



# SECURE and Safe Harbor

New guidance on safe harbor plan changes.

February 2021

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## KEY POINTS

- New guidance was issued on safe harbor provisions included in the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019.
- It clarifies that the automatic enrollment cap increase is discretionary and provides amendment guidelines.
- It also states that certain traditional safe harbor plans that provide for both safe harbor non-elective contributions and non-safe harbor matching contributions must still provide safe harbor notices.

On December 9, 2020, the Treasury Department ("Treasury") and Internal Revenue Service ("IRS") issued Notice 2020-86 ("Notice"), providing guidance—in the form of questions and answers—on changes to safe harbor plans made by the SECURE Act.

The SECURE Act increases the 10% cap for automatic enrollment safe harbor plans and eliminates safe harbor notice requirements for certain plans that provide for safe harbor nonelective contributions. It also provides flexibility for the retroactive adoption of safe harbor status for plans that provide safe harbor nonelective contributions.

## Cap Increase for Automatic Enrollment

For an automatic enrollment safe harbor plan (also referred to as qualified automatic contribution arrangement or "QACA" safe harbor plan), the contribution rate for automatically enrolled participants must be at least

3% during the "initial period" (which ends on the last day of the first plan year that begins after the date automatic enrollment contributions begin for a participant).

Prior to the enactment of the SECURE Act, the contribution rate for automatically enrolled participants could not exceed 10%. Section 102(a) of the SECURE Act provides that the contribution rate may not exceed 15% (or 10% during the initial period of automatic enrollment contributions).

The guidance makes the following clarifications:

- Automatic enrollment safe harbor plans are not required to increase the maximum contribution rate used to determine automatic contributions (e.g., not required to increase from 10% to 15%).
- If a plan incorporates the maximum contribution rate by reference to the Internal Revenue Code, the plan

may continue to apply a maximum contribution rate of 10%. However, the plan will need to be amended to explicitly state the maximum percentage in effect, for plan years beginning on or after January 1, 2020, within the time period applicable to SECURE Act amendments.<sup>1</sup>

## Safe Harbor Notice Requirements

Prior to the enactment of the SECURE Act, all traditional and automatic enrollment safe harbor plans were required to provide a safe harbor notice to each eligible employee “within a reasonable period” before the employee becomes eligible and “within a reasonable period” before the beginning of each subsequent year.

Section 103 of the SECURE Act amended the Internal Revenue Code to eliminate safe harbor notice requirements for certain plans that provide for safe harbor nonelective contributions.

The guidance makes the following clarifications:

- Traditional safe harbor plans that provide for both safe harbor non-elective contributions and non-safe harbor matching contributions which meet the requirements for being exempt from the Average Contribution Percentage (ACP) test<sup>2</sup> must still provide safe harbor notices.
- The SECURE Act does not change any other any other requirements that may apply to a plan that satisfies the safe harbor nonelective contribution requirements applicable to a traditional or QACA safe harbor plan.

For example, the SECURE Act did not change the notice requirements applicable to eligible automatic contribution arrangements (“EACAs”) that permit withdrawals of automatic contributions within the first 90 days of a participant’s first automatic enrollment contributions. As another example, the SECURE Act did not change the requirement that a 401(k) plan provide an employee with an effective opportunity to make (or change) a deferral election at least once during each plan year.

- A plan that provides safe harbor nonelective contributions but is no longer required to provide a safe harbor notice may provide a limited notice (that otherwise meets the safe harbor notice requirements) indicating that the plan may be amended mid-year to reduce or suspend safe harbor nonelective contributions. The guidance provides a transition rule for the first plan year beginning after December 31, 2020. Under the transition rule, the notice must be given to each eligible employee by the later of 30 days before the beginning of the plan year or January 31, 2021.

However, the plan must still satisfy all other requirements in order to reduce or suspend safe harbor nonelective contributions during the plan year, including advance notice of reduction or suspension.

## Retroactive Adoption of Safe Harbor Status

The SECURE Act modified the rules allowing for retroactive adoption of a nonelective contribution safe harbor design.

Following the SECURE Act, an employer can adopt a nonelective contribution safe harbor plan up until 30 days before the plan’s year end, and if the nonelective contribution is at least 4% of compensation, an employer has up until the last day of the following year to adopt the safe harbor plan design.

The guidance makes the following clarifications:

- If a plan is amended to reduce or suspend safe harbor nonelective contributions during a plan year, but later is amended to readopt safe harbor nonelective contributions for the entirety of the plan year, it will not be required to satisfy the ADP or ACP test (or be subject to the top-heavy rules) for the plan year.
- If a plan is amended to provide safe harbor nonelective contributions of at least 4% of compensation for a plan year, and those contributions are contributed to the plan after the tax filing deadline for the prior taxable year (including extensions), they are not deductible for the prior taxable year (however, they are deductible for the taxable year in which they are contributed).
- For plan years beginning after December 31, 2019, the retroactive plan amendment rules of Treas. Reg. § 1.401(k)-3(f) and § 1.401(m)-3(g) are generally no longer applicable. Those rules require the plan to use the current year testing method and to provide contingent and follow-up safe harbor participant notices.

However, traditional safe harbor plans that provide for both safe harbor non-elective contributions

<sup>1</sup>The deadline for SECURE Act amendments is the last day of the first plan year beginning on or after January 1, 2022. The plan amendment deadline for a governmental plan or for a collectively bargained plan is the last day of the first plan year beginning on or after January 1, 2024.

<sup>2</sup>The structural requirements under Internal Revenue Code section 401(m)(11)(B) provide that (1) matching contributions may not be made on elective deferrals or employee contributions in excess of 6% of compensation, (2) the rate of matching contributions cannot increase with the rate of elective deferrals or employee contributions, and (3) the rate of matching contributions for any highly compensated employee cannot be greater than the rate of matching contributions for any non-highly compensated employee at any rate of elective deferrals or employee contributions.

and non-safe harbor matching contributions which meet the requirements for being exempt from the Average Contribution Percentage (ACP) test must meet the retroactive plan amendment rules of Treas. Reg. § 1.401(m)-3(g).

Accordingly, the plan must use the current year testing method, an amendment is required no later than 30 days before the end of the plan year, and contingent and follow-up safe harbor notices must be provided to participants.

- Plan amendments for retroactively adopting nonelective safe harbor contributions under the SECURE Act may be adopted within the SECURE Act's special amendment deadline—generally no later than the last day of the first plan year beginning on or after January 1, 2022. Changes following the deadline must be adopted within 30 days prior to the close of the plan year, or by the close of the following plan year (for safe harbor nonelective contributions of at least 4%).

## **Request for Comments and Need for Additional Guidance**

The guidance in the Notice is intended to assist with specific implementation issues and is not meant to be comprehensive. Treasury and IRS intend to develop regulations to fully implement these provisions of the SECURE Act.

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