



# 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

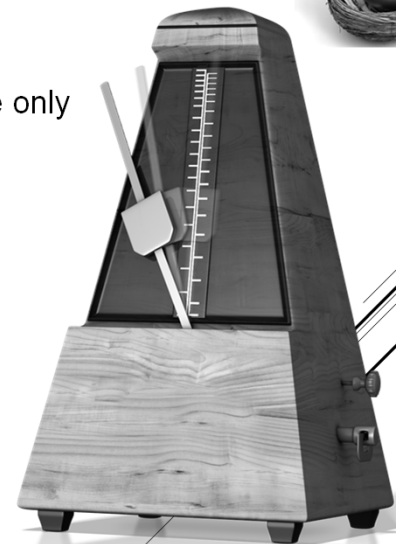


Interim Amendments	Discretionary Amendments
Change hardship necessity standards	CARES provisions
Add hardship casualty event (integral amendment)	Add in-service distribution
Add 10-year rule for RMDs	Add matching contribution
Change RMD tables to comply with new regulations	Add Roth deferrals
	Add top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

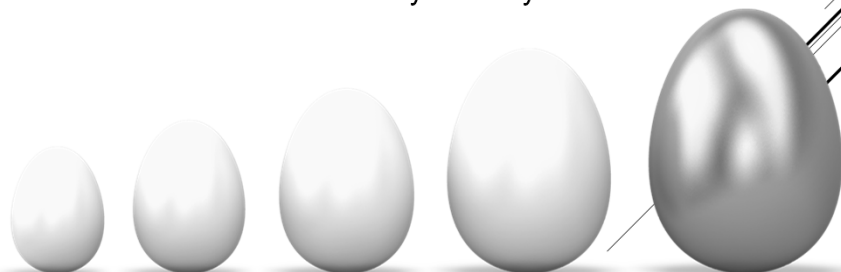
- Employer maintains deferral-only 401(k) plan
- Employer amends plan, on 5/6/2021 but effective 1/1/2020, to add nonelective contribution
- Amendment cannot be effective sooner than 1/1/2021
  - Nonelective contribution for 2020 is operational failure



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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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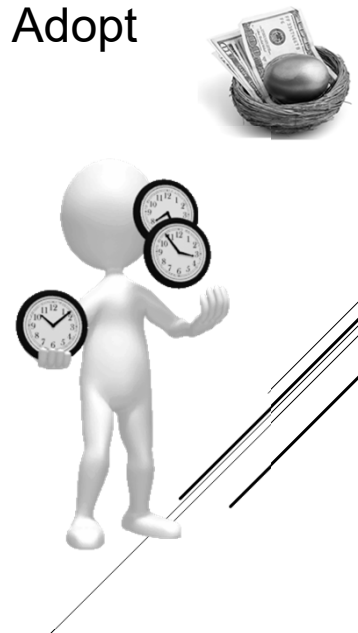


## CONGRESSIONAL AND IRS EXTENSIONS

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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



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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

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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

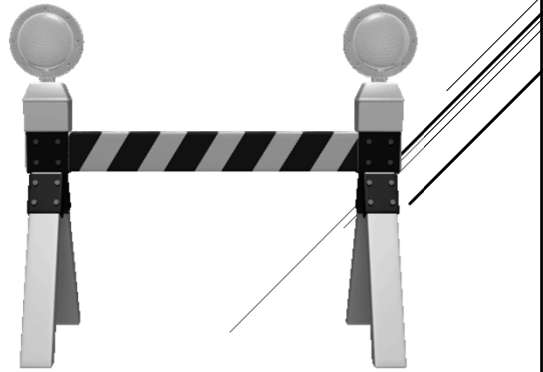


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## Limitations of This Approach



- ▶ 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?

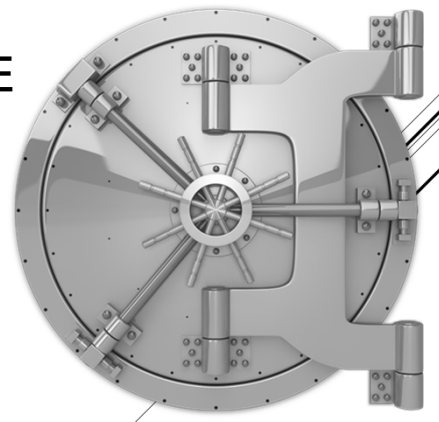


- ▶ Do we need to file for 2020 if plan isn't adopted until 2021
- ▶ No published answer
- ▶ Well-sourced rumor:
  - ▶ No need to file for 2020
  - ▶ For DB plan, attached 2020 Schedule SB to 2021 return
    - ▶ Remember 8½ minimum funding deadline



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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 1<sup>st</sup> 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.

