

COVID-19 Relief and Other Guidance on Mid-Year Reductions or Suspensions of Contributions to Safe Harbor § 401(k) and § 401(m) Plans

Notice 2020-52

I. PURPOSE

This notice clarifies the requirements that apply to a mid-year amendment to a safe harbor § 401(k) or § 401(m) plan that reduces only contributions made on behalf of highly compensated employees (HCEs), as defined in § 414(q) of the Internal Revenue Code (Code). This notice also provides temporary relief in connection with the ongoing Coronavirus Disease 2019 (COVID-19) pandemic from certain requirements that would otherwise apply to a mid-year amendment to a safe harbor § 401(k) or § 401(m) plan adopted between March 13, 2020, and August 31, 2020, that reduces or suspends safe harbor contributions.

II. BACKGROUND

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

Under § 401(a)(4) 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 HCEs. 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 includes safe harbor contributions also may include contributions that are not safe harbor contributions. For example, a traditional safe harbor § 401(k) plan that includes safe harbor nonelective contributions may also provide either (1) a discretionary matching contribution of 4% 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 4% 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. 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 provisions for safe harbor § 401(m) plans.

Section 1.401(k)-3(g) provides that a plan that includes 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 I.R.B. 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).

D. COVID-19 Pandemic

On March 13, 2020, the President of the United States issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in response to the ongoing COVID-19 pandemic. In connection with the COVID-19 pandemic, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) have issued guidance postponing certain deadlines. See, for example, Notice 2020-51 (extending the 60-day rollover period for certain distributions to August 31, 2020), which was released on June 23, 2020.

During the ongoing COVID-19 pandemic, many employers are facing unexpected financial challenges. The Treasury Department and the IRS have received comments that, as a result of these unexpected financial challenges, employers may need to reduce or suspend contributions under their safe harbor plans in order to satisfy payroll and other operating costs. One option that an employer maintaining a safe harbor plan may be considering is to reduce plan contributions made on behalf of HCEs. However, an employer may be uncertain as to whether an amendment that reduces only contributions made on behalf of HCEs is subject to the conditions for reducing or suspending safe harbor contributions set forth in §§ 1.401(k)-3(g) and 1.401(m)-3(h). An employer may also be considering reducing or suspending a plan's safe harbor matching contributions or safe harbor nonelective contributions. However, an employer may be uncertain as to whether it is operating at an economic loss for the plan year and, due to the unexpected nature of the COVID-19 pandemic, the employer may not have foreseen the need to have included a statement in the plan's safe harbor notice that safe harbor contributions may be reduced mid-year. Further, in light of the

COVID-19 pandemic, an employer may have difficulty satisfying the timing requirements for providing notice of reductions or suspensions of safe harbor contributions.

III. CLARIFICATION OF REQUIREMENTS FOR REDUCING CONTRIBUTIONS MADE ON BEHALF OF HCEs

As described in section II.B of this notice, contributions made on behalf of HCEs are not included in the definition of safe harbor contributions. Accordingly, a mid-year change that reduces only contributions made on behalf of HCEs is not a reduction or suspension of safe harbor contributions described in §§ 1.401(k)-3(g) and 1.401(m)-3(h). However, a mid-year change that reduces only contributions made on behalf of HCEs would be a mid-year change to a plan's required safe harbor notice content for purposes of section III.B of Notice 2016-16. Therefore, in order to satisfy the notice and election opportunity conditions of section III.C of Notice 2016-16, which apply generally to changes that affect required safe harbor notice content and are not reductions or suspensions of safe harbor contributions, an updated safe harbor notice and an election opportunity must be provided to HCEs to whom the mid-year change applies, determined as of the date of issuance of the updated safe harbor notice.¹

IV. TEMPORARY COVID-19 RELIEF REGARDING REDUCTIONS OR SUSPENSIONS OF SAFE HARBOR CONTRIBUTIONS

Due to the unprecedented nature of the COVID-19 pandemic, the Treasury Department and the IRS are providing the following temporary relief with respect to a reduction or suspension of safe harbor contributions in order to provide employers with

¹ The guidance in this section III does not address the impact on Notice 2016-16 of section 103 of Division O of the Further Consolidated Appropriations Act, 2020, P.L. 116-94, known as the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act). Among other changes, SECURE Act section 103 eliminated the safe harbor notice requirements of § 401(k)(12)(D) and (13)(E) for plans that satisfy the safe harbor nonelective contribution requirements of either § 401(k)(12)(C) or 401(k)(13)(D)(i)(II).

more flexibility during the COVID-19 pandemic, while retaining certain existing participant protections:

A. Temporary Relief Related to Mid-Year Reductions or Suspensions of Safe Harbor Matching or Safe Harbor Nonelective Contributions

If a plan amendment that reduces or suspends safe harbor matching contributions or safe harbor nonelective contributions during a plan year is adopted between March 13, 2020, and August 31, 2020, then the plan will not be treated as failing to satisfy the requirement in §§ 1.401(k)-3(g)(1)(i)(A) and (ii)(A) and 1.401(m)-3(h)(1)(i)(A) and (ii)(A) that the employer either (1) is operating at an economic loss (as described in § 412(c)(2)(A)) for the plan year, or (2) has included in the plan's safe harbor notice (as described in § 1.401(k)-3(d)) for the plan year a statement that (a) the plan may be amended during the plan year to reduce or suspend the safe harbor contributions and (b) the reduction or suspension will not apply until at least 30 days after all eligible employees are provided notice of the reduction or suspension.

B. Temporary Relief Related to the Supplemental Notice Requirement for Mid-Year Reductions or Suspensions of Safe Harbor 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 plan will not be treated as failing to satisfy the requirements of § 1.401(k)-3(g)(1)(ii) or § 1.401(m)-3(h)(1)(ii) merely because a supplemental notice is not provided to eligible employees at least 30 days before the reduction or suspension of safe harbor nonelective contributions is effective, provided that (1) the supplemental notice is provided to eligible employees no later than August 31, 2020, and (2) the plan

amendment that reduces or suspends safe harbor nonelective contributions is adopted no later than the effective date of the reduction or suspension of safe harbor nonelective contributions.

This 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 under § 1.401(k)-3(g)(1)(i) or 1.401(m)-3(h)(1)(i) because matching contribution levels communicated to employees directly affect employee decisions regarding elective contributions (and, if applicable, employee contributions).

V. SECTION 403(b) PLANS

Sections III and IV of this notice apply on similar terms to § 403(b) plans that apply the § 401(m) safe harbor rules pursuant to § 403(b)(12).

VI. EFFECT ON OTHER DOCUMENTS

Notice 2016-16 is clarified by section III of this notice.

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).