



# Safe and SECURE, or Is It? Exploring Safe Harbor 401(k) Plans




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1



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- ▶ Joanne Pecina
- ▶ Maureen Pesek
- ▶ Tim McCutcheon



2

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3

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4



Ilene Ferenczy  
S. Derrin Watson

Your Presenters Today

5



SECURE  
CHANGES  
TO SAFE  
HARBOR  
PLANS

6

## SECURE Amendment Deadline



- ▶ Amendments not required until last day of first plan year beginning in 2022
  - ▶ Governmental plans can wait until 2024
- ▶ Applies to mandatory and discretionary amendments
- ▶ Amendment must be retroactively effective and conform to plan operations
- ▶ Terminating plans should amend for SECURE prior to termination

7

## Example: Safe Harbor Notice



- ▶ Employer has safe harbor nonelective 401(k) plans
- ▶ Plan document requires all safe harbor 401(k) plans to provide safe harbor notice before beginning of plan year
- ▶ Employer doesn't give safe harbor notice before 2021 plan year
- ▶ Not an operational failure so long as:
  - ▶ Employer amends for SECURE by end of 2022 plan year
  - ▶ Amendment retroactively effective
  - ▶ Amendment conforms to plan operations

8

## But ... There Are Several Open Issues



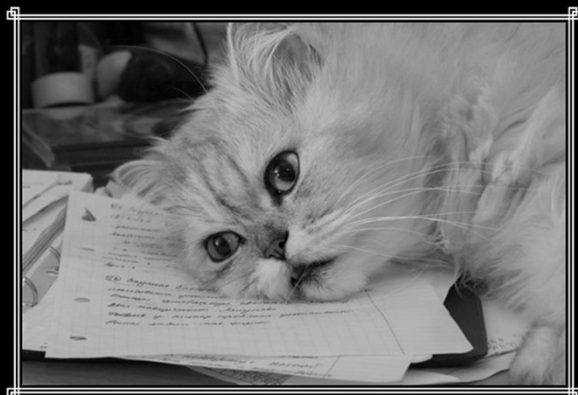
- ▶ IRS hasn't released guidance on safe harbor 401(k) issues
  - ▶ There are a lot of implications that aren't immediately obvious
- ▶ In the absence of guidance, safest position is to be conservative
  - ▶ Don't assume that the IRS will do what you consider logical and reasonable
  - ▶ Consider letting your client make the choice between conservative and aggressive

9

## SAFE HARBOR NOTICE



ACP safe harbor  
 Midyear suspensions  
 Midyear plan amendments



### PAPERWORK

You'll never be able to avoid it,  
 even if you're reincarnated as a cat.

10

## How to Sail into the ADP Safe Harbor

- ▶ Provide a 3% nonelective contribution
  - ▶ No need for notice
  - ▶ Satisfy plan year requirement
- ▶ Safe harbor match
  - ▶ Give a safe harbor notice
  - ▶ Satisfy plan year requirement
  - ▶ Give matching contribution
    - ▶ Basic match
    - ▶ QACA basic match
    - ▶ Enhanced match



11

## How to Sail into the ACP Safe Harbor

- ▶ Provide safe harbor notice
- ▶ Satisfy plan year requirement
- ▶ Make ADP safe harbor contribution
  - ▶ Match
  - ▶ Nonelective
- ▶ All matching formulas satisfy safe harbor restrictions
  - ▶ No climbing match
  - ▶ No HCE has higher rate of match than any NHCE at same levels of deferrals
  - ▶ Can't match deferrals > 6% of comp
  - ▶ Discretionary match can't exceed 4% of comp
- ▶ ACP safe harbor match can have vesting schedule



12

## WHY HAVE A SAFE HARBOR NOTICE FOR A NONELECTIVE PLAN?

1. Plan wants ACP safe harbor
  - ▶ Could use maybe notice
    - ▶ Doesn't commit you to safe harbor nonelective
    - ▶ Forces current year testing

13

## Requirements to Suspend Safe Harbor Contributions

- ▶ Applies to any suspension or reduction of safe harbor contributions
- ▶ Qualification: Either:
  - ▶ Operate at economic loss
  - ▶ Gave "maybe not" notice as part of safe harbor notice
- ▶ Requirements
  - ▶ Give 30 days advance notice
  - ▶ Allow all participants to change deferral elections
  - ▶ Execute amendment
    - ▶ Can't be effective retroactively
    - ▶ Can't be effective sooner than 30 days after notice
  - ▶ Fund safe harbor contributions through effective date of amendment
  - ▶ Pass ADP/ACP for full year using current year testing



14

## Will IRS Dispose of Maybe Not Notice/Suspension Notice for Nonelective Plans?



- ▶ They didn't in Notice 2020-52
  - ▶ But they gave short-term window to suspend without maybe notice
  - ▶ Window closed August 31
- ▶ Waived *advance* 30-day notice requirement for safe harbor nonelective
  - ▶ But required notice by August 31
- ▶ Notice 2020-52 acknowledged that they weren't taking into account SECURE provisions
- ▶ Conservative position: Assume the rules still apply

15

## WHY HAVE A SAFE HARBOR NOTICE FOR A NONELECTIVE PLAN?



1. Plan wants ACP safe harbor
  - ▶ Could use maybe notice
    - ▶ Doesn't commit you to safe harbor nonelective
    - ▶ Forces current year testing
2. Give "maybe not" notice to facilitate midyear suspension

16



## Midyear Safe Harbor Plan Amendments



- ▶ Notice 2016-16 permits most midyear safe harbor 401(k) amendments
- ▶ But if the amendment affects required safe harbor notice content:
  - ▶ Plan must provide “updated safe harbor notice”
  - ▶ Plan must give reasonable (30-day) opportunity to change deferral election



17

## Required Safe Harbor Notice Content



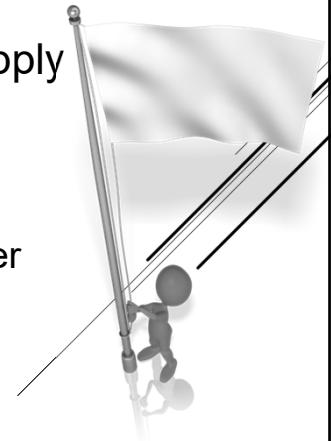
- ▶ Safe harbor contributions
- ▶ Any other plan contributions
- ▶ The type and amount of compensation that may be deferred
- ▶ How to make deferral elections
  - ▶ Includes any administrative requirements that apply to the elections
- ▶ Distribution provisions
- ▶ Vesting provisions
- ▶ Contact information
- ▶ QACA automatic deferral and investment provisions

18

## Will IRS Waive Notice 2016-16 Notice Requirement for Safe Harbor Nonelective Plans?



- ▶ They haven't yet
- ▶ Notice 2020-52 required it
- ▶ Conservative position: Assume the rules still apply
  - ▶ Even if you didn't give a notice before start of year
- ▶ Consider giving a notice and calling it an SMM
  - ▶ Because you'll have to give the SMM sooner or later



19

## RETROACTIVE ADDITION OF SAFE HARBOR 401(K) FEATURE



20

## Safe Harbor Plan Year Requirement in Regs



- ▶ General rule in regulations:
  - ▶ Plan provisions that satisfy safe harbor are adopted before beginning of plan year
    - ▶ Exception: Maybe notice
  - ▶ Provisions remain in effect entire 12-month plan year
    - ▶ Exceptions
      - ▶ Initial plan year
      - ▶ Change of plan year
      - ▶ Plan termination
      - ▶ Midyear suspension/reduction

21

## Initial Plan Year



- ▶ Newly established plan (or addition of 401(k) feature to profit-sharing plan) can have less than 12 months if:
  - ▶ Plan year is at least 3 months long
    - ▶ Or ASAP after employer established
  - ▶ Plan is not “a successor plan”
    - ▶ At least 50% of employees eligible to defer were eligible under another 401(k) plan maintained by the employer in the prior year

22

## Why the Three-Month Rule?

1. It guarantees that the safe harbor employer contributions will apply for at least a quarter of the year; and
2. It guarantees that the NHCEs will have at least three months during which they may save for their own retirement with the convenience of payroll deduction.



23

## New SECURE Act Rule

- ▶ ADP-tested plan can be amended after start of year to convert to safe harbor nonelective
- ▶ Minimum contribution depends on amendment timing
  - ▶ 3% nonelective
    - ▶ Any time before 30<sup>th</sup> day before close of plan year
      - ▶ Deadline: November 30 for calendar year plan
  - ▶ 4% nonelective
    - ▶ Deadline: 12 months after end of plan year
- ▶ Exception: Doesn't apply if "at any time during the plan year" the plan provided for ADP safe harbor match



24

## Thoughts about Retroactive Amendment

- ▶ The deadlines are absolute
  - ▶ Don't wait for SECURE amendment
- ▶ Can make it effective for just one plan year
  - ▶ Return to ADP-tested for following year
- ▶ Can be effective on permanent basis
  - ▶ Will want to have 4% contribution change to 3% going forward



25

## So, What Does This Change?

- ▶ New rule changes requirement that safe harbor provisions be in place before beginning of plan year
- ▶ New rule does not change requirement that safe harbor provisions be in effect for entire 12-month plan year
  - ▶ Subject to the regulatory exceptions
  - ▶ Cannot amend plan in November to provide safe harbor nonelective contribution just for the last two months



26

## So, Can We Now Adopt a New Safe Harbor 401(k) Plan with *very* Short Plan Year?



- ▶ The retroactive *amendment* provision does not authorize retroactive *adoption*
- ▶ 3-month rule is still in place
- ▶ If existing employer wants to adopt calendar year safe harbor nonelective 401(k) plan effective December 1, you can say:
  - ▶ Wait until January 1 (you can do ADP-tested for December)
  - ▶ We can have a plan year ending November 30, 2021
    - ▶ And then have short year for December 2021, converting to calendar in 2022
  - ▶ You can have a short year 12/1/20 to 2/28/21 and another from 3/1/21 to 12/31/21

27

## What About Return to Safe Harbor Following Suspension?



- ▶ Example 1:
  - ▶ Employer started 2020 with safe harbor match
  - ▶ Employer validly suspended safe harbor match April 30
    - ▶ Gave notice
    - ▶ Funded match through April 30
  - ▶ Employer wants to amend now to convert to safe harbor nonelective
  - ▶ Can't do it: Statute very clear
- ▶ Example 2:
  - ▶ Same facts except started with safe harbor nonelective
  - ▶ Regulations say plan must pass ADP test if suspend
  - ▶ Conservative position: Cannot retroactively return during 2020


28



## NEW QACA LIMIT

29

## QACA Automatic Deferrals Before SECURE



► Automatic deferral for participant whose first automatic deferral in calendar year QACA is January 15, 2020 paycheck:

Plan Year	Minimum Percentage	Maximum Percentage
Initial period: 2020, 2021	3%	10%
2022	4%	10%
2023	5%	10%
2024 and later	6%	10%

30

## QACA Automatic Deferrals After SECURE



- ▶ Automatic deferral for participant whose first automatic deferral in calendar year QACA is January 15, 2020 paycheck:

Plan Year	Minimum Percentage	Maximum Percentage
Initial period: 2020, 2021	3%	10%
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2024 and later	6%	15%

31

## Considerations



- ▶ If plan percentage set at 6%, new rules don't matter
- ▶ If plan has automatic deferral but isn't a QACA, new rules don't matter
- ▶ If QACA increases automatic deferral 1% per year up to 10% do you want it to increase to 15%?
  - ▶ Should be conscious decision, not inadvertent result of SECURE amendment
- ▶ Remember, ACP safe harbor won't apply if plan considers deferrals over 6% of compensation in computing match
  - ▶ SECURE Act 2 may change that for some QACAs

32



## Contact Information



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33

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34

## For Further Study



Joanne Pecina will demonstrate how to find more information on today's topic from the [ERISApedia.com](http://ERISApedia.com) resources.