

116TH CONGRESS
2D SESSION

S. 3341

To amend the Internal Revenue Code of 1986 to restrict the tax benefits of executive deferred compensation and increase disclosure, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 27, 2020

Mr. VAN HOLLEN (for Mr. SANDERS (for himself and Mr. VAN HOLLEN)) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend the Internal Revenue Code of 1986 to restrict the tax benefits of executive deferred compensation and increase disclosure, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “CEO and Worker Pen-
5 sion Fairness Act”.

6 **SEC. 2. NONQUALIFIED DEFERRED COMPENSATION.**

7 (a) IN GENERAL.—Section 409A of the Internal Rev-
8 enue Code of 1986 is amended to read as follows:

1 **“SEC. 409A. NONQUALIFIED DEFERRED COMPENSATION.**

2 “(a) IN GENERAL.—Except as otherwise provided in
3 subsection (c), any compensation which is deferred under
4 a nonqualified deferred compensation plan shall be includ-
5 ible in the gross income of the person who performed the
6 services to which such compensation relates in the cal-
7 endar year when there is no substantial risk of forfeiture
8 of the rights of such person to such compensation.

9 “(b) DEFINITIONS.—For purposes of this section—

10 “(1) SUBSTANTIAL RISK OF FORFEITURE.—The
11 rights of a person to compensation shall be treated
12 as subject to a substantial risk of forfeiture only if
13 such person’s rights to such compensation are condi-
14 tioned upon the future performance of substantial
15 services by any person. Such rights shall not be
16 treated as subject to a substantial risk of forfeiture
17 solely by reason of a covenant not to compete or the
18 occurrence of a condition related to a purpose of the
19 compensation other than the future performance of
20 services.

21 “(2) NONQUALIFIED DEFERRED COMPENSA-
22 TION PLAN.—The term ‘nonqualified deferred com-
23 pensation plan’ means any plan which provides for
24 the deferral of compensation, other than—

25 “(A) a qualified employer plan,

1 “(B) any bona fide vacation leave, sick
2 leave, compensatory time, disability pay, or
3 death benefit plan, and

4 “(C) any other plan or arrangement des-
5 ignated by the Secretary consistent with the
6 purposes of this section.

7 “(3) QUALIFIED EMPLOYER PLAN.—The term
8 ‘qualified employer plan’ means any plan, contract,
9 pension, account, or trust described in section
10 408(p)(2)(D)(ii) or a simple retirement account
11 (within the meaning of section 408(p)).

12 “(4) PLAN INCLUDES ARRANGEMENTS, ETC.—
13 The term ‘plan’ includes any agreement or arrange-
14 ment, including an agreement or arrangement which
15 includes only 1 person.

16 “(5) EXCEPTION.—Compensation shall not be
17 treated as deferred if the service provider receives
18 payment of such compensation not later than 2½
19 months after the end of the taxable year of the serv-
20 ice recipient during which the right to the payment
21 of such compensation is no longer subject to a sub-
22 stantial risk of forfeiture.

23 “(6) TREATMENT OF EARNINGS.—References to
24 deferred compensation shall be treated as including

1 references to income (whether actual or notional) at-
2 tributable to such compensation or such income.

3 “(7) TREATMENT OF QUALIFIED STOCK.—An
4 arrangement under which an employee may receive
5 qualified stock (as defined in section 83(i)(2)) shall
6 not be treated as a nonqualified deferred compensa-
7 tion plan with respect to such employee solely be-
8 cause of such employee’s election, or ability to make
9 an election, to defer recognition of income under sec-
10 tion 83(i).

11 “(8) AGGREGATION RULES.—Except as pro-
12 vided by the Secretary, rules similar to the rules of
13 subsections (b) and (c) of section 414 shall apply.

14 “(c) TREATMENT OF EQUITY-BASED COMPENSA-
15 TION.—

16 “(1) IN GENERAL.—Except as provided in para-
17 graph (7), subsection (a) shall not apply to any eq-
18 uity-based compensation, and such equity-based
19 compensation shall be includible in income as pro-
20 vided in paragraphs (2) through (6).

21 “(2) PLAN FAILURES.—

22 “(A) GROSS INCOME INCLUSION.—

23 “(i) IN GENERAL.—If at any time
24 during a taxable year a nonqualified de-
25 ferred compensation plan—

1 “(I) fails to meet the require-
2 ments of paragraphs (3), (4), and (5),
3 or

4 “(II) is not operated in accord-
5 ance with such requirements,
6 all equity-based compensation deferred
7 under the plan for the taxable year and all
8 preceding taxable years shall be includible
9 in gross income for the taxable year to the
10 extent not subject to a substantial risk of
11 forfeiture and not previously included in
12 gross income.

13 “(ii) APPLICATION ONLY TO AF-
14 FECTED PARTICIPANTS.—Clause (i) shall
15 only apply with respect to all compensation
16 deferred under the plan for participants
17 with respect to whom the failure relates.

18 “(B) INTEREST AND ADDITIONAL TAX
19 PAYABLE WITH RESPECT TO PREVIOUSLY DE-
20 FERRED EQUITY-BASED COMPENSATION.—

21 “(i) IN GENERAL.—If equity-based
22 compensation is required to be included in
23 gross income under subparagraph (A) for
24 a taxable year, the tax imposed by this

1 chapter for the taxable year shall be in-
2 creased by the sum of—

3 “(I) the amount of interest deter-
4 mined under clause (ii), and

5 “(II) an amount equal to 20 per-
6 cent of the equity-based compensation
7 which is required to be included in
8 gross income.

9 “(ii) INTEREST.—For purposes of
10 clause (i), the interest determined under
11 this clause for any taxable year is the
12 amount of interest at the underpayment
13 rate plus 1 percentage point on the under-
14 payments that would have occurred had
15 the deferred equity-based compensation
16 been includible in gross income for the tax-
17 able year in which first deferred or, if
18 later, the first taxable year in which such
19 compensation is not subject to a substan-
20 tial risk of forfeiture.

21 “(3) DISTRIBUTIONS.—

22 “(A) IN GENERAL.—The requirements of
23 this paragraph are met if the plan provides that
24 equity-based compensation deferred under the
25 plan may not be distributed earlier than—

1 “(i) separation from service as deter-
2 mined by the Secretary (except as provided
3 in subparagraph (B)(i)),

4 “(ii) the date the participant becomes
5 disabled (within the meaning of subpara-
6 graph (C)),

7 “(iii) death,

8 “(iv) a specified time (or pursuant to
9 a fixed schedule) specified under the plan
10 at the date of the deferral of such com-
11 pensation,

12 “(v) to the extent provided by the
13 Secretary, a change in the ownership or ef-
14 fective control of the corporation, or in the
15 ownership of a substantial portion of the
16 assets of the corporation, or

17 “(vi) the occurrence of an unforesee-
18 able emergency.

19 “(B) SPECIAL RULES.—

20 “(i) SPECIFIED EMPLOYEES.—In the
21 case of any specified employee, the require-
22 ment of subparagraph (A)(i) is met only if
23 distributions may not be made before the
24 date which is 6 months after the date of
25 separation from service (or, if earlier, the

1 date of death of the employee). For pur-
2 poses of the preceding sentence, a specified
3 employee is a key employee (as defined in
4 section 416(i) without regard to paragraph
5 (5) thereof) of a corporation any stock in
6 which is publicly traded on an established
7 securities market or otherwise.

8 “(ii) UNFORESEEABLE EMER-
9 GENCY.—For purposes of subparagraph
10 (A)(vi)—

11 “(I) IN GENERAL.—The term
12 ‘unforeseeable emergency’ means a se-
13 vere financial hardship to the partici-
14 pant resulting from an illness or acci-
15 dent of the participant, the partici-
16 pant’s spouse, or a dependent (as de-
17 fined in section 152(a)) of the partici-
18 pant, loss of the participant’s property
19 due to casualty, or other similar ex-
20 traordinary and unforeseeable cir-
21 cumstances arising as a result of
22 events beyond the control of the par-
23 ticipant.

24 “(II) LIMITATION ON DISTRIBU-
25 TIONS.—The requirement of subpara-

1 graph (A)(vi) is met only if, as deter-
2 mined under regulations of the Sec-
3 retary, the amounts distributed with
4 respect to an emergency do not exceed
5 the amounts necessary to satisfy such
6 emergency plus amounts necessary to
7 pay taxes reasonably anticipated as a
8 result of the distribution, after taking
9 into account the extent to which such
10 hardship is or may be relieved
11 through reimbursement or compensa-
12 tion by insurance or otherwise or by
13 liquidation of the participant's assets
14 (to the extent the liquidation of such
15 assets would not itself cause severe fi-
16 nancial hardship).

17 “(C) DISABLED.—For purposes of sub-
18 paragraph (A)(ii), a participant shall be consid-
19 ered disabled if the participant—

20 “(i) is unable to engage in any sub-
21 stantial gainful activity by reason of any
22 medically determinable physical or mental
23 impairment which can be expected to result
24 in death or can be expected to last for a

1 continuous period of not less than 12
2 months, or

3 “(ii) is, by reason of any medically de-
4 terminable physical or mental impairment
5 which can be expected to result in death or
6 can be expected to last for a continuous
7 period of not less than 12 months, receiv-
8 ing income replacement benefits for a pe-
9 riod of not less than 3 months under an
10 accident and health plan covering employ-
11 ees of the participant’s employer.

12 “(4) ACCELERATION OF BENEFITS.—

13 “(A) IN GENERAL.—The requirements of
14 this paragraph are met if the plan does not per-
15 mit the acceleration of the time or schedule of
16 any payment of equity-based compensation
17 under the plan, except as provided in regula-
18 tions by the Secretary.

19 “(B) EXCEPTION.—A plan shall not be
20 treated as failing to meet the requirement of
21 subparagraph (A) solely because the plan terms
22 permit the removal of participants who are or
23 become ineligible to participate in the plan, and
24 to distribute the benefits of such participants to
25 another qualified retirement plan (as defined in

1 section 4974(c)) of the participants, if such re-
2 moval is necessary to maintain the plan's ex-
3 emption from the provisions of the Employee
4 Retirement Income Security Act of 1974.

5 “(5) ELECTIONS.—

6 “(A) IN GENERAL.—The requirements of
7 this paragraph are met if the requirements of
8 subparagraphs (B) and (C) are met.

9 “(B) INITIAL DEFERRAL DECISION.—

10 “(i) IN GENERAL.—The requirements
11 of this subparagraph are met if the plan
12 provides that equity-based compensation
13 for services performed during a taxable
14 year may be deferred at the participant's
15 election only if the election to defer such
16 compensation is made not later than the
17 close of the preceding taxable year or at
18 such other time as provided in regulations.

19 “(ii) FIRST YEAR OF ELIGIBILITY.—

20 In the case of the first year in which a
21 participant becomes eligible to participate
22 in the plan, such election may be made
23 with respect to services to be performed
24 subsequent to the election within 30 days

1 after the date the participant becomes eli-
2 gible to participate in such plan.

3 “(iii) PERFORMANCE-BASED COM-
4 PENSATION.—In the case of any equity-
5 based compensation which is performance-
6 based and is based on services performed
7 over a period of at least 12 months, such
8 election may be made no later than 6
9 months before the end of the period.

10 “(C) CHANGES IN TIME AND FORM OF DIS-
11 TRIBUTION.—The requirements of this subpara-
12 graph are met if, in the case of a plan which
13 permits under a subsequent election a delay in
14 a payment or a change in the form of payment
15 of equity-based compensation—

16 “(i) the plan requires that such elec-
17 tion may not take effect until at least 12
18 months after the date on which the elec-
19 tion is made,

20 “(ii) in the case of an election related
21 to a payment not described in clause (ii),
22 (iii), or (vi) of paragraph (2)(A), the plan
23 requires that the payment with respect to
24 which such election is made be deferred for
25 a period of not less than 5 years from the

1 date such payment would otherwise have
2 been made, and

3 “(iii) the plan requires that any elec-
4 tion related to a payment described in
5 paragraph (2)(A)(iv) may not be made less
6 than 12 months prior to the date of the
7 first scheduled payment under such para-
8 graph.

9 “(6) RULES RELATING TO FUNDING.—For pur-
10 poses of this subsection—

11 “(A) OFFSHORE PROPERTY IN A TRUST.—
12 In the case of assets set aside (directly or indi-
13 rectly) in a trust (or other arrangement deter-
14 mined by the Secretary) for purposes of paying
15 deferred equity-based compensation under a
16 nonqualified deferred compensation plan, for
17 purposes of section 83 such assets shall be
18 treated as property transferred in connection
19 with the performance of services whether or not
20 such assets are available to satisfy claims of
21 general creditors—

22 “(i) at the time set aside if such as-
23 sets (or such trust or other arrangement)
24 are located outside of the United States, or

1 “(ii) at the time transferred if such
2 assets (or such trust or other arrange-
3 ment) are subsequently transferred outside
4 of the United States.

5 This subparagraph shall not apply to assets lo-
6 cated in a foreign jurisdiction if substantially
7 all of the services to which the nonqualified de-
8 ferred equity-based compensation relates are
9 performed in such jurisdiction.

10 “(B) EMPLOYER’S FINANCIAL HEALTH.—
11 In the case of equity-based compensation de-
12 ferred under a nonqualified deferred compensa-
13 tion plan, there is a transfer of property within
14 the meaning of section 83 with respect to such
15 compensation as of the earlier of—

16 “(i) the date on which the plan first
17 provides that assets will become restricted
18 to the provision of benefits under the plan
19 in connection with a change in the employ-
20 er’s financial health, or

21 “(ii) the date on which assets are so
22 restricted,
23 whether or not such assets are available to sat-
24 isfy claims of general creditors.

1 “(C) TREATMENT OF EMPLOYER’S DE-
2 FINED BENEFIT PLAN DURING RESTRICTED PE-
3 RIOD.—

4 “(i) IN GENERAL.—If—

5 “(I) during any restricted period
6 with respect to a single-employer de-
7 fined benefit plan, assets are set aside
8 or reserved (directly or indirectly) in a
9 trust (or other arrangement as deter-
10 mined by the Secretary) or trans-
11 ferred to such a trust or other ar-
12 rangement for purposes of paying de-
13 ferred equity-based compensation of
14 an applicable covered employee under
15 a nonqualified deferred compensation
16 plan of the plan sponsor or member of
17 a controlled group which includes the
18 plan sponsor, or

19 “(II) a nonqualified deferred
20 compensation plan of the plan sponsor
21 or member of a controlled group
22 which includes the plan sponsor pro-
23 vides that assets will become re-
24 stricted to the provision of benefits
25 under the plan to an applicable cov-

1 ered employee in connection with such
2 restricted period (or other similar fi-
3 nancial measure determined by the
4 Secretary) with respect to the defined
5 benefit plan, or assets are so re-
6 stricted,

7 such assets shall, for purposes of section
8 83, be treated as property transferred in
9 connection with the performance of serv-
10 ices whether or not such assets are avail-
11 able to satisfy claims of general creditors.
12 Subclause (I) shall not apply with respect
13 to any assets which are so set aside before
14 the restricted period with respect to the de-
15 fined benefit plan.

16 “(ii) RESTRICTED PERIOD.—For pur-
17 poses of this subsection, the term ‘re-
18 stricted period’ means, with respect to any
19 plan described in clause (i)—

20 “(I) any period during which the
21 plan is in at-risk status (as defined in
22 section 430(i)),

23 “(II) any period the plan sponsor
24 is a debtor in a case under title 11,

1 United States Code, or similar Fed-
2 eral or State law, and

3 “(III) the 12-month period begin-
4 ning on the date which is 6 months
5 before the termination date of the
6 plan if, as of the termination date, the
7 plan is not sufficient for benefit liabil-
8 ities (within the meaning of section
9 4041 of the Employee Retirement In-
10 come Security Act of 1974).

11 “(iii) SPECIAL RULE FOR PAYMENT
12 OF TAXES ON DEFERRED EQUITY-BASED
13 COMPENSATION INCLUDED IN INCOME.—If
14 an employer provides directly or indirectly
15 for the payment of any Federal, State, or
16 local income taxes with respect to any eq-
17 uity-based compensation required to be in-
18 cluded in gross income by reason of this
19 subparagraph—

20 “(I) interest shall be imposed
21 under paragraph (1)(B)(i)(I) on the
22 amount of such payment in the same
23 manner as if such payment was part
24 of the deferred equity-based com-
25 pensation to which it relates,

1 “(II) such payment shall be
2 taken into account in determining the
3 amount of the additional tax under
4 paragraph (1)(B)(i)(II) in the same
5 manner as if such payment was part
6 of the deferred equity-based com-
7 pensation to which it relates, and

8 “(III) no deduction shall be al-
9 lowed under this title with respect to
10 such payment.

11 “(iv) OTHER DEFINITIONS.—For pur-
12 poses of this subsection—

13 “(I) APPLICABLE COVERED EM-
14 PLOYEE.—The term ‘applicable cov-
15 ered employee’ means any covered em-
16 ployee of a plan sponsor or a member
17 of a controlled group which includes
18 the plan sponsor, and any former em-
19 ployee who was a covered employee at
20 the time of termination of employment
21 with the plan sponsor or a member of
22 a controlled group which includes the
23 plan sponsor.

24 “(II) COVERED EMPLOYEE.—The
25 term ‘covered employee’ means an in-

1 dividual described in section
2 162(m)(3) or an individual subject to
3 the requirements of section 16(a) of
4 the Securities Exchange Act of 1934.

5 “(v) INTERNAL REVENUE SERVICE IN-
6 TERNAL GUIDANCE.—The Secretary shall
7 develop instructions and training materials
8 for employees of the Internal Revenue
9 Service to assist such employees in obtain-
10 ing and evaluating information and deter-
11 mining whether there exists a restricted
12 period with respect to a company with a
13 single-employer defined benefit plan, and
14 whether such a company has, during a re-
15 stricted period, set aside assets for the
16 purpose of paying deferred compensation
17 under a nonqualified deferred compensa-
18 tion plan.

19 “(D) INCOME INCLUSION FOR OFFSHORE
20 TRUSTS AND EMPLOYER’S FINANCIAL
21 HEALTH.—For each taxable year that assets
22 treated as transferred under this paragraph re-
23 main set aside in a trust or other arrangement
24 subject to subparagraph (A), (B), or (C), any
25 increase in value in, or earnings with respect to,

1 such assets shall be treated as an additional
2 transfer of property under this paragraph (to
3 the extent not previously included in income).

4 “(E) INTEREST ON TAX LIABILITY PAY-
5 ABLE WITH RESPECT TO TRANSFERRED PROP-
6 ERTY.—

7 “(i) IN GENERAL.—If amounts are re-
8 quired to be included in gross income by
9 reason of subparagraph (A), (B), or (C)
10 for a taxable year, the tax imposed by this
11 chapter for such taxable year shall be in-
12 creased by the sum of—

13 “(I) the amount of interest deter-
14 mined under clause (ii), and

15 “(II) an amount equal to 20 per-
16 cent of the amounts required to be in-
17 cluded in gross income.

18 “(ii) INTEREST.—For purposes of
19 clause (i), the interest determined under
20 this clause for any taxable year is the
21 amount of interest at the underpayment
22 rate plus 1 percentage point on the under-
23 payments that would have occurred had
24 the amounts so required to be included in
25 gross income by subparagraph (A), (B), or

1 (C) been includible in gross income for the
2 taxable year in which first deferred or, if
3 later, the first taxable year in which such
4 amounts are not subject to a substantial
5 risk of forfeiture.

6 “(7) EXCEPTION FOR HIGHLY COMPENSATED
7 RECIPIENTS.—In the case of any highly com-
8 pensated employee (as defined in section 414(q)), or
9 any person who would be such a highly compensated
10 employee if such person were an employee of the
11 service recipient (determined as of the date of the
12 grant of the equity-based compensation)—

13 “(A) paragraphs (1) through (6) shall not
14 apply, and

15 “(B) equity-based compensation shall be
16 treated under subsection (a) in the same man-
17 ner as other compensation which is deferred
18 under a nonqualified deferred compensation
19 plan.

20 “(8) EQUITY-BASED COMPENSATION.—The
21 term ‘equity-based compensation’ means—

22 “(A) a right to compensation based on the
23 value of, or appreciation in value of, a specified
24 number of equity units of the service recipient,
25 whether paid in cash or equity, or

1 “(B) stock appreciation rights or stock op-
2 tions.

3 Such term shall not include a transfer of property
4 described in section 83 (other than stock options) or
5 compensation provided under that portion of any
6 plan which consists of a trust to which section
7 402(b) applies.

8 “(d) NO INFERENCE ON EARLIER INCOME INCLU-
9 SION OR REQUIREMENT OF LATER INCLUSION.—Nothing
10 in this section shall be construed to prevent the inclusion
11 of amounts in gross income under any other provision of
12 this chapter or any other rule of law earlier than the time
13 provided in this section. Any amount included in gross in-
14 come under this section shall not be treated as required
15 to be included in gross income under any other provision
16 of this chapter or any other rule of law later than the
17 time provided in this section.

18 “(e) REGULATIONS.—The Secretary shall prescribe
19 such regulations as may be necessary or appropriate to
20 carry out the purposes of this section, including regula-
21 tions—

22 “(1) providing for the determination of
23 amounts of deferral in the case of a nonqualified de-
24 ferred compensation plan which is a defined benefit
25 plan,

1 “(2) relating to changes in the ownership and
2 control of a corporation or assets of a corporation
3 for purposes of subsection (c)(2)(A)(v),

4 “(3) exempting arrangements from the applica-
5 tion of subsection (c)(5) if such arrangements will
6 not result in an improper deferral of United States
7 tax and will not result in assets being effectively be-
8 yond the reach of creditors,

9 “(4) defining financial health for purposes of
10 subsection (c)(5)(B), and

11 “(5) disregarding a substantial risk of for-
12 feiture in cases where necessary to carry out the
13 purposes of this section.”.

14 (b) WITHHOLDING OF TAX ON NONRESIDENT
15 ALIENS.—Section 1441(c)(4) of the Internal Revenue
16 Code of 1986 is amended by inserting “(other than under
17 a nonqualified deferred compensation plan (within the
18 meaning of section 409A(b)(2))” after “compensation for
19 personal services”.

20 (c) TERMINATION OF CERTAIN OTHER NON-
21 QUALIFIED DEFERRED COMPENSATION RULES.—

22 (1) 457(b) PLANS OF TAX EXEMPT ORGANIZA-
23 TIONS.—Section 457 of the Internal Revenue Code
24 of 1986 is amended by adding at the end the fol-
25 lowing new subsection:

1 “(h) TERMINATION OF CERTAIN PLANS.—

2 “(1) TAX-EXEMPT ORGANIZATION PLANS.—

3 This section shall not apply to amounts deferred
4 which are attributable to services performed after
5 December 31, 2020, under a plan maintained by an
6 employer described in subsection (e)(1)(B).

7 “(2) INELIGIBLE DEFERRED COMPENSATION

8 PLANS.—Subsection (f) shall not apply to amounts
9 deferred which are attributable to services performed
10 after December 31, 2020.”.

11 (2) NONQUALIFIED DEFERRED COMPENSATION
12 FROM CERTAIN TAX INDIFFERENT PARTIES.—

13 (A) IN GENERAL.—Subpart B of part II of
14 subchapter E of chapter 1 of such Code is
15 amended by striking section 457A (and by
16 striking the item relating to such section in the
17 table of sections for such subpart).

18 (B) CONFORMING AMENDMENT.—Section
19 26(b)(2) of such Code is amended by striking
20 subparagraph (X).

21 (d) EFFECTIVE DATE.—

22 (1) IN GENERAL.—Except as otherwise pro-
23 vided in this subsection, the amendments made by
24 this section shall apply to amounts which are attrib-

1 utable to services performed after December 31,
2 2020.

3 (2) ACCELERATED PAYMENTS.—No later than
4 120 days after the date of the enactment of this Act,
5 the Secretary of the Treasury shall issue guidance
6 providing a limited period of time during which a
7 nonqualified deferred compensation arrangement at-
8 tributable to services performed on or before Decem-
9 ber 31, 2020, may, without violating the require-
10 ments of section 409A of the Internal Revenue Code
11 of 1986, be amended to conform the date of dis-
12 tribution to the date the amounts are required to be
13 included in income.

14 (3) CERTAIN BACK-TO-BACK ARRANGEMENTS.—
15 If the taxpayer is also a service recipient and main-
16 tains one or more nonqualified deferred compensa-
17 tion arrangements for its service providers under
18 which any amount is attributable to services per-
19 formed on or before December 31, 2020, the guid-
20 ance issued under paragraph (2) shall permit such
21 arrangements to be amended to conform the dates of
22 distribution under such arrangement to the date
23 amounts are required to be included in the income
24 of such taxpayer under this subsection.

1 (4) ACCELERATED PAYMENT NOT TREATED AS
2 MATERIAL MODIFICATION.—Any amendment to a
3 nonqualified deferred compensation arrangement
4 made pursuant to paragraph (2) or (3) shall not be
5 treated as a material modification of the arrange-
6 ment for purposes of section 409A of the Internal
7 Revenue Code of 1986.

8 (5) APPLICATION TO EXISTING DEFERRALS.—
9 In the case of any amount deferred to which this
10 section does not otherwise apply solely by reason of
11 the fact that the amount is attributable to services
12 performed before January 1, 2021, to the extent
13 such amount is not includible in gross income in a
14 taxable year beginning before 2029, such amounts
15 shall be includible in gross income in the later of—

16 (A) the last taxable year beginning before
17 2029; or

18 (B) the taxable year in which there is no
19 substantial risk of forfeiture of the rights to
20 such compensation.

21 (e) TRANSFER OF AMOUNTS COLLECTED.—

22 (1) IN GENERAL.—The Secretary of the Treas-
23 ury shall transfer annually an amount equal to the
24 increase in revenue attributable to the enactment of
25 subsections (a), (b), and (c) of this section to the

1 first and the second Pension Benefit Guaranty funds
2 described in section 4005(a) of the Employee Retirement
3 Income Security Act of 1974 (29 U.S.C.
4 1305(a)), and such amount shall be allocated—

5 (A) to the fund used with respect to basic
6 benefits guaranteed under section 4022A of
7 such Act (29 U.S.C. 1322a), until such time
8 that the Pension Benefit Guaranty Corpora-
9 tion’s annual projections report indicates that
10 such fund and the fund used with respect to
11 basic benefits guaranteed under section 4022 of
12 such Act (29 U.S.C. 1322) have substantially
13 similar future financial conditions and substan-
14 tially similar risks of insolvency; and

15 (B) thereafter, to each of the funds de-
16 scribed in subparagraph (A) in equal amounts,
17 subject to paragraph (2).

18 (2) ADJUSTMENTS TO ALLOCATIONS.—If, after
19 amounts transferred under paragraph (1) have been
20 allocated in accordance with paragraph (1)(B), the
21 Director of the Pension Benefit Guaranty Corpora-
22 tion (referred to in this section as the “Director”)
23 determines that the future financial conditions or
24 risks of insolvency of the funds used with respect to
25 basic benefits guaranteed under each of sections

1 4022A and 4022 of the Employee Retirement In-
2 come Security Act of 1974 are no longer substan-
3 tially similar as described in paragraph (1)(A), the
4 Director, in consultation with the board of directors
5 of the Pension Benefit Guaranty Corporation, shall
6 determine an appropriate allocation of such amounts
7 between such funds.

8 **SEC. 3. DEPARTMENT OF LABOR OVERSIGHT OF TOP HAT**
9 **PLANS.**

10 (a) GUIDANCE.—Not later than December 31, 2020,
11 the Secretary of Labor shall issue guidance defining the
12 term “select group of management or highly compensated
13 employees” for purposes of the Employee Retirement In-
14 come Security Act of 1974 (29 U.S.C. 1001 et seq.). Such
15 guidance shall address the participation rate and plan lan-
16 guage with respect to a plan which is unfunded and is
17 maintained by an employer primarily for the purpose of
18 providing deferred compensation for a select group of
19 management or highly compensated employees, and the
20 compensation and description of job duties of employees
21 eligible to participate in such plans.

22 (b) REGULATIONS.—Not later than December 31,
23 2020, the Secretary of Labor shall issue final regulations
24 requiring the sponsors of plans that are unfunded and
25 maintained by employers primarily for the purpose of pro-

1 viding deferred compensation for a select group of man-
2 agement or highly compensated employees to align eligi-
3 bility requirements for participation in such plans with the
4 guidance issued under subsection (a).

5 (c) DISCLOSURE REQUIREMENT.—Part 1 of title I of
6 the Employee Retirement Income Security Act of 1974
7 (29 U.S.C. 1021 et seq.) is amended by adding at the end
8 the following:

9 **“SEC. 112. PLANS FOR A SELECT GROUP OF MANAGEMENT**
10 **OR HIGHLY COMPENSATED EMPLOYEES.**

11 “Beginning January 1, 2021, the plan sponsor of a
12 plan which is unfunded and is maintained by an employer
13 primarily for the purpose of providing deferred compensa-
14 tion for a select group of management or highly com-
15 pensated employees shall report to the Secretary annually
16 on, with respect to the previous plan year—

17 “(1) the job title and salary of each employee
18 participating in the plan;

19 “(2) the percentage of the employer’s workforce
20 that is eligible to participate in such plan;

21 “(3) the percentage of employees who actually
22 participated in the plan;

23 “(4) a comparison of the annual compensation
24 of employees eligible to participate in such plan with

1 the annual compensation of employees not eligible to
2 participate in the plan; and

3 “(5) any other information, as the Secretary
4 determines appropriate.”.

5 (d) TREASURY REGULATIONS AND GUIDANCE.—The
6 Secretary of the Treasury, in consultation with the Sec-
7 retary of Labor, shall issue such regulations or guidance
8 as are necessary—

9 (1) to assist plans in taking appropriate correc-
10 tive actions when employees that are not part of a
11 select group of management or highly compensated
12 employees (as defined in the guidance issued pursu-
13 ant to section 3(a)) are found to be participating in
14 such plans; and

15 (2) to clarify the treatment of the consequences
16 for purposes of the Internal Revenue Code of 1986
17 of the Secretary of Labor’s guidance on plan correc-
18 tive actions so that employees who are not part of
19 the select group described in paragraph (1) are not
20 adversely affected, including guidance on actions
21 which plan sponsors should take with respect to par-
22 ticipants in such plans who have already made the
23 maximum permissible contributions under qualified
24 plans.

1 **SEC. 4. DISCLOSURE OF NONQUALIFIED DEFERRED COM-**
2 **PENSATION ON FORM W-2.**

3 Not later than 6 months after the date of the enact-
4 ment of this Act and effective for taxable year 2020, the
5 Secretary of the Treasury (or the Secretary's delegate)
6 shall—

7 (1) revise the Form W-2 to require reporting of
8 amounts deferred under a nonqualified deferred
9 compensation plan in box 12; and

10 (2) amend the regulations under sections
11 6051(a)(13) and 6041(g) of the Internal Revenue
12 Code of 1986 to make the reporting of such defer-
13 rals under such sections mandatory.

14 For purposes of the preceding sentence, the term “non-
15 qualified deferred compensation plan” has the meaning
16 given such term in section 409A(b)(2) of the Internal Rev-
17 enue Code of 1986.

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