December, 2020

IRS Issues Guidance on SECURE Act Provisions Affecting Safe Harbor Plans

On December 9, 2020, the Internal Revenue Service (IRS) issued Notice 2020-86 to provide guidance addressing provisions of Sections 102 and 103 of The Setting Every Community Up for Retirement Enhancement (SECURE) Act. While not intended as comprehensive guidance, the notice addresses certain issues relating to SECURE changes to automatic enrollment and notice requirements.

Plans Impacted

IRS Notice 2020-86 applies to automatic enrollment safe harbor 401(k) and 403(b) plans that are subject to ERISA and to applicable safe harbor notice requirements for 401(k) and 403(b) plans that are subject to ERISA.

SECURE Act Section 102, Changes to Automatic Enrollment Caps for QACA Plans

Section 102 of SECURE increased the maximum automatic deferral rate for Qualified Automatic Contribution Arrangement (QACA) plans to 15% from 10% for years after the first plan year in which the employee is automatically enrolled. In the first plan year, the default contribution rate still cannot exceed 10% of compensation.

Notice 2020-86 clarifies that this increase is optional. QACA plans are not required to increase their maximum rate. However, plans that incorporate the maximum QACA percentage by reference (without specifying the actual percentage) must implement the higher 15% rate or be timely amended to specify the maximum rate used in operation. The Notice also confirms that amendments to adopt the increased QACA deferral rate are eligible for the special amendment deadline for SECURE. For such amendments after that deadline, the general discretionary amendment deadlines will apply.

SECURE Section 103, Safe Harbor Notice Requirement Changes

Section 103 of SECURE eliminated safe harbor notice requirements for certain traditional safe harbor plans that meet the 401(k) safe harbor contribution requirement by providing a safe harbor contribution in the form of a non-elective contribution.

However, Notice 2020-86 emphasizes that SECURE did not eliminate notice requirements for traditional safe harbor plans intended to meet the 401(m) safe harbor. For example, an ERISA 403(b) traditional safe harbor plan that meets the safe harbor contribution requirement by providing for a safe harbor contribution in the form of a non-elective contribution, but which also provides for a non-safe harbor matching contribution that meets the meets the requirements under 401(m) such that they are not required to pass the ACP test, will still need to provide the ACP safe harbor notice required under §401(m)(11)(A).

Notice 2020-86 also confirms that unlike traditional safe harbor plans as described above, the safe harbor notice requirement is eliminated for both the 401(k) and 401(m) safe harbor for QACA safe harbor plans that meet the QACA safe harbor contribution requirement by providing a safe harbor contribution in the form of a non-elective contribution.

The Notice clarifies that the changes to the safe harbor notice requirements do not change any other requirements applicable to plans that satisfy the safe harbor non-elective contribution requirements applicable to a traditional or QACA safe harbor 401(k) plan.

The Notice also provides that plans that want to retain the flexibility to reduce or suspend their safe harbor contribution mid-year, but are not required to distribute a safe harbor notice, may distribute a notice indicating that the plan may be amended mid-year to reduce or suspend safe harbor non-elective contributions. For the first plan year beginning after December 31, 2020, such a notice will be considered timely if it is distributed by the later of 30 days before the beginning of the plan year or January 31, 2021.

SECURE Act Section 103, Retroactive Safe Harbor Non-elective Plan Adoption

Section 103 also provided for retroactive adoption of safe harbor non-elective plan designs.

Notice 2020-86 clarifies that if an employer amends its plan during the plan year to reduce or suspend its safe harbor non-elective contribution, but subsequently amends to reinstate the contribution for the entire plan year, the plan is not required to satisfy ADP or ACP testing and is not subject to Top-Heavy rules (which are not applicable to 403(b) plans) for the plan year.

The Notice also clarifies that safe harbor non-elective contributions are subject to deduction timing rules, even under the new retroactive adoption provisions. Safe harbor non-elective contributions made after the tax filing deadline for the prior taxable year (including granted extensions) are not deductible for that prior tax year and are instead deductible for the taxable year in which they are contributed to the plan, to the extent they are otherwise deductible under §404.

The Notice further states that for plan years beginning after December 31, 2019, in order for a plan to be amended during a plan year to adopt a traditional or QACA safe harbor design under 401(k) (and for a QACA plan, 401(m)) using safe harbor non-elective contributions, the plan must satisfy the retroactive plan amendment requirements as amended by § 103 of the SECURE Act. The pre-existing retroactive plan amendment rules under Treas. Reg. §1.401(m)-3(g), which required "contingent" and "follow-up" notices, no longer apply for those purposes for those plan years.

However, the Notice emphasizes that for a traditional 401(k) plan to be amended during the plan year to adopt the 401(m) safe harbor design using safe harbor non-elective contributions, the plan sponsor must comply with the pre-existing retroactive plan amendment rules under Treas. Reg. §1.401(m)-3(g), including the "contingent" and "follow-up" notice requirements. This is because the SECURE Act did not eliminate the safe harbor notice requirement of Code section 401(m) for traditional safe harbor 401(m) plans.

Finally, Notice 2020-86 provides that amendments to incorporate the retroactive safe harbor for non-elective contributions are eligible for the special SECURE amendment deadline, even if that deadline is later than the deadlines generally applicable under SECURE Act Section 103. Plans amended to incorporate the retroactive safe harbor for non-elective contributions after that special deadline must follow the amendment timing rules set forth in SECURE Act Section 103 (i.e., by the 30th day before the last day of the plan year, or by the last day of the following plan year if the non-elective contribution is at least 4%).

Voya continues to monitor regulatory developments impacting retirement plans.