Guidance on Sections 102 and 103 of the SECURE Act With Respect to Safe Harbor Plans

Notice 2020-86

I. PURPOSE

This notice provides guidance in the form of questions and answers with respect to §§ 102 and 103 of Division O of the Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, 133 Stat. 2534 (2019), known as the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act).[1] Section 102 of the SECURE Act increases the 10 percent cap for automatic enrollment safe harbor plans. Section 103 of the Secure Act eliminates certain safe harbor notice requirements for plans that provide for safe harbor nonelective contributions and adds new provisions for the retroactive adoption of safe harbor status for those plans. This notice is not intended to provide comprehensive guidance as to § 102 or 103 of the SECURE Act, but rather is intended to assist taxpayers by providing guidance on particular issues while the Treasury Department and the IRS develop regulations to fully implement these sections of the SECURE Act. The Treasury Department and the IRS invite comments on the guidance in this notice and any other aspect of § 102 or 103 of the SECURE Act.

[1] On September 2, 2020, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) released Notice 2020-68, 2020-38 IRB 567, which provides guidance with respect to §§ 105, 107, 112, 113, 116, and 601 of the SECURE Act (and § 104 of Division M of the Further Consolidated Appropriations Act, 2020, known as the Bipartisan American Miners Act of 2019).

II. BACKGROUND

A. Exemptions from Actual Deferral Percentage (ADP) and Actual Contribution Percentage (ACP) Testing for Safe Harbor Plans

Under § 401(a)(4) of the Internal Revenue Code (Code) and § 1.401(a)(4)-1(b)(2), contributions or benefits provided under a qualified retirement plan must not be discriminatory in amount in favor of highly compensated employees (HCEs), as defined in § 414(q). Under § 401(k)(3) and § 1.401(k)-1(a)(4)(iv)(A) and (b)(1)(ii)(A), a § 401(k) plan satisfies this requirement if elective contributions made on behalf of eligible employees for a year satisfy the ADP test described in § 1.401(k)-2. Under § 401(m)(2) and § 1.401(m)-1(a)(1)(i) and (b)(1)(i), a similar test, the ACP test, applies to matching contributions and employee contributions.

As an alternative to satisfying the annual ADP test, a plan may satisfy the ADP safe harbor provisions of § 401(k)(12) (a traditional safe harbor § 401(k) plan) or 401(k)(13) (a qualified automatic contribution arrangement (QACA) safe harbor § 401(k) plan). Similarly, as an alternative to satisfying the annual ACP test with respect to matching contributions, a plan may satisfy the ACP safe harbor provisions of § 401(m)(11) (a traditional safe harbor § 401(m) plan) or 401(m)(12) (a QACA safe harbor § 401(m) plan).

B. Safe Harbor Contributions

Under § 1.401(k)-3(a)(1), a traditional safe harbor § 401(k) plan is required to satisfy the safe harbor contribution requirements of either § 1.401(k)-3(b) (safe harbor nonelective contributions) or 1.401(k)-3(c) (safe harbor matching contributions) for the plan year. Under § 1.401(k)-3(b) and (c), contributions must be made on behalf of each eligible employee who is not an HCE (NHCE). Similarly, under § 1.401(m)-3(a)(1), a

traditional safe harbor § 401(m) plan is required to satisfy the safe harbor contribution requirements of either § 1.401(m)-3(b), which cross-references the safe harbor nonelective contribution requirements of § 1.401(k)-3(b), or 1.401(m)-3(c), which cross-references the safe harbor matching contribution requirements of § 1.401(k)-3(c), for the plan year.

Under § 1.401(k)-3(a)(2), a QACA safe harbor § 401(k) plan is required to satisfy the safe harbor contribution requirements of § 1.401(k)-3(k) for the plan year. Under § 1.401(k)-3(k)(1), a QACA safe harbor § 401(k) plan must satisfy either the safe harbor nonelective contribution requirements of § 1.401(k)-3(b) or the safe harbor matching contribution requirements of § 1.401(k)-3(c), as modified by § 1.401(k)-3(k)(2) and (3). Similarly, under § 1.401(m)-3(a)(2), a QACA safe harbor § 401(m) plan is required to satisfy the safe harbor requirements of § 1.401(k)-3, including the safe harbor contribution requirements of § 1.401(k)-3(k).

Subject to certain requirements, a plan that provides for safe harbor contributions also may provide for contributions that are not safe harbor contributions. For example, a traditional safe harbor § 401(k) plan that provides for safe harbor nonelective contributions may also provide for either (1) a discretionary matching contribution of four percent of safe harbor compensation that would not need to satisfy the ACP test because the contribution satisfies the requirements of § 1.401(m)-3(d) (including the limits on matching rate increases, matching contributions, and matching rates on behalf of HCEs as compared to matching rates on behalf of NHCEs), or (2) a discretionary matching contribution in excess of four percent of safe harbor compensation that would need to satisfy the ACP test because the contribution does not satisfy the limit on

discretionary matching contributions under § 1.401(m)-3(d)(3)(ii). Under § 1.401(k)-3(a)(3), neither of these types of additional matching contributions are referred to as safe harbor contributions.

C. Safe Harbor Notices

Section 401(k)(12)(D) generally requires a traditional safe harbor § 401(k) plan to provide a safe harbor notice to each eligible employee "within a reasonable period before any year." Section 1.401(k)-3(d)(3)(i) clarifies that a safe harbor notice must be "provided within a reasonable period before the beginning of the plan year (or, in the year an employee becomes eligible, within a reasonable period before the employee becomes eligible)." Section 401(m)(11)(A)(ii) requires a traditional safe harbor § 401(m) plan to satisfy the safe harbor notice requirements of § 401(k)(12)(D).

Section 401(k)(13)(E)(i) similarly requires a QACA safe harbor § 401(k) plan to provide a safe harbor notice to each eligible employee "within a reasonable period before each plan year," and § 1.401(k)-3(a)(2) requires a QACA safe harbor § 401(k) plan to satisfy the safe harbor notice requirements of § 1.401(k)-3(d), as modified by § 1.401(k)-3(k)(4). Section 401(m)(12)(A) requires a QACA safe harbor § 401(m) plan to satisfy the requirements for a QACA safe harbor § 401(k) plan.

D. Mid-Year Changes to Safe Harbor Plans and Notices

Section 1.401(k)-3(e)(1) provides that, in general, a plan will fail to satisfy the requirements of § 401(k)(12) and (13) and § 1.401(k)-3 unless plan provisions that satisfy the safe harbor plan rules of § 1.401(k)-3 are adopted before the first day of the plan year and remain in effect for an entire 12-month plan year. In addition, § 1.401(k)-3(e)(1) provides that, except as provided in § 1.401(k)-3(g) or in guidance of

general applicability published in the Internal Revenue Bulletin, a plan that includes provisions that satisfy the safe harbor plan rules of § 1.401(k)-3 will not satisfy the nondiscrimination requirements for § 401(k) plans for a plan year if the plan is amended to change those provisions during the plan year. Section 1.401(m)-3(f) includes similar rules for safe harbor § 401(m) plans.

Under § 1.401(k)-3(g), a plan that provides for safe harbor contributions for a plan year may be amended during the plan year to reduce or suspend future safe harbor matching contributions or safe harbor nonelective contributions if the plan is also amended to provide that the ADP test will be satisfied for the entire plan year in which the reduction or suspension occurs (using the current year testing method) and if certain other requirements are satisfied. Section 1.401(k)-3(g)(1)(i) sets forth the requirements for a mid-year reduction or suspension of safe harbor matching contributions, and § 1.401(k)-3(g)(1)(ii) sets forth the requirements for a mid-year reduction or suspension of safe harbor nonelective contributions.

Under § 1.401(k)-3(g)(1)(i)(A) and (ii)(A), the employer must either (1) be operating at an economic loss (as described in § 412(c)(2)(A)) for the plan year, or (2) have included in the plan's safe harbor notice (as described in § 1.401(k)-3(d)) for the plan year a statement that the plan may be amended during the plan year to reduce or suspend safe harbor contributions and that the reduction or suspension will not apply earlier than 30 days after all eligible employees are provided notice of the reduction or suspension. Under § 1.401(k)-3(g)(1)(i)(C) and (ii)(C), the reduction or suspension of safe harbor contributions may be effective no earlier than the later of the date the amendment is adopted or 30 days after eligible employees are provided the

supplemental notice described in § 1.401(k)-3(g)(2). Under § 1.401(k)-3(g)(1)(i)(D) and (ii)(D), eligible employees must be given a reasonable opportunity (including a reasonable period after receipt of the supplemental notice) prior to the reduction or suspension of safe harbor contributions to change their cash or deferred elections and, if applicable, their employee contribution elections.

Section 1.401(m)-3(h) provides rules similar to those of § 1.401(k)-3(g) for a reduction or suspension of future safe harbor matching contributions or safe harbor nonelective contributions in a safe harbor § 401(m) plan.

Notice 2016-16, 2016-7 IRB 318, provides guidance on mid-year changes to safe harbor plans to the extent that conditions for those mid-year changes are not addressed in the Code or regulations (including conditions for reducing or suspending safe harbor contributions under §§ 1.401(k)-3(g) and 1.401(m)-3(h)). Section III.B of Notice 2016-16 provides that a change made to a safe harbor plan or to a plan's required safe harbor notice content does not fail to satisfy the requirements of §§ 1.401(k)-3 and 1.401(m)-3 merely because the change is a mid-year change, provided that: (1) if it is a mid-year change to a plan's required safe harbor notice content, the notice and election opportunity conditions in section III.C of Notice 2016-16 are satisfied; and (2) the mid-year change is not described in a list of prohibited mid-year changes in section III.D of Notice 2016-16. Section III.A of Notice 2016-16 defines required safe harbor notice content as the information that is required by the safe harbor plan regulations to be provided in a plan's safe harbor notice. For example, a plan's safe harbor notice must describe any other contributions under the plan or matching contributions to another plan on account of elective contributions or employee contributions under the plan

(including the potential for discretionary matching contributions) and the conditions under which such contributions are made. See § 1.401(k)-3(d)(2)(ii)(B).

E. Section 102 of the SECURE Act

For a QACA safe harbor § 401(k) plan, § 401(k)(13)(C) generally requires that each employee eligible to participate be treated as having elected to have the employer make elective contributions in an amount equal to a qualified percentage of compensation (subject to certain exceptions for employees who have made or make affirmative participation elections). The qualified percentage of compensation may be any percentage determined under the plan if such percentage is applied uniformly, does not exceed the maximum percentage specified in § 401(k)(13)(C)(iii), and satisfies certain minimum percentage requirements specified in § 401(k)(13)(C)(iii)(I) – (IV). For example, § 401(k)(13)(C)(iii)(I) provides that the qualified percentage must be at least three percent during the initial period ending on the last day of the first plan year that begins after the date on which the first automatic elective contribution is made with respect to an employee. Prior to the enactment of the SECURE Act, § 401(k)(13)(C)(iii) of the Code provided that the qualified percentage could not exceed 10 percent.

Section 102(a) of the SECURE Act amended § 401(k)(13)(C)(iii) of the Code to provide that the qualified percentage may not exceed 15 percent (or 10 percent during the initial period of automatic elective contributions described in § 401(k)(13)(C)(iii)(I)).

Section 102(b) of the SECURE Act provides that the amendments made by § 102 of the SECURE Act apply to plan years beginning after December 31, 2019.

F. Section 103 of the SECURE Act

Prior to the enactment of the SECURE Act, § 401(k)(12) required all traditional safe harbor § 401(k) plans to satisfy the safe harbor notice requirements of § 401(k)(12)(D), and § 401(k)(13) required all QACA safe harbor § 401(k) plans to satisfy the safe harbor notice requirements of § 401(k)(13)(E). In addition, § 401(k)(12) and (13) did not explicitly permit retroactive adoption of the safe harbor nonelective contribution requirements of § 401(k)(12)(C) (traditional) or 401(k)(13)(D)(i)(II) (QACA) for a plan year.[2]

Section 103(a) of the SECURE Act amended § 401(k)(12)(A) of the Code to eliminate the safe harbor notice requirements of § 401(k)(12)(D) for a traditional safe harbor § 401(k) plan that satisfies the safe harbor nonelective contribution requirements of § 401(k)(12)(C). Section 103(a) of the SECURE Act also amended § 401(k)(13)(B) of the Code to eliminate the safe harbor notice requirements of § 401(k)(13)(E) for a QACA safe harbor § 401(k) plan that satisfies the safe harbor nonelective contribution requirements of § 401(k)(13)(D)(i)(II).

Section 103(a) of the SECURE Act did not amend § 401(m)(11) or 401(m)(12) of the Code. Thus, § 401(m)(11)(A)(ii) continues to require all traditional safe harbor § 401(m) plans to satisfy the safe harbor notice requirements of § 401(k)(12)(D). Section 401(m)(12)(A) also continues to require all QACA safe harbor § 401(m) plans to satisfy the requirements for a QACA safe harbor § 401(k) plan. However, § 103(a) of

[2] Although § 401(k)(12) and (13) did not explicitly permit retroactive adoption of safe harbor nonelective contribution requirements, §§ 1.401(k)-3(f) and 1.401(m)-3(g) permit a plan that provides for the use of the current year testing method to be retroactively amended to adopt a safe harbor design for the plan year, using safe harbor nonelective contributions, if certain additional requirements are met (including contingent and follow-up notice requirements).

the SECURE Act eliminated the safe harbor notice requirements of § 401(k)(13)(E) of the Code for a QACA safe harbor § 401(k) plan that satisfies the safe harbor nonelective contribution requirements of § 401(k)(13)(D)(i)(II).

Section 103(b) of the SECURE Act added new § 401(k)(12)(F) of the Code to permit a plan to be amended after the beginning of a plan year to provide that the safe harbor nonelective contribution requirements of § 401(k)(12)(C) will apply for the plan year, provided that: (1) the amendment is adopted before the 30th day before the close of the plan year (or before the last day under § 401(k)(8)(A) for distributing excess contributions for the plan year if the safe harbor nonelective contribution for the plan year is at least four percent of each employee's compensation); and (2) the plan did not provide, at any time during the plan year, for safe harbor matching contributions under § 401(k)(12)(B) (traditional) or 401(k)(13)(D)(i)(I) (QACA) for the plan year.

Section 103(c) of the SECURE Act likewise amended the QACA safe harbor § 401(k) plan rules of § 401(k)(13) of the Code to add new § 401(k)(13)(F), which provides rules similar to those of § 401(k)(12)(F).

Section 103(d) of the SECURE Act provides that the amendments made by § 103 of the SECURE Act apply to plan years beginning after December 31, 2019.

III. GUIDANCE REGARDING SECTION 102 OF THE SECURE ACT (INCREASE IN 10 PERCENT CAP FOR AUTO-ENROLLMENT SAFE HARBOR)

Q-1. In order to maintain its status as a QACA safe harbor § 401(k) plan, is a QACA safe harbor § 401(k) plan required, pursuant to § 102(a) of the SECURE Act, to increase the maximum qualified percentage of compensation used to determine automatic elective contributions?

A-1. No. The qualified percentage under a QACA safe harbor § 401(k) plan may be any percentage of compensation determined under the plan, as long as the percentage is applied uniformly, does not exceed the maximum percentage specified in § 401(k)(13)(C)(iii) (15 percent, or 10 percent during the initial period of automatic elective contributions described in § 401(k)(13)(C)(iii)(I)), and satisfies certain minimum percentage requirements specified in § 401(k)(13)(C)(iii)(I) – (IV).

Q-2. If a plan incorporates the maximum qualified percentage of § 401(k)(13)(C)(iii) by reference, will the plan fail to operate in accordance with its terms merely because the plan continues to apply the maximum qualified percentage of 10 percent that applied under § 401(k)(13)(C)(iii) of the Code before that section was amended by § 102(a) of the SECURE Act?

A-2. No. However, the plan would need to be amended on or before the plan amendment deadline determined under § 601(b) of the SECURE Act,[3] as described in Q&A G-1 of Notice 2020-68, to provide explicitly that the plan's maximum qualified percentage is 10 percent, retroactive to the first day of the first plan year beginning after December 31, 2019. If a plan incorporates the maximum qualified percentage of § 401(k)(13)(C)(iii) of the Code by reference and the plan is not amended on or before the plan amendment deadline determined under § 601(b) of the SECURE Act to provide a specific maximum qualified percentage, then the plan will be treated as providing for the maximum qualified percentage specified in § 401(k)(13)(C)(iii) of the Code, as

[3] In general, for a qualified retirement plan that is not a governmental plan within the meaning of § 414(d) of the Code, or an applicable collectively bargained plan, the plan amendment deadline determined under § 601 of the SECURE Act is the last day of the first plan year beginning on or after January 1, 2022. The plan amendment deadline for a qualified governmental plan, as defined in § 414(d) of the Code, or for an applicable collectively bargained plan is the last day of the first plan year beginning on or after January 1, 2024.

amended by § 102(a) of the SECURE Act, effective as of the first day of the first plan year beginning after December 31, 2019. In this case, the plan will have failed to operate in accordance with its terms by applying the maximum qualified percentage of 10 percent that applied under § 401(k)(13)(C)(iii) of the Code before that section was amended by § 102(a) of the SECURE Act.

Q-3. What plan amendment timing rules apply to a plan amendment that increases the maximum qualified percentage of compensation used to determine automatic elective contributions to a percentage greater than 10 percent (but no greater than 15 percent) after the initial period of automatic elective contributions described in § 401(k)(13)(C)(iii)(I)?

A-3. In general, the plan amendment timing provisions of § 601 of the SECURE Act, as described in Q&A G-1 of Notice 2020-68, apply to a plan amendment adopted under § 102 of the SECURE Act. In addition, a plan may be amended to reflect § 102 of the SECURE Act after the applicable plan amendment deadline under § 601 of the SECURE Act, in accordance with the general discretionary amendment deadlines set forth in Rev. Proc. 2016-37, 2016-29 IRB 136, as most recently modified by Rev. Proc. 2020-40, 2020-38 IRB 575.

IV. GUIDANCE REGARDING SECTION 103 OF THE SECURE ACT (SAFE HARBOR NOTICE REQUIREMENTS AND RETROACTIVE SAFE HARBOR STATUS FOR PLANS THAT PROVIDE SAFE HARBOR NONELECTIVE CONTRIBUTIONS)

Q-4. How does § 103(a) of the SECURE Act affect the safe harbor notice requirements for a traditional safe harbor § 401(k) plan or a traditional safe harbor § 401(m) plan?

A-4. Section 103(a) of the SECURE Act amended the requirements for a traditional safe harbor § 401(k) plan that satisfies the safe harbor nonelective contribution requirements of § 401(k)(12)(C) of the Code by eliminating the safe harbor notice requirements of § 401(k)(12)(D) (including the requirement under § 1.401(k)-3(d)(3)(i) to provide a safe harbor notice within a reasonable period before an employee becomes eligible). However, § 103(a) of the SECURE Act did not eliminate the safe harbor notice requirements of § 401(m)(11)(A) of the Code for a traditional safe harbor § 401(m) plan that satisfies the safe harbor nonelective contribution requirements of § 401(k)(12)(C).

Thus, for example, if a traditional safe harbor § 401(k) plan satisfies the safe harbor nonelective contribution requirements of § 401(k)(12)(C), but also provides non-safe harbor matching contributions that are structured to satisfy the requirements of § 1.401(m)-3(d) (and, therefore, are not required to satisfy the ACP test), then the plan still must satisfy the safe harbor notice requirements of § 401(m)(11)(A). On the other hand, if a traditional safe harbor § 401(k) plan that satisfies the safe harbor nonelective contribution requirements of § 401(k)(12)(C) also provides non-safe harbor matching contributions that are not intended to satisfy the requirements of § 1.401(m)-3(d) (and, therefore, are required to satisfy the ACP test), then the plan need not satisfy the safe harbor notice requirements of either § 401(k)(12)(D) or 401(m)(11)(A).

Q-5. How does § 103(a) of the SECURE Act affect the safe harbor notice requirements for a QACA safe harbor § 401(k) plan or QACA safe harbor § 401(m) plan?

A-5. Section 103(a) of the SECURE Act amended the requirements for a QACA safe harbor § 401(k) plan that satisfies the safe harbor nonelective contribution requirements of § 401(k)(13)(D)(i)(II) of the Code by eliminating the safe harbor notice requirements of § 401(k)(13)(E) (including the requirement under § 1.401(k)-3(d)(3)(i) to provide a notice within a reasonable period before an employee becomes eligible). The amendments made by § 103(a) of the SECURE Act also result in the elimination of any safe harbor notice requirement under § 401(m)(12) of the Code for a QACA safe harbor § 401(m) plan that satisfies the safe harbor nonelective contribution requirements of § 401(k)(13)(D)(i)(II). The result is different for a traditional safe harbor § 401(m) plan, as described in Q&A-4 of this notice, than for a QACA safe harbor § 401(m) plan because § 401(m)(11) specifically requires a traditional safe harbor § 401(m) plan to satisfy the safe harbor notice requirements of § 401(k)(12)(D), but § 401(m)(12)(A) merely requires a QACA safe harbor § 401(m) plan to satisfy the requirements for a QACA safe harbor § 401(k) plan.

Q-6. Does § 103(a) of the SECURE Act change any other requirements?

A-6. No. Section 103(a) of the SECURE Act does not change 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 § 401(k) plan under § 401(k)(12)(C) or 401(k)(13)(D)(i)(II) of the Code. For example, § 103(a) of the SECURE Act did not change the notice requirements under § 414(w)(4) of the Code for a plan that permits, pursuant to the eligible automatic contribution arrangement rules of § 414(w), an employee to elect to withdraw automatic elective contributions (and earnings) no later than 90 days after the date of the first elective contribution with

respect to the employee under the eligible automatic contribution arrangement. Accordingly, the § 414(w)(4) notice requirements continue to apply even if the plan satisfies the safe harbor nonelective contribution requirements of § 401(k)(12)(C) or 401(k)(13)(D)(i)(II).

As another example, § 103(a) of the SECURE Act did not change the requirement under § 1.401(k)-1(e)(2)(ii) that a cash or deferred arrangement (including an arrangement in a plan that satisfies the safe harbor nonelective contribution requirements of § 401(k)(12)(C) or 401(k)(13)(D)(i)(II) of the Code) provide an employee with an effective opportunity, determined based on all the relevant facts and circumstances, including the adequacy of notice of the availability of a cash or deferred election, to make (or change) a cash or deferred election at least once during each plan year.

Q-7. If a plan does not provide a safe harbor notice for a plan year beginning after December 31, 2019 (because, pursuant to § 103(a) of the SECURE Act and Q&A-4 or Q&A-5 of this notice, safe harbor notice requirements no longer apply to the plan), but the employer nevertheless provides a notice that includes a statement that the plan may be amended mid-year to reduce or suspend safe harbor nonelective contributions, as described in §§ 1.401(k)-3(g)(1)(ii)(A)(2) and 1.401(m)-3(h)(1)(ii)(A)(2), and that otherwise satisfies the requirements for a safe harbor notice, will the plan fail to satisfy the condition in § 1.401(k)-3(g)(1)(ii)(A)(2) or 1.401(m)-3(h)(1)(ii)(A)(2) that the statement regarding the possible mid-year reduction or suspension of safe harbor nonelective contributions be included in a safe harbor notice?

A-7. No. The plan will not fail to satisfy § 1.401(k)-3(g)(1)(ii)(A)(2) or 1.401(m)-3(h)(1)(ii)(A)(2) merely because the employer included the statement described in §§ 1.401(k)-3(g)(1)(ii)(A)(2) and 1.401(m)-3(h)(1)(ii)(A)(2) in a notice that otherwise satisfies the requirements for a safe harbor notice (rather than in an actual safe harbor notice).[4] Further, solely with respect to the first plan year beginning after December 31, 2020, a notice will be treated as satisfying the requirement under §§ 1.401(k)-3(d)(3) and 1.401(m)-3(e) that the notice be provided within a reasonable period before the beginning of the plan year if the notice is given to each eligible employee by the later of (1) 30 days before the beginning of the plan year, or (2) January 31, 2021. However, except as provided in Q&A-8 of this notice, the plan must satisfy all other requirements set forth in § 1.401(k)-3(g)(1)(ii) or 1.401(m)-3(h)(1)(ii), as applicable, in order to reduce or suspend safe harbor nonelective contributions during the plan year.

Q-8. If an employer amends a traditional or QACA safe harbor § 401(k) plan (or a traditional or QACA safe harbor § 401(m) plan) to reduce or suspend the plan's safe harbor nonelective contributions during a plan year, but later amends the plan to readopt the safe harbor nonelective contributions in accordance with § 401(k)(12)(F) or 401(k)(13)(F) for the entirety of the plan year, will the plan be required to satisfy the ADP or ACP test (as applicable) for the plan year or be subject to the top-heavy rules under § 416 for the plan year?

A-8. No. The retroactive plan amendment provisions of §§ 401(k)(12)(F) and 401(k)(13)(F) of the Code, as amended by § 103 of the SECURE Act, are not

[4] In addition, see section IV.A of Notice 2020-52, 2020-29 IRB 79, for certain temporary relief from the requirements of §§ 1.401(k)-3(g)(1)(ii)(A) and 1.401(m)-3(h)(1)(ii)(A).

conditioned on whether a prior plan amendment reduced or suspended safe harbor nonelective contributions during the plan year. Accordingly, the plan will not be required to satisfy either § 1.401(k)-3(g)(1)(ii)(E) (ADP testing) or 1.401(m)-3(h)(1)(ii)(E) (ACP testing) for the plan year and, pursuant to § 416(g)(4)(H) of the Code, the plan will not be subject to the top-heavy rules under § 416 for the plan year.[5]

Q-9. If a plan is amended pursuant to § 401(k)(12)(F)(i)(II) (traditional) or 401(k)(13)(F)(i)(II) (QACA) to adopt safe harbor nonelective contributions of at least four percent of compensation for a plan year, and the safe harbor nonelective contributions are contributed to the plan after the tax filing deadline for the prior taxable year (including extensions) but before the last day under § 401(k)(8)(A) for distributing excess contributions for the plan year, are the safe harbor nonelective contributions deductible for the prior taxable year?

A-9. No. Section 404(a)(6) provides that a taxpayer will be deemed to have made a payment on the last day of the prior taxable year if the payment is on account of that taxable year and is made not later than the time prescribed by law for filing the return for that taxable year (including extensions). Therefore, the safe harbor nonelective contributions are not deductible for the prior taxable year because they are contributed to the plan after the latest date permitted under § 404(a)(6) for a contribution to be deductible for the prior taxable year. However, the safe harbor nonelective contributions are deductible for the taxable year in which they are contributed to the plan, to the extent otherwise deductible under § 404.

[5] However, for a plan that terminates during the plan year and has a final plan year of less than 12 months, the guidance provided in this Q&A-8 does not change the requirements under § 1.401(k)-3(e)(4) or § 1.401(m)-3(f)(4).

Q-10. For plan years beginning after December 31, 2019, do the retroactive plan amendment requirements of § 401(k)(12)(F) or 401(k)(13)(F) of the Code, as amended by § 103 of the SECURE Act, apply to an amendment adopted during a plan year that adds the traditional or QACA safe harbor design set forth in § 401(k)(12) or 401(k)(13) of the Code for the plan year using safe harbor nonelective contributions (rather than the retroactive plan amendment rules in § 1.401(k)-3(f))?

A-10. Yes. Effective for plan years beginning after December 31, 2019, in order for a plan to be amended during a plan year to adopt the safe harbor design set forth in § 401(k)(12) or 401(k)(13) for the plan year using safe harbor nonelective contributions, the plan must satisfy the retroactive plan amendment requirements of § 401(k)(12)(F) or 401(k)(13)(F) of the Code, as amended by § 103 of the SECURE Act. Accordingly, the retroactive plan amendment rules of § 1.401(k)-3(f) no longer apply for those plan years.

Q-11. For plan years beginning after December 31, 2019, do the retroactive plan amendment requirements of § 401(k)(13)(F) of the Code, as amended by § 103 of the SECURE Act, apply to an amendment adopted during a plan year that adds the safe harbor design set forth in § 401(m)(12) of the Code (QACA) for the plan year using safe harbor nonelective contributions (rather than the retroactive plan amendment rules in § 1.401(m)-3(g))?

A-11. Yes. Effective for plan years beginning after December 31, 2019, in order for a plan to be amended during a plan year to adopt the safe harbor design set forth in § 401(m)(12) for the plan year using safe harbor nonelective contributions, the plan must satisfy the retroactive plan amendment requirements of § 401(k)(13)(F) of the

Code, as amended by § 103 of the SECURE Act. Accordingly, the retroactive plan amendment rules of § 1.401(m)-3(g) no longer apply for those plan years.

Q-12. For plan years beginning after December 31, 2019, do the retroactive plan amendment requirements of § 401(k)(12)(F) of the Code, as amended by § 103 of the SECURE Act, apply to an amendment adopted during a plan year that adds the safe harbor design set forth in § 401(m)(11) of the Code (traditional) for the plan year using safe harbor nonelective contributions (rather than the retroactive plan amendment rules in § 1.401(m)-3(g))?

A-12. No. As described in Q&A-4 of this notice, § 103(a) of the SECURE Act did not eliminate the safe harbor notice requirements of § 401(m)(11)(A) of the Code for a traditional safe harbor § 401(m) plan that satisfies the safe harbor nonelective contribution requirements of § 401(k)(12)(C). Accordingly, a plan sponsor must comply with the retroactive plan amendment rules of § 1.401(m)-3(g) (including both the contingent and follow-up notice requirements under § 1.401(k)-3(f)) in order for the plan to qualify as a safe harbor design set forth in § 401(m)(11) after the beginning of the plan year using safe harbor nonelective contributions.

Q-13. What plan amendment timing rules apply to a plan amendment that is adopted after the beginning of a plan year to provide that the safe harbor nonelective contribution requirements of § 401(k)(12)(C) (traditional) or 401(k)(13)(D)(i)(II) (QACA) will apply for the plan year, in accordance with § 103(b) or (c) of the SECURE Act?

A-13. In general, the plan amendment timing provisions of § 601 of the SECURE Act, as described in Q&A G-1 of Notice 2020-68, apply to a plan amendment adopted under § 103(b) or (c) of the SECURE Act (even if the applicable plan amendment

deadline under § 601 of the SECURE Act is later than the deadline under § 103(b) or (c) of the SECURE Act). In addition, a plan may be amended after the applicable plan amendment deadline under § 601 of the SECURE Act, in accordance with the plan amendment provisions of § 103(b) or (c) of the SECURE Act (which provide an exception to the general discretionary amendment deadlines set forth in Rev. Proc. 2016-37, as most recently modified by Rev. Proc. 2020-40).

V. SECTION 403(b) PLANS

This notice applies on similar terms to § 403(b) plans that apply the § 401(m) safe harbor rules pursuant to § 403(b)(12).

VI. REQUEST FOR COMMENTS

The Treasury Department and the IRS invite comments on the guidance in this notice and any other aspect of § 102 or 103 of the SECURE Act.

Comments should be submitted in writing on or before February 8, 2021, and should include a reference to Notice 2020-86. Comments may be submitted in one of two ways:

(1) Electronically via the Federal eRulemaking Portal at www.regulations.gov (type IRS-2020-0045 in the search field on the regulations.gov homepage to find this notice and submit comments).

(2) Alternatively, by mail to: Internal Revenue Service, Attn: CC:PA:LPD:PR (Notice 2020-86), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044.

All commenters are strongly encouraged to submit public comments electronically. The IRS expects to have limited personnel available to process public

comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Treasury Department and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket.

VII. DRAFTING INFORMATION

The principal author of this notice is Kara M. Soderstrom of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the Treasury Department and the IRS participated in the development of this guidance. For further information regarding this notice, contact Ms. Soderstrom at (202) 317-6799 (not a toll-free number).