MEMO# 35992

January 21, 2025

IRS and Treasury Issue Regulations on SECURE 2.0 Automatic Enrollment Requirement

[35992]January 21, 2025TO:ICI Members
Pension Committee
Pension Operations Advisory CommitteeSUBJECTS:Pension
TaxRE:IRS and Treasury Issue Regulations on SECURE 2.0 Automatic Enrollment Requirement
On January 10, 2025, the Internal Revenue Service (IRS) and Treasury Department released proposed regulations providing guidance on the new automatic enrollment requirements under section 101 of the SECURE 2.0 Act.[1] As a reminder, section 101 of the SECURE 2.0 Act requires, effective for plan years beginning after December 31, 2024, that newly established 401(k) and 403(b) plans automatically enroll participants (subject to certain exceptions).[2] Comments on the proposal are due on March 17.

Background

Section 101 of the SECURE 2.0 Act adds new section 414A to the Internal Revenue Code ("Code"), which, effective for plan years beginning after December 31, 2024, requires newly established 401(k) and 403(b) plans to automatically enroll participants (subject to exceptions listed below). Plans subject to Code section 414A must meet the definition of an eligible automatic contribution arrangement (EACA), as defined in section 414(w)(3).[3] Further, plans are required to allow permissible withdrawals[4] and must set the default contribution rate between three and ten percent of compensation for the first year of participation—increasing the rate by one percent each year, up to at least ten percent but not higher than fifteen percent. For plans other than safe harbor 401(k) plans (under both Code sections 401(k)(12) and (13)), the statute provides a maximum default contribution rate of ten percent, rather than fifteen percent, for an initial period.[5] For participants who do not select an investment, contributions must be invested in accordance with the Department of Labor (DOL) qualified default investment alternative (QDIA) regulation.

The following plans are not subject to the automatic enrollment requirement:

- SIMPLE 401(k) plans;
- Plans in existence prior to enactment, December 29, 2022 (a "Pre-Enactment Plan");
- Governmental and church plans;
- Plans adopted by businesses in existence for less than 3 years (a "New Business Plan"); and

- Plans adopted by businesses that employ ten or fewer employees (a "Small Business Plan").

In the case of a multiple employer plan (MEP), the Act specifies that employers that join an existing MEP after enactment are not exempt from the requirement to automatically enroll participants. Also, the exceptions for new and small businesses apply separately with respect to each such employer participating in a MEP.

Other SECURE 2.0 Act Provisions Addressed by Proposal

The proposal also addresses three other provisions of the SECURE 2.0 Act that impact the notice required under the EACA rules.

Section 320(b) of the SECURE 2.0 Act modifies the notice requirements under the Code, effective for plan years beginning after December 31, 2022, to provide that individual account plans are not required to provide certain notices to employees who are eligible to participate but have not enrolled in the plan.[6]

Section 127 of the SECURE 2.0 Act permits employers to offer, as part of a defined contribution (DC) plan, a new short term emergency savings account (a pension-linked emergency savings account or PLESA) to non-highly compensated employees.[7] The employer may automatically enroll such employees into the PLESA or simply make the PLESA available. A plan that offers a PLESA must provide participants an initial notice and annual notice with information about the PLESA. The statute permits plans to consolidate these PLESA notices with other existing notices, including the EACA notice.[8]

Section 341 of the SECURE 2.0 Act directs DOL and Treasury to adopt regulations permitting a DC plan to consolidate two or more of the following notices required under ERISA and the Code:

- ERISA section 404(c)(5)(B) (QDIA notice);
- ERISA section 514(e)(3) (automatic contribution arrangement notice);
- Code section 401(k)(12)(D) (401(k) safe harbor plan notice);
- Code section 401(k)(13)(E) (401(k) automatic enrollment safe harbor notice); and
- Code section 414(w)(4) (EACA notice).

Initial Guidance Provided Under Grab Bag Notice

On December 20, 2023, Treasury and IRS released Notice 2024-2 (the "Grab Bag Notice"), providing initial guidance, in Q&A format, on various issues related to the SECURE 2.0 Act changes, including the new requirement for automatic enrollment in retirement plans.[9] The Grab Bag Notice provisions on the auto-enrollment requirement primarily focus on the exception for Pre-Enactment Plans. On February 20, 2024, ICI submitted a comment letter in response to the Grab Bag Notice.[10] In the preamble to the new proposal, IRS and Treasury address several of the comments they received.

IRS and Treasury also pull several concepts from their existing regulations regarding qualified automatic enrollment arrangements (QACAs), the automatic enrollment safe harbor plan rules under Code section 401(k)(13).

Overview of Proposal

The proposal confirms that a 401(k) or 403(b) plan subject to the new requirement is required to be an eligible automatic contribution arrangement (EACA) as defined in Code section 414(w)(3). It further must satisfy the additional requirements of Code section

414A(b)(2) through (4)—that is, it must allow permissible withdrawals, must satisfy the minimum contribution percentage specified under the statute, and must meet investment requirements (i.e., meet DOL's qualified default investment alternative (QDIA) rules). The determination of whether these requirements are met is made on a plan year basis.

Employees Required to be Automatically Enrolled

In response to questions from commenters (including ICI) regarding which employees are subject to the auto-enrollment requirement, the proposal clarifies that a plan satisfies the auto-enrollment requirements only if the plan's EACA provisions cover all employees in the plan who are eligible to elect to make contributions under the plan (including long-term part-time (LTPT) employees).[11] However, the proposal states that a plan still satisfies the requirements if it does not automatically enroll participants who already (as of the date the plan becomes subject to the new requirement) have an affirmative election in place (either an election to have contributions made or to not make contributions).[12] Therefore, the proposal implies that a plan subject to the requirement cannot limit its auto-enrollment provision to apply only to employees becoming eligible for the plan in 2025 and later. Rather, plans must extend the auto-enrollment to those who previously became eligible prior to the automatic enrollment effective date, absent an affirmative election made by those employees. A special rule addresses the timing of the applicability of this requirement, as discussed below under Applicability Date.

Permissive Withdrawals

Regarding the requirement that the plan permit permissive withdrawals, the proposal refers to the existing regulations.[13]

Minimum Contribution Percentage

The proposal incorporates the minimum contribution percentage requirements set by the statute. For an employee's initial period (the first year of participation), the statute requires a default of a uniform percentage of at least three percent and not more than ten percent. The proposal clarifies that the initial period begins when the employee is first eligible to participate (or if later, when the plan first becomes subject to the auto-enrollment requirement) and ends on the last day of the plan year following the plan year that includes the date on which the initial period begins.

The statute requires that, for plan years after the initial period, the default contribution percentage must increase by one percentage "after each completed year of participation" to at least 10 percent, but not more than 15 percent (other than the initial reduced ceiling, applicable to certain plans). The proposal provides the following rules, based on existing QACA rules, to address the situation in which an employee does not have default elective contributions made throughout an entire plan year.

- If, after an employee's initial period began, the employee did not have default elective contributions made for an entire plan year, then the plan is permitted to redetermine the employee's initial period.
- If, for an entire plan year, no default contributions were made solely because the employee was not eligible to elect to have contributions made for that entire plan year, then the plan is permitted to provide that the employee's initial period is redetermined so that it begins on the date the employee is again eligible to elect to have contributions made. In the preamble, IRS notes that an employer may adopt this provision to apply in the even that an employee was rehired more than one plan year after being terminated.[14]

- If, for an entire plan year, no default contributions were made solely because the employee made an affirmative election to have contributions made in a different amount (including an election not to have contributions made), then the plan is permitted to provide that the initial period is redetermined so that it begins on any date specified under the plan that is later than the date the employee's original initial period ended. The preamble suggests that an employer might use this provision to include a re-enrollment feature to apply to employees who had previously opted out, or as a way to facilitate contribution rate increases.[15]

The proposal incorporates certain exceptions to the uniform percentage requirements that are based on similar exceptions under the QACA regulations.[16]

Exceptions to Auto-Enrollment Requirement

As described above under Background, the statute includes several exceptions for plans that are not subject to the auto-enrollment requirement, including exceptions for Pre-Enactment Plans, New Business Plans, and Small Business Plans. Employers that join an existing MEP after enactment are not exempt from the requirement to automatically enroll participants. Also, the exceptions for New Business Plans and Small Business Plans apply separately with respect to each employer participating in a MEP.

The proposal incorporates several of the provisions included in the Grab Bag Notice regarding these exceptions.

Regarding the exception for New Business Plans, IRS and Treasury agree with commenters to the Grab Bag Notice that plans should not be required to implement auto-enrollment in the middle of a plan year. The proposal clarifies that the requirement to auto-enroll does not apply to a plan for a plan year, if as of the beginning of the plan year, the employer maintaining the plan has been in existence for less than three years.

Regarding the exception for Small Business Plans (normally employing ten or fewer employees), the proposal clarifies that the method for counting the number of employees normally employed for a taxable year is by using the rules of Q&A-5 of §54.4980B-2 (i.e., the COBRA coverage rules, which also use a "normally employs" standard). Under this method, a full-time common law employee is considered one employee, while a part-time common law employee is a fraction of an employee, based on the number of hours worked on a typical day. The proposal also specifies that the requirement to auto-enroll does not apply before the first plan year that begins at least 12 months after the close of the first taxable year of the employer in which the employer normally employed more than 10 employees.

The statute provides special rules for the new and small business exceptions in the case of "a plan maintained by more than 1 employer." The proposal clarifies that this phrase means a multiple employer plan, and therefore, in the case of a multiple employer plan, the exceptions for new and small businesses apply on an employer-by-employer basis.

Regarding the exception for Pre-Enactment Plans, the proposal incorporates much of the guidance included in the Grab Bag Notice and expands on it.

- The Grab Bag Notice provided that if two Pre-Enactment Plans are merged together, the resulting plan will continue to be a Pre-Enactment Plan, and that the result is the same if a single employer Pre-Enactment Plan is merged with a MEP that is a Pre-Enactment Plan. The proposal extends this guidance to the merger of two pre-enactment MEPs.

- The Grab Bag Notice provided that if a Pre-Enactment Plan is merged with a plan that is not a Pre-Enactment Plan, generally the resulting plan will not be a Pre-Enactment Plan and will be subject to the new requirements. The Grab Bag Notice applied an exception for certain mergers in connection with a corporate transaction described in Code section 410(b)(6)(C), where the Pre-Enactment Plan is designated as the ongoing plan and other requirements are met. The proposal would expand the exception to address certain situations in which a plan maintained by a single employer that is not a Pre-Enactment Plan is merged into a MEP that is designated as the ongoing plan. In this case, the MEP would be treated as a Pre-Enactment Plan with respect to the employer that sponsored the merged-in plan if, with respect to the participating employer that engaged in the transaction, the MEP was treated as a Pre-Enactment Plan before the transaction. If both plans are MEPs, however, the proposal clarifies that the merger will not affect whether the merged plan is treated as a Pre-Enactment Plan with respect to any employer that maintained either MEP prior to the merger.
- The proposal responds favorably to one comment made by several commenters to the Grab Bag Notice (including ICI's comments) regarding a Pre-Enactment Plan that, after December 29, 2022 is merged into a new MEP. The proposal provides that, if an employer maintains a Pre-Enactment Plan that is merged into a MEP after December 29, 2022, then the post-merger MEP will be treated as a Pre-Enactment Plan with respect to that employer. This rule would apply regardless of the date of establishment of the MEP.
- The proposal further provides that a plan will not fail to remain a Pre-Enactment Plan merely because the plan is amended (provided that the amendment does not relate to an adoption of a MEP or a plan merger) or because of a change in recordkeeper or a similar change. This rule would apply even if the plan amendment expands eligibility to participate in the plan to other employees of the employer (or within the controlled group).
- The text of the proposal includes six examples that illustrate the application of the exception for Pre-Enactment Plans, specifically, examples involving plan mergers, employers' adoption of a MEP, a plan amendment that expands eligibility, and a plan spin-off.

Applicability Date

The new auto-enrollment requirement applies to plan years beginning after December 31, 2024. IRS and Treasury propose that the regulation would apply to plan years that begin more than six months after the date that final regulations are issued. For earlier plan years, a plan would be treated as having complied with the statutory requirement if the plan complies with a reasonable, good faith interpretation of Code section 414A.

The proposal addresses how this effective date applies to the requirement to cover all eligible employees. If a plan becomes subject to the auto-enrollment requirement as of the first day of the 2025 plan year, but employees who previously became eligible to participate in the plan (and who do not have affirmative elections in effect) are not covered by the plan's auto-enrollment provision, then those employees would have to be covered as of the first day of the first plan year that the final regulations apply to the plan (the first applicable plan year). For those employees (employees who were eligible to participate before the first day of the 2025 plan year and who do not have an affirmative election in effect), the default contribution percentage would be the percentage that would apply under the EACA for the first applicable plan year had those employees been automatically enrolled starting on the first day of the 2025 plan year. Alternatively, the plan could apply the redetermination of the initial period in the case of an employee who did not have default elective contributions made for an entire plan year. If the plan applies this permissive plan term, the plan could provide that the initial contribution percentage is determined as if the initial period for those employees started on the first day of the first applicable plan year.

Miscellaneous

Because the proposal interprets the language "a plan maintained by more than one employer" to mean a MEP, that phrase does not include a multiemployer plan or a plan maintained by members of a controlled group.[17] Therefore, a pre-enactment multiemployer plan would continue to be treated as a Pre-Enactment Plan with respect to an employer that adopts the plan after December 29, 2022, or with respect to an employer whose plan is merged into the multiemployer plan after December 29, 2022.

The preamble to the proposal discusses the interaction of the rules for PLESAs with the auto-enrollment requirement under Code section 414A.[18] The preamble explains that an affirmative election to contribute to a PLESA is considered an affirmative election to participate in the plan, for purposes of the proposal. However, automatic contributions to the PLESA cannot be used to satisfy the automatic enrollment requirements under Code section 414A, because the QDIA investment requirement would not be met (funds in a PLESA must be invested in cash or a principal preservation product).

As noted earlier, the proposal also reflects sections 320 (eliminating unnecessary plan requirements related to unenrolled participants) and 341 (consolidation of DC plan notices) of the SECURE 2.0 Act. The proposal amends the regulations under Code section 414(w)(4) regarding the EACA notice requirements, by adding a paragraph confirming that if the statutory requirements are met for notices to unenrolled participants (new Code section 414(bb)), then the plan does not need to provide the EACA notice to a participant. Similarly, the proposal specifies that the EACA notice may be combined with certain other notices, incorporating the legislative text in section 341 of the SECURE 2.0 Act.[19]

Comment Period and Public Hearing

Comments are due on March 17, 2025. Treasury and IRS also plan to hold a public hearing on the proposal on April 8, 2025. Comments specifically are requested on whether guidance is needed to define the term "predecessor employer" as used in the statutory exemption for New Business Plans ("the employer maintaining such plan (and any predecessor employer) has been in existence for less than 3 years")[20] and on the criteria that should apply for an individual to be an unenrolled participant under the SECURE 2.0 Act provision eliminating unnecessary plan notices to unenrolled participants (Code section 414(bb)(2)).[21]

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Notes

[1] The proposed regulations were published at 90 Fed. Reg. 3092 (January 14, 2025), available at https://www.govinfo.gov/content/pkg/FR-2025-01-14/pdf/2025-00501.pdf.

[2] For a summary of the SECURE 2.0 Act, see ICI Memorandum No. 34795, dated January

12, 2023, available at https://www.ici.org/memo34795.

[3] An EACA is an arrangement under which participants are automatically enrolled and which meets the notice requirements in Code section 414(w)(4).

[4] Under Code section 414(w), qualified plans, 403(b) plans, and governmental 457(b) plans may provide participants with the opportunity to withdraw contributions made under an EACA no later than 90 days after the first elective contribution is made under the EACA.

[5] The statute currently provides at Code section 414A(b)(3)(B) that this initial reduced ceiling applies for plan years ending before January 1, 2025. As section 101 is not effective for plan years ending before January 1, 2025, this appears to be a drafting error. The SECURE 2.0 Act Technical Corrections Discussion Draft released in December 2023 includes a provision changing this date from "plan years ending before January 1, 2025" to "plan years ending before January 1, 2026." The Discussion Draft was released by Chairpersons and Ranking Members of the House Committee on Ways and Means Chairman and the House Committee on Education and the Workforce. The Chairmen and Ranking Members of the Senate Finance Committee and Senate Committee on Health, Education, Labor and Pensions released an identical measure in the Senate. See announcement dated December 6, 2023, available https://waysandmeans.house.gov/2023/12/06/secure-2-0-act-technical-corrections-discussion-draft-released/.

[6] The plan must provide such employees with notices required in connection with the employee's initial eligibility under the plan (including the summary plan description), an annual notice reminding the employee that he or she is eligible to participate in the plan and any applicable election deadlines, and other documents upon the participant's request.

[7] For an overview of guidance from IRS and DOL on PLESAs, see ICI Memorandum No. 35604, dated January 30, 2024, available at https://www.ici.org/memo35604.

[8] Code section 402A(e)(5)(C).

[9] For an overview of the Grab Bag Notice, see ICI Memorandum No. 35590, dated January 22, 2024, available at https://www.ici.org/memo35590.

[10] For a summary of the letter, see ICI Memorandum No. 35623, dated February 20, 2024, available at https://www.ici.org/memo35623.

[11] Section 112 of the SECURE Act requires that 401(k) plans (except for collectively bargained plans) permit participation by employees who complete at least three consecutive years of service with at least 500 hours of service each year. Section 125 of the SECURE 2.0 Act expands this requirement, providing that effective for plan years beginning after December 31, 2024, the three-year requirement is reduced to two years. Section 125 also extends the LTPT coverage rules to 403(b) plans that are subject to ERISA. In November 2023, IRS and Treasury published proposed rules for the treatment of LTPT employees under 401(k) plans. See ICI Memorandum No. 35596, dated January 24, 2024, available at https://www.ici.org/memo35596. In October 2024, the IRS released Notice 2024-73, providing guidance on the treatment of LTPT employees under 403(b) plans. See ICI Memorandum No. 35885, dated October 21, 2024, available at https://www.ici.org/memo35885.

[12] The preamble explains that this provision is similar to the exception for certain current

employees under a QACA.

[13] Treas. Reg. section 1.414(w)-1(c).

[14] 90 Fed. Reg. at 3097.

[15] Id.

[16] See proposal section 1.414A-1(c)(3)(iii)(A) through (D). An [EACA] does not fail to satisfy the uniform percentage requirement of paragraph (c)(3)(ii) of this section merely because—

(A) The percentage used for the default election varies based on the number of years (or portions of years) since the beginning of the initial period for an employee;

(B) The rate of contributions under a cash or deferred election or salary reduction agreement that is in effect for an employee immediately prior to the date that the default election under paragraph (c) of this section first applies to the employee is not reduced;

(C) The rate of contributions under a cash or deferred election or salary reduction agreement is limited so as not to exceed the applicable limits of sections 401(a)(17), 401(k)(16), 402(g) (determined with or without catch-up contributions), 403(b)(16), and 415; or

(D) The default election provided under paragraph (c)(3)(i) of this section is not applied during the period an employee is not permitted to have contributions made on the employee's behalf under a cash or deferred election or salary reduction agreement in order for the plan to satisfy the requirements of section 414(u)(12)(B)(ii).

[17] The SECURE 2.0 Act Technical Corrections Discussion Draft discussed above in footnote 5 includes a provision that supports this interpretation. The bill would modify the statutory language describing this provision (Code section 414A(c)(2)(B)) from "a plan maintained by more than one employer" to "a plan described in section 413(c)."

[18] In the preamble, IRS references the August 2023 request for information (RFI) issued by DOL on provisions of the SECURE 2.0 Act that impact ERISA's reporting and disclosure requirements, including notices and disclosures related to PLESAs. Commenters to the RFI asked about the interaction of the PLESA rules and the 414A auto-enrollment rules. For an overview of the RFI, see ICI Memorandum No. 35399, dated August 14, 2023, available at https://www.ici.org/memo35399.

[19] Treas. Reg. section 1.414(w)-1(b)(4)(ii) requires (as required by the statute) that the combined notice—

(A) Includes the required content,

(B) Clearly identifies the issues addressed therein,

(C) Is furnished at the time and with the frequency required for each notice,

(D) Is presented in a manner that is reasonably calculated to be understood by the average plan participant, and

(E) Does not obscure or fail to highlight the primary information required for each notice.

[20] Code section 414A(c)(4)(A).

[21] 90 Fed. Reg. at 3103.