AMERICAN RETIREMENT ASSOCIATION

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Working for America's Retirement

February 5, 2021

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

RE: Notice 2020-86 Guidance on Sections 102 and 103 of the SECURE Act with Respect to Safe Harbor Plans

The American Retirement Association ("ARA") is writing in response to Internal Revenue Service Notice 2020-86 (the "Notice") regarding comments on Sections 102 and 103 of the SECURE Act, Public Law 116-94, and in particular Section 103, which eliminates certain safe harbor notice requirements for plans that provide safe harbor nonelective contributions and adds provisions for the retroactive adoption of safe harbor status. ARA thanks the Internal Revenue Service ("IRS" or "Service") and the Department of the Treasury ("Treasury") for the opportunity to provide input on these very important matters.

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the American Society of Enrolled Actuaries ("ASEA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has nearly 28,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

ARA thanks the Service and Treasury for their willingness to consider comments regarding the guidance provided in the Notice and other aspects of Sections 102 and 103 of the SECURE Act as they develop regulations to fully implement these sections of the SECURE Act.

ARA recommends that the Service:

I. Amend the Treasury Regulations to align with Section 103 of the SECURE Act by eliminating the requirement to provide a notice reserving the plan sponsor's right to reduce or suspend the safe harbor nonelective contribution mid plan year.

II. Clarify Q&A-12 of the Notice with respect to whether the deadline for adopting an ACP safe harbor amendment would preclude safe harbor treatment in certain situations where the plan sponsor adopts a 4% nonelective safe harbor retroactively.

ARA believes that each of the suggestions:

- Will improve economic efficiency by reducing the complexity and burdens on the plan sponsor and eliminating notices that offer nominal information or protections to plan participants.

- Will promote sound tax administration by helping plan sponsors and practitioners to maintain retirement plans.

- Can be drafted in a manner that can be easily understood and applied by plan sponsors and practitioners, thereby reducing the likelihood of administrative errors resulting in operational or document failures necessitating correction.

Discussion

I. Amend the Treasury Regulations to align with Section 103 of the SECURE Act by eliminating the requirement to provide a notice reserving the plan sponsor's right to reduce or suspend the safe harbor nonelective contribution mid plan year.

A plan sponsor is permitted to reduce or suspend safe harbor nonelective contributions during a year only by showing that it was operating at an economic loss or by reserving its right to reduce or suspend safe harbor nonelective contributions in a safe harbor notice provided before the beginning of the plan year. Treas. Reg. §1.401(k)-3(g)(1)(ii)(A)(2) and §1.401(m)-3(h)(1)(ii)(A)(2). The SECURE Act eliminated for plans utilizing safe harbor nonelective contributions the requirement to provide a safe harbor notice before the beginning of the plan year, which is the notice that was used by plan sponsors to reserve this right as required by the regulations. Recognizing a safe harbor notice is no longer required, the Notice requires a plan sponsor that wishes to reserve its right to reduce or suspend the safe harbor nonelective contribution to provide a notice "in such a manner that otherwise satisfies the requirements for a safe harbor notice but is not an actual safe harbor notice." Notice Q&A-7.

ARA recommends that the IRS eliminate the requirement to provide a notice before the plan year in order for the plan sponsor to preserve its right to reduce or suspend the safe harbor non-elective contribution during the plan year. In connection with the adoption of the SECURE Act, the House Ways and Means Committee concluded that "more flexible rules, combined with employee protections, will better facilitate the adoption of nonelective contribution 401(k) safe harbor plans." Further, "some aspects of the current procedural rules relating to adoption of the nonelective contribution 401(k) safe harbor, intended to protect employees, may serve as a barrier." H.R. Rep. No. 116-65, pt. II, at 48 (2019). While a plan sponsor could simply forgo flexibility by not giving a notice, as the year 2020 demonstrated, unforeseen circumstances may arise that

necessitate the cessation of safe harbor contributions, so plan sponsors will deem it necessary to follow whatever procedural requirements the Service establishes to ensure they may adjust the plan contributions. Thus, plan sponsors will deem it essential to provide the notice reserving the right to reduce or suspend a safe harbor nonelective contribution, which undercuts the intention of the SECURE Act and the House Ways and Means Committee by retaining a barrier to adoption of nonelective contribution 401(k) safe harbor plans. Further, elimination of this notice is appropriate because whether a participant is notified annually of the plan sponsor's right to suspend the nonelective contribution will not impact the participant's decisions related to elective deferrals. Finally, retaining the notice requirement may contribute to participant confusion, desensitize participants to important plan communications, and discourage plan sponsors from adopting nonelective contribution 401(k) safe harbor plans.

II. Clarify Q&A-12 of the Notice with respect to whether the deadline for adopting an ACP safe harbor amendment would preclude safe harbor treatment in certain situations where the plan sponsor adopts a 4% nonelective safe harbor retroactively.

The Notice clarifies that the SECURE Act did not eliminate the notice requirements under Code Section 401(m)(11)(A)(ii). If a traditional 401(k) plan provides for matching contributions otherwise intended to satisfy the ACP safe harbor requirements, the requirements under Treas. Reg. §1.401(m)-3(g) apply (allowing adoption of a 3% safe harbor nonelective contribution up to 30 days before the end of the plan year). As a result, if a plan sponsor wants to retroactively amend a plan to provide for safe harbor nonelective contributions (to satisfy the ADP test) and the plan permits matching contributions that would satisfy the ACP safe harbor requirements, the regulatory requirements under Treas. Reg. §1.401(m)-3(g) would have to be satisfied for the plan to be exempt from both ADP and ACP testing for the plan year (*i.e.*, the contingent notice and follow-up notices would have to be provided). Further, the amendment would have to be adopted no later than 30 days before the last day of the plan year. However, plan sponsors are now permitted to adopt a non-elective contribution safe harbor design using a 4% nonelective contribution less than 30 days before the end of the plan year, up until the last day of the next plan year. Currently, it would appear that a plan sponsor utilizing that 4% safe harbor will not be permitted to treat the matching contribution as satisfying the ACP safe harbor requirements even though the notices and matching formula would otherwise satisfy the ACP safe harbor requirements, merely due to the timing of the plan amendment. This can be illustrated in the following example:

> The ABC 401(k) plan is a calendar-year plan that includes a discretionary matching contribution that would otherwise satisfy the ACP test safe harbor (*e.g.*, only deferrals up to 6% of compensation are taken in account, the maximum match is 4% of compensation and there are no allocation conditions on the match). Prior to the start of the 2021 calendar plan year ABC provides a "contingent safe harbor notice" to participants stating that the plan might be amended to provide for a safe harbor nonelective

contribution for 2021.[1] ABC may amend the plan between December 1, 2021 and December 31, 2022, to satisfy the ADP test safe harbor using the 4% nonelective contribution. However, the ABC plan would apparently not be treated as satisfying the ACP test safe harbor because the amendment is adopted after December 1, 2021 (*i.e.*, later than 30 days before the end of the 2021 plan year) and a follow-up notice is not provided by November 30, 2021.

ARA recommends that the IRS modify the regulations or clarify that a plan that is amended to provide for the 4% safe harbor nonelective contribution by the latest date for adopting such amendment also will be treated as satisfying the ACP test safe harbor assuming all other requirements of the ACP test safe harbor are satisfied. ***ARA also recommends*** that a follow-up notice described in Treas. Reg. §1.401(k)-3(f)(3) not be required for adoption of a non-elective safe harbor contribution in this instance because it will not affect a participant's decision to participate in the plan and may cause confusion when given in a subsequent plan year. If elimination of the follow up notice is not acceptable, ARA alternatively recommends that the IRS permit the follow up notice be provided 30 days after the plan is amended.

This change or clarification is appropriate because it furthers the intention of the SECURE Act and the House Ways and Means Committee by eliminating a barrier to adoption of nonelective contribution 401(k) safe harbor plans and it furthers the policy objective of simplifying administration of safe harbor plans by providing uniform rules for all permitted nonelective safe harbor designs and streamlining the notices required. This simplicity and uniformity will promote proper plan administration and reduce complexity.

If you have any questions regarding the matters discussed herein, please contact Kelsey N.H. Mayo, Director of Regulatory Policy, at KMayo@USAretirement.org or (704) 342-5307. Thank you for your time and consideration.

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[1] While the "contingent safe harbor notice" is not needed for the nonelective safe harbor, a "contingent safe harbor notice" is required if ABC wants to preserve the ability to be an ACP test safe harbor for 2021.

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