces controversy and lessens the burden on taxpayers or the IRS.

We believe that providing additional guidance on withdrawals in the case of birth or adoption under the SECURE Act meets all these requirements. (1) The recommended guidance is a significant tax issue relevant to many taxpayers because adults continue to grow their families through birth and adoption. In 2018, 3.79 million children were born in the United States[6] , and nearly 135,000 children are adopted each year throughout the country.[7] While it is uncertain how many of these children are born to or adopted by parents participating in a 401(k) plan, it is reasonable to assume that there is a significant number and, therefore, this issue is an essential issue to a significant number of taxpayers. (2) Guidance in this area promotes sound tax policy by ensuring that plan sponsors can effectively carry out the intent of the SECURE Act by clarifying a number of questions, including whether these provisions are optional and how to treat such distributions for tax purposes. (3) We are certain that this guidance can be drafted to be easily understood and applied as such guidance is necessary to answer outstanding questions. (4) This recommended guidance stems from recently enacted legislation, which was innovative in allowing qualified birth or adoption distributions. Prior to the SECURE Act, there was no such benefit for new parents. Therefore, guidance is needed to implement the full intent of the statute. (5) The IRS guidance can provide the requested guidance on a uniform basis through regulations or sub-regulatory guidance. (6) Presently, there is uncertainty about whether the birth/adoption provision is optional and, if so, how to treat certain distributions for tax purposes. If there is no guidance on this matter, there will not be clarity, and the provisions will be implemented differently among plan sponsors and, therefore, there will not be uniform implementation for the millions of growing families that may rely on the distribution.

III. Requested Guidance Nondiscrimination Testing Relief for Closed Plans

The SECURE Act provides much-needed nondiscrimination testing relief for closed defined benefit plans. Section 401(o) generally requires closed defined benefit plans to satisfy nondiscrimination testing "for the plan year as of which the class closes and the two succeeding plans years" before the SECURE Act testing relief is available. Code section 401(o) also eliminates the requirement that plans must have the same plan year to be aggregated for testing purposes.

[6] "Births: Final Data for 2018" National Vital Statistics Reports, Centers for Disease Control and Prevention, Department of Health and Human Services, see https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_13-508.pdf
[7] "Adoption Statistics" Adoption Network, see https://adoptionnetwork.com/adoption-statistics

In some cases, a plan sponsor who closed its plan pre-SECURE Act had to change the closed plan's plan year, so that it would have the same plan year – and thus could be aggregated with - one or more of the sponsor's other plans. There is now some uncertainty about whether the resulting "short plan year" may be counted as one of the "2 succeeding plan years" toward the SECURE Act testing relief. If the short plan year is not counted, this disregards meaningful benefits provided during that short year, which would not have been required post-SECURE Act given the ability to aggregate plans with different plan years.

Guidance should clarify that the SECURE Act shall not be applied in a way that penalizes plan sponsors who, in good faith, implemented changes to allow their closed plans to satisfy nondiscrimination testing based on pre-SECURE Act requirements.

Pursuant to the Notice, IRS and Treasury consider the following when reviewing recommendations and selecting projects for inclusion on the Priority Guidance:

1. Whether the recommended guidance resolves significant issues relevant to many taxpayers;
2. Whether the recommended guidance promotes sound tax administration;
3. Whether the recommended guidance can be drafted in a manner that will enable taxpayers to easily understand and apply the guidance;
4. Whether the recommended guidance involves regulations that are outmoded, ineffective, insufficient, or excessively burdensome and that should be modified, streamlined, expanded, or repealed;
5. Whether the IRS can administer the recommended guidance on a uniform basis; and
6. Whether the recommended guidance reduces controversy and lessens the burden on taxpayers or the IRS.

We believe that providing additional guidance on nondiscrimination testing relief for closed plans meets all these requirements. (1) The recommended guidance is a significant tax issue because plan sponsors who changed the closed plan's plan year prior to the SECURE Act becoming law may unnecessarily be punished for acting in good faith in meeting pre-SECURE Act testing requirements. Guidance will help clarify closed plans' liability as they transitioned to meet SECURE Act testing requirements. (2) Guidance in this area promotes sound tax policy by ensuring that plan sponsors with short plan years will not have meaningful benefits be disregarded during that short year. (3) The requested guidance is necessary to ensure plan sponsors are not penalized for their efforts. We are certain that requested guidance can be drafted to better help plan sponsors, who closed their defined benefit plans, to understand how to correctly implement the new nondiscrimination provisions. (4) The SECURE Act's nondiscrimination testing provisions provide an update to the rules that plan sponsors have been requesting for over a decade. The requested guidance is needed to completely update these rules. . (5) The requested guidance can provide a uniform basis for plan sponsors through a notice or other form of guidance because, currently, there is disagreement. (6) Clarifying that the resulting "short plan year" may be counted as one of the "2 succeeding plan years" toward the SECURE Act testing will allow plan sponsors to take full advantage of the nondiscrimination rules and not create burdens on plan sponsors who, in good faith, changed the plan year to meet nondiscrimination testing requirements prior to SECURE Act enactment.

IV. Conclusion

Thank you for your consideration of our requests. We look forward to the opportunity to discuss them in greater detail or to answer any questions.

Sincerely,

Aliya Robinson
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The ERISA Industry Committee