



Amendments: Try, Try Again

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Your Presenters Today

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Amendment Timing: Interim and Discretionary Amendments

Extensions from Congress and IRS

SECURE Rule Allowing Retroactive Adoption

SECURE Rule for Retroactive SH 401(k)

Retroactive Corrective Amendments 1.401(a)(4)-11(g)

Retroactive EPCRS Amendments

TODAY'S AGENDA

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INTERIM AND DISCRETIONARY AMENDMENTS

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Two Types of Plan Amendments (Between Restatements)

- ▶ Interim Amendments
 - ▶ An amendment regarding a disqualifying provision which either:
 - ▶ Results in the failure of the plan to satisfy the qualification requirements because of a change in those requirements effective after 2001
 - ▶ Includes statutory change, change in regulations, or other change in IRS guidance
 - ▶ Provisions which are integral to those changed requirements
 - ▶ Could include the absence of a provision required by (or integral to) change in requirements
- ▶ Discretionary Amendments: Any amendment that isn't interim amendment

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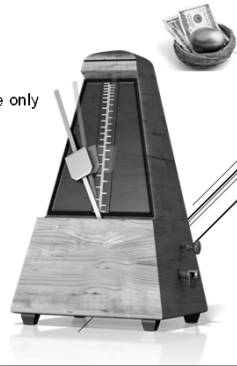
Examples

Interim Amendments	Discretionary Amendments
Change hardship necessity standards	CARES provisions
Add hardship casualty event (integral amendment)	Add in-service distribution
Add 10-year rule for RMDs	Add matching contribution
Change RMD tables to comply with new regulations	Add Roth deferrals
	Add top 20% rule to determine HCEs

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Basic Amendment Timing

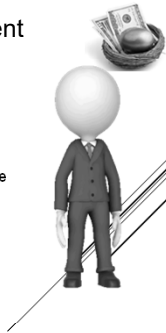
- ▶ Can't violate anti-cutback rule [IRC §411(d)(6)]
 - ▶ Amendments reducing benefits can be prospective only
- ▶ Discretionary amendment:
 - ▶ Last day of plan year put into effect
- ▶ Interim amendment:
 - ▶ One employer — later of:
 - ▶ Last day of plan year
 - ▶ Extended employer tax return deadline
 - ▶ More than one employer:
 - ▶ 10 months after end of plan year
- ▶ Special rules for governmental plans



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Timing Examples – Discretionary Amendment

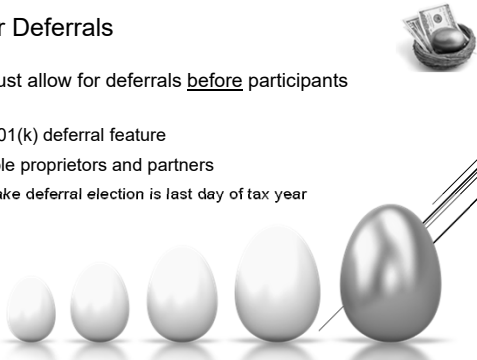
- ▶ Example 1:
 - ▶ Plan does not allow in-service distributions
 - ▶ Plan distributes to owner (in-service) at age 60 on 5/1/2021
 - ▶ All plans in our examples have calendar plan year
 - ▶ Deadline to amend plan is 12/31/2021
 - ▶ If plan isn't amended by deadline, distribution is operational failure
- ▶ Example 2:
 - ▶ Employer maintains deferral-only 401(k) plan
 - ▶ Employer amends plan, on 5/6/2021 but effective 1/1/2020, to add nonelective contribution
 - ▶ Amendment cannot be effective sooner than 1/1/2021
 - ▶ Nonelective contribution for 2020 is operational failure




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Special Rule for Deferrals

- ▶ Plan document must allow for deferrals before participants can make them
 - ▶ No retroactive 401(k) deferral feature
 - ▶ That includes sole proprietors and partners
 - ▶ Last day to make deferral election is last day of tax year



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CONGRESSIONAL AND IRS EXTENSIONS

The graphic features a circular emblem with the US Capitol building, a 1040 tax form shaped like a question mark, and a stack of money.

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Congress Frequently Allows Extra Time to Adopt Amendments

- ▶ Current examples: Last day of 2022 plan year
 - ▶ SECURE
 - ▶ CARES
 - ▶ 2020 Disasters
- ▶ It's OK to operate in conformance with law and amend by deadline
 - ▶ Amendment must be retroactively effective
 - ▶ Amendment must reflect plan operations

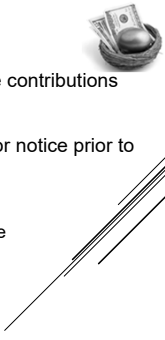


The graphic shows a 3D white figure holding three clocks, with a stack of money in the background.

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Example

- ▶ Employer has 401(k) plan with safe harbor nonelective contributions
- ▶ Plan document requires annual safe harbor notice
- ▶ Relying on SECURE, employer did not give safe harbor notice prior to 2021 plan year
- ▶ Employer adopts SECURE amendment 10/1/2022
 - ▶ Amendment removes requirement for safe harbor notice
- ▶ No operational failure



The graphic shows a 3D white figure holding a clock, with a stack of money in the background.

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IRS Frequently Grants Extensions



- ▶ Current IRS extensions:
 - ▶ BAMA reduction of minimum pension in-service distribution age to 59 ½
 - ▶ Deadline same as SECURE
 - ▶ Amendments to implement final hardship regulations
 - ▶ Deadline December 31, 2021
 - ▶ Applies to 401(k), 403(b), individually designed or preapproved



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SECURE ALLOWS RETROACTIVE ADOPTION



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New Code §401(b)(2)

- ▶ Allows employer to adopt qualified plan retroactively
- ▶ Deadline: extended due date of employer's return
- ▶ Example:
 - ▶ Sole proprietor adopts cash balance plan 5/6/2021
 - ▶ Retroactively effective 1/1/2020
 - ▶ Treated as though employer had adopted plan 12/31/2020

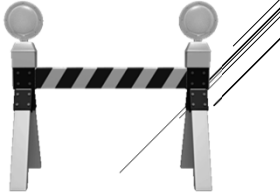


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Limitations of This Approach



- ▶ Applies to qualified plans; not 403(b) plans
- ▶ Does not allow retroactive adoption of elective deferrals
- ▶ Allows adoption of new plans; not amendment of existing plans
- ▶ Other rules can impact decision
 - ▶ Deadline to have after-tax contributions counted for 2020 calendar limitation year was 1/30/2021



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Addition of Nonelective Contribution



Employer wants to amend deferral-only 401(k) plan on 5/6/2021 to add nonelective contribution for 2020



Can they use Code §401(b)(2) to do it?	No
	New rule allows adoption, not amendment



Alternative: Employer can adopt profit-sharing plan 5/6/2021 retroactively effective to 1/1/2020 Later merge the two plans

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Do We Need to File 5500 for 2020 for Late Adopter?



- ▶ Do we need to file for 2020 if plan isn't adopted until 2021
- ▶ No published answer
- ▶ Well-sourced rumor:
 - ▶ No need to file for 2020
 - ▶ For DB plan, attached 2020 Schedule SB to 2021 return
 - ▶ Remember 8½ minimum funding deadline

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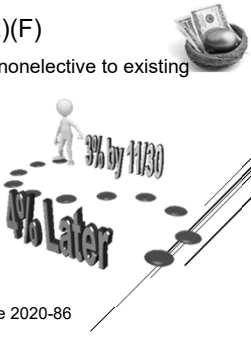
SECURE ALLOWS RETROACTIVE ADDITION OF SAFE HARBOR NONELECTIVE



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SECURE Change: Code §401(k)(12)(F)


- ▶ Can retroactively amend to add safe harbor nonelective to existing 401(k) plan
 - ▶ Any time up to 12 months after end of plan year
- ▶ Contribution rate:
 - ▶ 3% if adopted more than 30 days before end of plan year
 - ▶ November 30 or earlier for calendar year plan
 - ▶ 4% if adopted thereafter
- ▶ No requirement for notice to employees
 - ▶ Maybe notice not needed; IRS repealed in Notice 2020-86
 - ▶ Exception: ACP safe harbor




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It Works After Suspension! (Notice 2020-86)

- ▶ Example:
 - ▶ Employer started 2020 with safe harbor nonelective
 - ▶ Calendar year plan
 - ▶ Decided to suspend safe harbor
 - ▶ Gave notice March 31
 - ▶ Amended plan to prospectively eliminate SH nonelective effective April 30
 - ▶ Now decides it wants (and can afford) SH for 2020
 - ▶ Can retroactively amend to return to SH for 2020
 - ▶ 4% if after November 30, 2020
 - ▶ Can qualify for top heavy safe harbor exemption
- ▶ Won't work if plan used safe harbor match (basic or enhanced) at any time during plan year



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Late Amendment Doesn't Change Deduction Deadline 


▶ Example:


- ▶ November 1, 2021, employer amends 401(k) to add 4% safe harbor nonelective contribution for 2020
 - ▶ Immediately makes employer contribution
- ▶ Assume extended tax return due date was October 15, 2021
- ▶ Contribution is deductible on 2021 return
- ▶ Contribution is 415 annual addition for 2020 (since it was within 30 days of extended due date)

▶ Moral: Employer probably wants to decide about safe harbor before tax return deadline

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Addition of Nonelective Contribution 

 Employer wants to amend deferral-only 401(k) plan on 5/6/2021 to add nonelective contribution for 2020

 Can they use Code §401(k)(12)(F) to do it?

Yes!
But it's fully vested and allocated as safe harbor contribution
Can be greater than 3%/4%

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RETROACTIVE CORRECTIVE AMENDMENT UNDER TREAS. REG. §1.401(A)(4)-11(G) 



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Regulatory Correction under Treas. Reg. §1.401(a)(4)-11(g)



- » Designed to fix coverage, nondiscrimination and minimum participation
- » Allows employer 9½ months after plan year end to make "corrective amendment"
- » What can you do in a corrective amendment?
 - Let someone benefit who wasn't previously benefiting
 - Give someone more of an allocation or benefit than they otherwise would have had
 - Make benefit, right, or feature available to employees to whom it was not previously available
- » What does the amendment do?
 - For coverage, nondiscrimination, etc. amendment treated as though adopted on 1st day of plan year being corrected
 - Avoids disqualifying failure

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Main Retroactive Corrective Amendment Conditions



- ▶ Cannot reduce benefits prior to amendment
 - ▶ Similar to anti-cutback rule
- ▶ Effective as though in place on first day of plan year corrected
 - ▶ So, if problem is coverage, amendment allowing part-time EE to enter must be effective on first day of plan year, with contributions made according to the plan allocation/benefit formula
- ▶ Additional allocations must separately pass 410(b) and 401(a)(4)
 - ▶ Generally not a problem because they are for NHCEs
 - ▶ For 410(b), treat amendment participants as component plan
 - ▶ Not required if purpose of amendment is to bring plan into uniform allocation/benefit safe harbor

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Main Retroactive Corrective Amendment Conditions (cont'd)



- ▶ Corrective amendment must have substance
 - ▶ Can't give money to nonvested terminated participant, so vest the contribution, or
 - ▶ Give to active participants likely to vest in it



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Special Rule for Sections 401(k)/401(m)



- ▶ Scenario: 401(k) feature fails coverage for 2020
 - ▶ Employer adopts -11(g) amendment to expand 401(k) coverage
 - ▶ New NHCEs have had no chance to defer/get match: EPCRS
 - ▶ Must give each new NHCE a QNEC = NHCE ADP x compensation
 - ▶ Even in safe harbor plan (also need to give SH contribution)
 - ▶ No 50%/25% reduction
- ▶ Scenario: Plan also fails coverage for matching contributions
 - ▶ -11(g) amendment expands entitlement to matching contribution
 - ▶ Must give each new NHCE a QNEC = NHCE ACP x compensation

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More on Retroactive Corrective Amendments



- ▶ No regulatory requirement to fail coverage or nondiscrimination first
 - ▶ Sometimes impossible to prove
 - ▶ You can always try a different definition of compensation
 - ▶ However, some practitioners and agents read the rules to require that you fail first
 - ▶ Why do regs call it a corrective amendment?
- ▶ Normal Code §404 deduction rules apply to retroactive corrective amendment amounts (deadline and limits)

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Addition of Nonelective Contribution




Employer wants to amend deferral-only 401(k) plan on 5/6/2021 to add nonelective contribution for 2020



Can they use -11(g) amendment to do it?

Our answer: No
No relationship to any existing feature that could warrant correction


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EPCRS AMENDMENT TO EXPAND BENEFITS, RIGHTS, AND FEATURES

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EPCRS Retroactive Amendment to Conform to Plan Operations

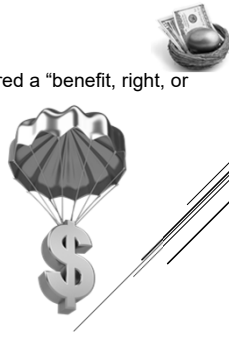


► Conditions:

- Normal self-correction requirements (not necessarily "significant")
- Satisfy three requirements:
 - a) Plan amendment results in increase of a benefit, right, or feature,
 - b) The increase in the benefit, right, or feature is available to all eligible employees; and
 - c) Providing the increase in the benefit, right, or feature is permitted under the Code and satisfies the correction principles of EPCRS, including:
 - Reasonable and appropriate
 - Keep assets in the plan
 - Not violate another specific rule

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What's a BRF?



► Is this rule limited to changes that are considered a "benefit, right, or feature"?

► What's a BRF?

- Treas. Reg. §1.401(a)(4)-4
- Probably meant more
 - Unofficially, that's what we've been told

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Addition of Nonelective Contribution



Employer wants to amend deferral-only 401(k) plan on 5/6/2021 to add nonelective contribution for 2020



Can they use EPCRS BRF amendment to do it?

Our answer: No
Must conform to prior operations; not change prior operations

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#1 Question!



- ▶ Employer A adopted plan
 - ▶ A in controlled group with B
 - ▶ Only A employees can participate
- ▶ Employees of Employer B were allowed to participate
 - ▶ B never signed participation agreement
- ▶ Self-correctable?

- ▶ We don't think so
- ▶ Not really a BRF
- ▶ It doesn't satisfy universality
- ▶ We recommend filing under VCP

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Speaker Information



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For Further Study



Joanne Pecina will demonstrate how to find more information on today's topic from the ERISApedia.com resources.



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