

TYPES NOT MAPPED YET January 27, 2021 | TTR not mapped yet | Lori W. Jones

# Preliminary IRS guidance regarding traditional and QACA safe harbor 401(k) plans under the Secure Act

*A version of this article was previously published in the February 2021 edition of Employee Benefit Plan Review.*

The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), includes a number of provisions relating to safe harbor 401(k) plans. <sup>1</sup> On December 9, 2020, the Internal Revenue Service (IRS) issued Notice 2020-86 <sup>2</sup> which provides preliminary guidance clarifying certain aspects of the SECURE Act provisions relating to safe harbor 401(k) plans. Although this article addresses safe harbor 401(k) plans, Notice 2020-86 applies on similar terms to Section 403(b) plans that apply safe harbor rules pursuant to Section 403(b)(12) of the Internal Revenue Code (Code). The U.S. Treasury Department and the IRS plan to issue more comprehensive regulatory guidance in the future. <sup>3</sup>

## Background

Safe harbor 401(k) plans are designed to avoid certain nondiscrimination tests that are otherwise applicable to 401(k) plans under the Code. <sup>4</sup> There are two types of safe harbor plans; a safe harbor plan under Code Section 401(k)(12), referred to herein as a “traditional safe harbor 401(k) plan,” and a qualified automatic contribution arrangement under Code Section 401(k)(13), referred to herein as a “QACA safe harbor 401(k) plan.”

Under a traditional safe harbor 401(k) plan, an employer is required to make either a safe harbor nonelective employer contribution of 3% or more of compensation or a safe harbor matching contribution pursuant to a formula specified under the Code. A QACA safe harbor plan must also provide either a 3% safe harbor nonelective employer contribution or a safe harbor matching contribution under a slightly different statutory formula. In addition, a QACA safe harbor plan must include, for participants who fail to make an affirmative deferral election under the plan, (i) an automatic enrollment feature within specified minimum and maximum deferral percentages, each referred to as a “qualified percentage” and (ii) an automatic escalation of deferral percentages.

A traditional safe harbor 401(k) plan may also provide for employer contributions that do not qualify as safe harbor contributions. For example, a traditional safe harbor 401(k) plan providing a safe harbor nonelective employer safe harbor can also provide a discretionary matching contribution without triggering nondiscrimination testing, provided that the matching contribution does not exceed 4% of compensation. However, a discretionary matching contribution that exceeds 4% of compensation would be required to satisfy nondiscrimination testing.

Prior to the SECURE Act both types of safe harbor plans were required to provide a safe harbor notice to eligible employees before the beginning of each plan year. Generally, the safe harbor contributions described in the safe harbor notice are required to remain in effect for the entire plan year. However, reduction or suspension of safe harbor employer contributions is permitted in certain circumstances in accordance with regulations and other IRS guidance.

## SECURE Act Provisions

Effective for plan years beginning after December 31, 2019, the SECURE Act increased the maximum qualified percentage under the automatic enrollment and escalation provisions of a QACA safe harbor 401(k) plan, to 15% (or 10% during the initial period of automatic elective contributions). <sup>5</sup> Previously, the maximum qualified percentage was 10% of compensation.

The SECURE Act also eliminated the annual safe harbor notice requirement for traditional safe harbor 401(k) plans and QACA safe harbor 401(k) plans that provide safe harbor nonelective employer contributions. <sup>6</sup>

Under the SECURE Act, an employer may amend a plan to qualify as a traditional safe harbor 401(k) plan or a QACA safe harbor 401(k) plan that provides safe harbor nonelective employer contributions provided such plan is amended before the 30th day before the close of the plan year.<sup>7</sup> The deadline is extended to the last day for distributing excess contributions under Code Section 401(k)(i)(A) if the level of safe harbor nonelective employer contributions is at least 4% of compensation. This provision does not apply to safe harbor 401(k) plans that provided safe harbor matching contributions.

### Notice 2020-86

The following is a summary of the preliminary guidance provided under Notice 2020-86 that is designed to clarify implementation of the SECURE Act pending regulatory guidance.

#### Maximum Qualified Percentage for QACA Safe Harbor 401(k) Plans

Notice 2020-86 clarifies that a QACA safe harbor 401(k) plan is not required to increase the maximum qualified percentage used to determine automatic elective contributions as permitted under the SECURE Act. The qualified percentage may be any percentage designated under the plan, provided it is applied uniformly and does not exceed the permitted maximum qualified percentage nor fall below the minimum qualified percentage (3% for the initial period of automatic elective contributions).<sup>8</sup>

The Notice also clarifies that a QACA safe harbor 401(k) plan that incorporates by reference the maximum qualified percentage under Code Section 401(k)(13)(C)(iii) will not fail to operate in accordance with its terms if it continues to apply a maximum qualified percentage of 10% (i.e., does not adopt the increase permitted under the SECURE Act), provided that the plan is amended by the last day of the plan year beginning on or after January 1, 2022 to specify that the plan's maximum qualified percentage is 10%.<sup>9</sup> However, if a plan is not timely amended, the plan will be treated as failing to operate in accordance with its terms, effective as of the first day of the first plan year beginning after December 31, 2019. If, after the amendment deadline under the SECURE Act, an employer decides to amend a QACA safe harbor 401(k) plan to increase the maximum qualified percentage as permitted under the SECURE Act, such amendment will be subject to the general discretionary amendment deadlines set forth in Revenue Procedure 2016-37, as modified by Revenue Procedure 2020-40.<sup>10</sup>

#### Safe Harbor Notice Requirements

Notice 2020-86 clarifies that, in certain circumstances, the SECURE Act does not eliminate the safe harbor notice for traditional safe harbor 401(k) plans that provide, not only safe harbor nonelective employer contributions, but also matching contributions.<sup>11</sup> The Notice includes an example in which a traditional safe harbor 401(k) plan providing safe harbor nonelective employer contribution also includes non-safe harbor matching contributions that are structured to satisfy the requirements which exempt the plan from the Code Section 401(m) actual deferral percentage (ACP) test. In that case, the plan must satisfy the safe harbor notice requirements. However, if a traditional safe harbor 401(k) plan provides safe harbor nonelective employer contributions as well as matching contributions that are subject to ACP testing, no safe harbor notice will be required. In other words, the safe harbor notice is required in order to avoid ACP testing of matching contributions. Because of differences in statutory language under the Code, the safe harbor notice no longer applies to QACA safe harbor 401(k) plans that provide safe harbor nonelective employer contributions even if such plan also offers matching contributions.<sup>12</sup>

Notice 2020-86 clarifies that the SECURE Act does not negate the notice requirements of Code Section 414(w).<sup>13</sup> Section 414(w) provides that a participant may be permitted to withdraw automatic elective contributions without application of the early withdrawal penalties under Code Section 72(t) if (i) such election is made no later than 90 days after the first elective contribution is made pursuant to the automatic deferral feature, and (ii) a notice of the participant's right to withdrawal is provided before the beginning of each plan year. Traditional safe harbor 401(k) plans and QACA safe harbor 401(k) plans providing safe harbor nonelective employer contributions must continue to satisfy the Section 414(w) notice requirement if the plan includes this feature.

Notice 2020-86 also clarifies that the annual notice required to permit mid-year reductions or suspensions of safe harbor contributions is still required and can be satisfied without providing an annual safe harbor notice for those safe harbor 401(k) plans exempt from the safe harbor notice requirement. All of the other regulatory requirements for mid-year reductions or suspensions of safe harbor contributions must be satisfied.<sup>14</sup> Possibly to address employer confusion on this point, the Notice provides that with respect to the first plan year beginning after December 31, 2020, the notice will be considered timely if provided to each eligible employee by the later of (1) 30 days before the beginning of the plan year, or (2) January 31, 2021.<sup>15</sup>

The SECURE Act permits an employer to amend a plan to become a traditional safe harbor 401(k) plan or QACA safe harbor 401(k) plan providing safe harbor nonelective employer contributions if such amendment is adopted at any time before the 30th day before the end of the plan year.<sup>16</sup> Notice 2020-86 clarifies that this rule applies even if an employer has amended a traditional or QACA safe harbor 401(k) plan to reduce or suspend safe harbor nonelective employer contributions during a plan year and then, within these time limits, amends the plan to retroactively restore safe harbor nonelective employer contributions for the entire plan year.<sup>17</sup>

The SECURE Act extends the deadline for amending a plan to become a traditional safe 401(k) plan or QACA safe harbor 401(k) plan providing safe harbor nonelective employer contributions to the last day for distributing excess contributions for a plan year (generally by the close of the following plan year) if such plan provides for a level of safe harbor nonelective employer contributions equal to at least 4% of compensation. Notice 2020-86 clarifies that if an employer adopts such an amendment and makes safe harbor nonelective employer contributions after the employer's deadline for filing its tax return for the tax year, including extensions (the Code Section 404(a)(6)

deadline for making deductible plan contributions for a plan year), but before that last day for distributing excess contributions for such plan year, the contributions will be deductible in the taxable year the employer actually makes the contributions to the plan (rather than the plan year for which the contributions are made). <sup>18</sup>

The IRS expects to provide additional guidance regarding impact of the SECURE Act on safe harbor contribution plans providing safe harbor nonelective employer contributions when it issues regulations on the topic. Employers who maintain or are contemplating offering safe harbor plans should monitor the issuance of additional guidance.

*[Lori Jones](#) is the chair of Thompson Coburn's Employee Benefits practice.*

1. Safe harbor 401(k) plans are designed to avoid certain nondiscrimination tests that are applicable to traditional 401(k) plans. [↔](#)
2. [Notice 2020-86 \(irs.gov\)](#) [↔](#)
3. The IRS solicited comments on Notice 2020-86 by February 8, 2021. [↔](#)
4. Safe harbor 401(k) plans are not subject to the actual deferral percentage (ADP) test under Code Section 401(k)(3) and the actual contribution percentage (ACP) test under Code Section 401(m). [↔](#)
5. SECURE Act, §102. [↔](#)
6. SECURE Act, §103(a). [↔](#)
7. SECURE Act, §103(b). [↔](#)
8. Notice 2020-86, Q&A-1 [↔](#)
9. Notice 2020-86, Q&A-2; special amendment deadlines apply for governmental and collectively bargained plans. [↔](#)
10. Notice 2020-86, Q&A-3. [↔](#)
11. Notice 2020-86, Q&A-4. [↔](#)
12. Notice 2020-86, Q&A-5. [↔](#)
13. Notice 2020-86, Q&A-6. [↔](#)
14. Notice 2020-86, Q&A-7. [↔](#)
15. Id. [↔](#)
16. §§401(k)(12)(F) and 401(k)(13)(F). [↔](#)
17. Notice 2020-86, Q&A-8. [↔](#)
18. Notice 2020-86, Q&A-9. [↔](#)

#### authorsTest

**lori**

Lori W. Jones