The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
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IRS Issues Guidance on SECURE Act Changes for Safe Harbor Plans

[32978]

December 11, 2020 TO: ICI Members
Pension Committee
Pension Operations Advisory Committee SUBJECTS: Pension RE: IRS Issues Guidance on SECURE Act Changes for Safe Harbor Plans

The IRS released Notice 2020-86,[1] providing guidance on the changes for safe harbor 401(k) and 403(b) plans enacted under sections 102 and 103 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act).[2] Section 102 of the SECURE Act increases the 10 percent cap for automatic enrollment safe harbor plans. Section 103 of the SECURE Act eliminates certain safe harbor notice requirements for plans that provide for safe harbor nonelective contributions and adds new provisions for the retroactive adoption of safe harbor status for those plans.

The guidance is provided in the form of questions and answers. The Notice indicates that it is not intended to provide comprehensive guidance on these provisions, but rather is intended to assist taxpayers while the Treasury Department and IRS develop regulations to fully implement these sections of the SECURE Act. Treasury and the IRS invite comments on the guidance in the Notice and any other aspect of sections 102 or 103 of the SECURE Act, on or before February 8, 2021.

Increase of 10 Percent Cap

For plans using the qualified automatic contribution arrangement (QACA) safe harbor under Code section 401(k)(13), section 102 of the SECURE Act raises from 10 percent to 15 percent the limit on automatic escalation of deferral rates after the first year of enrollment. The provision applies to plan years beginning after December 31, 2019. Section III of Notice 2020-86 addresses various questions about implementation of this change, including:

- Q&A 1: A QACA safe harbor plan is not required to increase the maximum qualified percentage of compensation used to determine automatic elective contributions (i.e., it may continue to use 10 percent).
- Q&A 2: A plan that incorporates by reference the maximum qualified percentage of Code section 401(k)(13)(C)(iii) will not fail to operate in accordance with its terms merely because the plan continues to apply the maximum qualified percentage of 10

percent that applied prior to the SECURE Act, although such a plan would have to be amended on or before the plan amendment deadline determined under section 601(b) of the SECURE Act,[3] as described in Q&A G-1 of Notice 2020-68,[4] 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.

Safe Harbor Notice Requirements and Retroactive Adoption of Safe Harbor Status

For plans that provide safe harbor nonelective contributions, section 103(a) of the SECURE Act eliminates the safe harbor notice requirements for both a traditional safe harbor 401(k) plan that satisfies Code section 401(k)(12)(C) and a QACA safe harbor 401(k) plan that satisfies Code section 401(k)(13)(D)(i)(II). Section 103 does not specifically amend the safe harbor requirements under Code sections 401(m)(11) (for traditional safe harbor 401(m) plans) or 401(m)(12) (for QACA safe harbor 401(m) plans). Sections 103(b) and (c) of the SECURE Act permit a plan to be amended after the beginning of a plan year to provide that the safe harbor nonelective contribution requirements of the traditional or QACA safe harbor will apply for the plan year, provided certain requirements are met.

Notice 2020-86 (Section IV) includes guidance clarifying the situations in which the elimination of the safe harbor notice requirement applies:

- Q&A 4: Confirms that section 103(a) of the SECURE Act does not eliminate the safe harbor notice requirements of Code section 401(m)(11)(A) for a traditional safe harbor 401(m) plan that uses safe harbor nonelective contributions.[5]
- Q&A 5: Confirms that section 103(a) of the SECURE Act effectively eliminates the safe harbor notice requirements for both a QACA safe harbor 401(k) plan and a QACA safe harbor 401(m) plan using safe harbor nonelective contributions. The Notice explains that this result is different than the result described above (in Q&A 4) for a traditional safe harbor 401(m) plan, because Code section 401(m)(11) specifically requires a traditional safe harbor 401(m) plan to satisfy the safe harbor notice requirements of Code section 401(k)(12)(D), but Code section 401(m)(12)(A) merely requires a QACA safe harbor 401(m) plan to satisfy the requirements for a QACA safe harbor 401(k) plan (for which the notice requirement was eliminated).

Section IV of the Notice also includes questions and answers on topics including:

- The effect of the SECURE Act section 103 amendments on other requirements applicable to safe harbor plans using nonelective contributions;
- The impact of providing a notice stating that the plan may be amended mid-year to reduce or suspend safe harbor nonelective contributions (even though no safe harbor notice was provided);
- The implications of readopting safe harbor nonelective contributions after reducing or suspending safe harbor nonelective contributions during the plan year;
- The timing of deductibility for safe harbor nonelective contributions made pursuant to a delayed adoption of safe harbor status; and
- The applicable retroactive plan amendment rules for delayed adoption of safe harbor status.

403(b) Plans

Section V of Notice 2020-86 indicates that the guidance applies on similar terms to 403(b) plans that apply the section 401(m) safe harbor rules pursuant to Code section 403(b)(12).

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endnotes

[1] Notice 2020-86 is *available at* https://www.irs.gov/pub/irs-drop/n-20-86.pdf.

[2] For more background on the SECURE Act, *see* ICI Memorandum No. 32118, dated December 20, 2019. *Available here*: https://www.ici.org/my_ici/memorandum/memo32118. The IRS previously provided guidance on certain other provisions of the SECURE Act and plan amendment deadlines related to SECURE Act changes. *See* ICI Memorandum No. 32741, dated September 4, 2020. *Available here*: https://www.ici.org/my_ici/memorandum/memo32741.

[3] In general, for a qualified retirement plan that is not a governmental plan within the meaning of Code section 414(d), or an applicable collectively bargained plan, the plan amendment deadline determined under section 601 of the SECURE 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 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.

[4] *See* ICI Memorandum No. 32741, dated September 4, 2020. *Available here:*https://www.ici.org/my_ici/memorandum/memo32741.

[5] Q&A 4 provides the following example: "[I]f a traditional safe harbor § 401(k) plan satisfies the safe harbor nonelective contribution requirements of § 401(k)(12)(C), but also provides non-safe harbor matching contributions that are structured to satisfy the requirements of § 1.401(m)-3(d) (and, therefore, are not required to satisfy the ACP test), then the plan still must satisfy the safe harbor notice requirements of § 401(m)(11)(A). On the other hand, if a traditional safe harbor § 401(k) plan that satisfies the safe harbor nonelective contribution requirements of § 401(k)(12)(C) also provides non-safe harbor matching contributions that are not intended to satisfy the requirements of § 1.401(m)-3(d) (and, therefore, are required to satisfy the ACP test), then the plan need not satisfy the safe harbor notice requirements of either § 401(k)(12)(D) or 401(m)(11)(A)."
