

# Employee Benefits Corner

## CARES Act Guidance for Qualified Plans Brings Welcomed Relief

By Elizabeth Thomas Dold and David N. Levine

The Internal Revenue Service (“IRS”) recently issued three important Notices regarding the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act),<sup>1</sup> and related COVID-19 relief, for qualified retirement plans and IRAs. These Notices include:

1. Notice 2020-50—which largely tracks Notice 2005-92 and provides clarity to plan administrators and participants on coronavirus-related loans and distributions under the CARES Act.
2. Notice 2020-51—which explains how to implement the 2020 waiver of required minimum distributions (RMDs) under the CARES Act for defined contribution plans (including 403(b) and governmental 457(b) plans) and IRAs, and provides important transition relief for implementation of the SECURE and CARES Act changes (largely consistent with prior guidance under Notice 2009-82).
3. Notice 2020-52—which provides temporary relief for employers wanting to reduce (or suspend) contributions during 2020 to their safe harbor 401(k) or 403(b) plans.

These Notices are briefly summarized below, focusing on what is new or otherwise notable in the guidance.

### Background

In response to the pandemic, the CARES Act gave retirement plan participants greater access to their retirement savings by expanding plan loans and allowing for coronavirus-related hardship distributions. For “Qualified Individuals,” plan loan limits under the Code were increased from \$50,000 to \$100,000 (or 100% of vested account balance) through September 22, 2020, and certain plan loan payments due in 2020 could be suspended for up to a year. Also, a special distribution right was made available for up to \$100,000, at the plan sponsor’s election, for certain plans that provided favorable tax treatment for the distribution—including relief from the 10% additional tax under Code Sec. 72(t), the ability to spread the taxes over three years, and right to recontribute the funds.

In 2019, Congress passed the Setting Every Community Up for Retirement Enhancement (SECURE) Act,<sup>2</sup> which extended the required beginning date for RMDs under Code Sec. 401(a)(9) to April 1 of the calendar year following the

year an individual turns 72 (for those born on or after July 1, 1949).

RMDs were further altered by Section 2203 of the CARES Act, providing a 2020 waiver of RMDs for defined contribution plans and IRAs in light of COVID-19 and the resulting market volatility.<sup>3</sup>

Lastly, the Code and regulations provide detailed rules for reducing or suspending safe harbor contributions to a 401(k) or 403(b) plan.

## Notice 2020-50

### 1. Expanded Definition of “Qualified Individuals”

The Notice expanded the definition of “Qualified Individuals” for the purpose of coronavirus-related distributions and loans to now include:

- Participants (and beneficiaries), their spouses or dependents diagnosed with COVID-19; or
- Participants (or beneficiaries)—or their spouse or a member of their household (meaning a person who shares the principal residence)—who experiences adverse financial consequences as a result of the following due to COVID-19: (1) Quarantine, (2) Furloughs, (3) Lay offs, (4) Rescinded or delayed job offers, (5) Reduction in work hours or pay, (6) Unable to work due to lack of childcare, or (7) Closing or reducing hours of a business owned or operated by such individual.

A sample certification is also provided for this purpose.

### 2. Employer Safe Harbor for Plan Loans

The CARES Act permits a delay in certain plan loan repayments in light of COVID-19. Importantly, the Notice establishes the following safe harbor for employers who choose to offer coronavirus-related plan loan suspensions for Qualified Individuals:

- Loan from a qualified employer plan outstanding on or after March 27, 2020;
- The due date pursuant to Code Sec. 72(p)(2)(B) or (C) for any repayment with respect to the loan occurs during the period beginning on March 27, 2020, and ending on December 31, 2020;
- The obligation to repay a plan loan is suspended under the plan for any period beginning not earlier than March 27, 2020, and ending not later than December 31, 2020 (suspension period);
- Loan repayments resume after the end of the suspension period (*e.g.*, no later than January 1, 2021), and the term of the loan may be extended by up to one

year from the date the loan was originally due to be repaid; and

- Interest accrued during the suspension period must be added to the remaining principal loan balance, which is satisfied if the loan is reamortized and repaid in substantially level installments over the remaining loan period (*e.g.*, five years from the date of the loan, plus up to one year).

The IRS also recognized that other reasonable approaches may be used, and gave an example of another approach that delays reamortization (but not 2021 payments) beyond January 1, 2021.

### 3. Nonqualified Deferred Compensation Plan Relief

The Notice also provides important relief for participants with a deferral election under a NQDC plan. Specifically, it deems a CRD to be a hardship distribution for purposes of the 409A regulations rule (Reg. §1.409A-3(j)(4)(viii)) that allows for the cancellation of an otherwise irrevocable deferral election under the NQDC plan if a participant receives a hardship distribution from the 401(k) plan. This cancellation results in the permissible accelerated payment of amounts that would have been deferred into the NQDC plan. The relief is available now, and does not require the higher level of scrutiny needed for an “unforeseeable emergency” distribution from such plan.

## Notice 2020-51

### 1. Extends the 60-Day Indirect Rollover Period Through August 31, 2020

The Notice aims to assist plan participants (and IRA owners) that have already received distributions in 2020 by extending the 60-day indirect rollover period through August 31, 2020, for amounts that would but for the CARES or SECURE Act would have been RMDs.

### 2. Explains What 2020 Waived RMDs Can Be Rolled over from Defined Contribution Plans

The Notice provides that taxpayers receiving the following distributions may roll them into an eligible retirement plan, provided the Code Sec. 402(c) (rollover) rules are satisfied (even if part of a series of substantially equal periodic payments):

- Distributions to a plan participant paid in 2020 (or paid in 2021 for 2020 RMDs for an employee with a required beginning date of April 1, 2021) if the

payments (1) equal the amounts that would have been RMDs in or for 2020, but for the CARES Act waiver, or (2) are one or more payments (that include the 2020 RMDs) as part of a series of substantially equal periodic payments made at least annually for the life of the participant (or joint lives of participant and beneficiary) or for a period of at least 10 years; and

- For a plan participant with a required beginning date of April 1, 2021, distributions that are paid in 2021 that would be an RMD for 2021 absent the CARES Act waiver, which is generally described as 2021 payments less the 2021 RMD.

The IRS also addressed a number of other technical points that are important for proper administration of the relief through a series of 12 questions and answers.

### 3. Provides Some Relief from the One-Per-12 Month IRA Indirect Rollover Limitation

In the case of an IRA owner or beneficiary who has already received a distribution of an amount that would have been a RMD in 2020 absent the CARES or SECURE Act changes, the recipient may repay the distribution to the distributing IRA by August 31, 2020. Importantly, the repayment will be treated as a rollover contribution, but it will not be subject to (1) the one rollover per 12-month period limitation under Code Sec. 408(d)(3)(B), nor (2) the restrictions on rollovers for nonspousal beneficiaries under Code Sec. 408(d)(3)(C) for inherited IRAs.

### 4. Grants Rollover and Withholding Relief for Certain SECURE Act Mistakes

The Notice provides that a distribution from a plan made during 2020 that would otherwise been an RMD but for the changes made by Section 114 of the SECURE Act is not required to be treated as an eligible rollover distribution under Code Secs. 401(a)(31), 402(f), and 3405(c). This should permit plan sponsors and recordkeepers the ability to retain the initial distribution and withholding treatment for RMDs, without concern about plan qualification, 402(f) notice penalties, or under-withholding of federal income taxes.

### 5. Sets Forth Sample Plan Amendments for the 2020 Waived RMDs

Per the CARES Act, plan sponsors have until the last day of the 2022 plan year (2024 plan year for governmental plans) to adopt plan amendments (unless these dates are extended).

The Notice provides a sample amendment for defined contribution plan sponsors that implement the 2020 RMD waiver under the CARES Act. The sample amendment provides a choice to participants or beneficiaries of receiving RMD distributions, and offers employers different options regarding direct rollovers and default distribution rules. The sample amendment is drafted for pre-approved plans, but can be modified for individually designed plans, and importantly will not result in loss of reliance on a favorable opinion, advisory, or determination letter. (Note that the Notice does indicate that the amendment be signed and dated by the employer.)

The Notice recognizes that an employer may adopt other amendments, but cautions that the anti-cutback relief provided under the statute will not be available if such an amendment eliminates an optional form of benefit. For example, if the plan provides for automatic distribution of the 2020 RMD without regard to Code Sec. 401(a)(9), an amendment to eliminate this right is not permitted. Conversely, if the plan terms automatically suspend the 2020 RMD, an amendment to eliminate the right to defer is not permitted.

Notably, no amendment is required to be made to IRA documents.

## Notice 2020-52

### 1. Suspension of HCE Contributions Is Permitted Without Loss of Safe Harbor Plan Status

The Notice clarifies that contributions made on behalf of HCEs are not included in the definition of safe harbor contributions, and, therefore, a mid-year change that reduces only contributions made on behalf of HCEs is not a reduction or suspension of safe harbor contributions and will not cause the plan to lose its safe harbor status. However, an updated safe harbor notice and an election opportunity must be provided to in accordance with Notice 2016-16.

### 2. Suspension of Safe Harbor Contributions Without Regard to Operating Loss Through August 31, 2020

The Notice provides that a plan amendment may be adopted between March 13, 2020, and August 31, 2020 that reduces or suspends safe harbor contributions (either match or nonelective) during the plan year regardless of whether the employer is operating at an economic loss, or

has included the required special “suspension language” in the plan’s safe harbor notice for the plan year.

### 3. Relaxation of Supplemental Notice Requirements for Nonelective Contributions

If a plan amendment that reduces or suspends safe harbor nonelective contributions during a plan year is adopted between March 13, 2020, and August 31, 2020, then the supplemental notice described in Notice 2016-16 must be provided to eligible employees no later than August 31, 2020 (instead of 30 days prior to the reduction or suspension). Also, the plan amendment that reduces or suspends safe harbor nonelective contributions must be adopted no later than the effective date of the reduction or suspension of safe harbor nonelective contributions (*i.e.*, it cannot be retroactive).

Unfortunately, the Notice does not provide relief with respect to the timing of supplemental notices for a mid-year reduction or suspension of safe harbor matching contributions—this means that the supplemental notice must be provided at least 30 days before the reduction in the matching contributions begins. Importantly, the Notice does not provide any relief for the nondiscrimination ADP/ACP testing that must be performed.

#### Next Steps

Following Notice 2020-50, plan sponsors and recordkeepers should review their existing policies and procedures, including distribution and loan forms, and update them accordingly to comply with the Notice. This includes expanding the definition of a Qualified Individual, reviewing the approach to be taken for recontributions of CRDs, and reviewing the loan suspension/reamortization approach to see if it falls within the IRS safe harbor, and if not a careful review of the approach is recommended. In addition, plan sponsors should review the terms of any nonqualified deferred compensation plan to determine whether the cancellation of a deferral election is required upon a CRD.

Following Notice 2020-51, plan sponsors and recordkeepers of plans and IRAs should review and update their existing RMD and rollover policies and procedures to provide for the 2020 RMD suspension. There should also be a review of sample plan amendment language (and consider the decisions needed therein) and provide participants with elections (whether or not to receive the distribution) and update distribution packages on the basis of the sponsor’s decision as to which (if any) direct rollover options should be provided. If the sample amendment is not used, plan sponsors should carefully consider the existing plan document language and determine if any amendments are needed to comply with plan operations (and when amending plans, should be mindful of anti-cutback rules).

Following Notice 2020-52, plan sponsors and recordkeepers of safe harbor 401(k) and 403(b) plans now have a clear road map from the IRS on how to reduce or suspend employer contributions during 2020, with some special relief that expires on August 31, 2020. If a plan sponsor has already reduced or suspended contributions, it should review whether it has provided the required notice to participants (there is an extended deadline for notices for nonelective contribution changes until August 31). Those that have not taken any action may wish to consider whether to take advantage of this relief in light of current economic circumstances. This includes (1) reducing or suspending only safe harbor contributions to highly compensated employees (and retain the plan’s safe harbor status), or (2) reducing or suspending all safe harbor contributions and giving up the plan’s safe harbor status and performing nondiscrimination testing. Notably, unlike safe harbor nonelective employer contributions, safe harbor matching contributions still need at least 30 days advance participant notice before they can be suspended/reduced.

All in all, three rounds of IRS guidance that provides important details on how to implement the CARES Act relief and thereby help maintain the continued tax-qualified status of the plans. Well worth the read!

#### ENDNOTES

<sup>1</sup> The Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-36).

<sup>2</sup> The Setting Every Community Up for Retirement Enhancement (SECURE) Act (P.L. 116-94).

<sup>3</sup> Code Sec. 401(a)(9)(l).

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