

## Employee Benefits & Executive Compensation ADVISORY

November 3, 2009

### Do You Need to Send an Annual Notice to Plan Participants? If So, You May Need to Do So by December 1, 2009

Plan sponsors of defined contribution qualified plans may need to issue one or more annual notices to participants prior to the end of each plan year. Failure to issue a required annual notice can have a significant impact. For example, if a plan sponsor forgets to issue the annual 401(k) safe harbor notice, the plan could lose its safe harbor status and be forced to limit (or refund) contributions by highly compensated employees.

This advisory focuses on the escalating number of year-end notices that defined contribution plans must issue to participants. These notices must be distributed within a reasonable period of time prior to the start of the plan year. The accompanying charts describe these deadlines.

The following table provides a list of the most common notices that plan sponsors may need to distribute:

- Traditional Safe Harbor 401(k) Notice
- Qualified Automatic Contribution Arrangements for a Safe Harbor 401(k) Notice
- Eligible Automatic Contribution Arrangement Notice
- Qualified Default Investment Alternative Notice (QDIA)
- Non-Safe Harbor Automatic Contribution Arrangement Notice

### Breaking News...

#### IRS Announces 2010 Cost-of-Living Adjustments for Retirement Plans

The IRS recently announced that the dollar limits for qualified retirement plans (and generally for 403(b) and 457(b) plans) will remain unchanged for 2010 because the applicable cost-of-living indexes have not increased.

The following is a list of some important retirement plan limits for 2010:

- **Elective Deferral Contributions.** The annual limit on elective deferrals to Section 401(k) plans, Section 403(b) annuity contracts and eligible Section 457 plans remains \$16,500 for 2010.
- **Age 50 and Older Catch-Up Contributions.** The annual limit for catch-up contributions for individuals age 50 and older under Section 401(k) plans, Section 403(b) annuity contracts and eligible Section 457 plans sponsored by governmental entities remains \$5,500 for 2010.
- **Includable Compensation.** The 2010 limit on total compensation under 401(a)(17) remains \$245,000.
- **Defined Contribution Annual Addition Limit.** The 2010 dollar limit on aggregate annual additions remains \$49,000.
- **Highly Compensated Employees.** An individual earning more than \$110,000 in 2009 will be treated as an HCE in 2010.

Please contact your Alston & Bird attorney if you have any questions about the 2010 plan limits.

Notice	Summary of Content	When/To Whom	Potential Consequence for Failing to Timely Deliver Notice
<p>Traditional Safe Harbor 401(k) Notice (Code Section 401(k)(12))</p>	<ul style="list-style-type: none"> <li>• Description of safe harbor matching contribution formula or safe harbor nonelective contribution formula</li> <li>• Other available employer contributions</li> <li>• Type and amount of compensation that can be deferred</li> <li>• How and when to make a cash or deferred election (including administrative requirements)</li> <li>• Withdrawal and vesting provisions</li> <li>• How to obtain additional information such as an SPD</li> </ul>	<p>Disclosure is required to all eligible employees</p> <p>The notice is deemed to have been given timely if it is provided 30 to 90 days before the beginning of the plan year (exceptions for new plan and newly eligible employees)</p>	<p>Possible loss of safe harbor status (requiring discrimination testing, and possibly limiting or refunding contributions for highly compensated employees)</p> <p>Could be a qualification defect</p>
<p>Qualified Automatic Contribution Arrangements (QACA) – Safe Harbor 401(k) Notice (Code Section 401(k)(13))</p>	<ul style="list-style-type: none"> <li>• The same items described in the traditional safe harbor 401(k) notice above</li> <li>• The level of elective contributions that will be made if the employee does not make an affirmative election</li> <li>• The employee’s right to not have elective contributions made, or to change the amounts</li> <li>• How contributions will be invested, including how contributions will be invested in the absence of an investment election by the employee</li> </ul>	<p>Disclosure is required to all eligible employees</p> <p>The notice is deemed to have been given timely if it is provided 30 to 90 days before the beginning of the plan year (exceptions for new plan and newly eligible employees)</p>	<p>Possible loss of safe harbor status (requiring discrimination testing)</p> <p>Note that if the QACA arrangement uses a QDIA, under DOL Regulation 2560.502c-4, a civil monetary penalty of \$1,100 per day for each violation may be assessed</p>
<p>Eligible Automatic Contribution Arrangement (EACA) (Code Section 414(w))</p>	<ul style="list-style-type: none"> <li>• The same items described in the traditional safe harbor 401(k) notice above (to the extent applicable)</li> <li>• The same items described in the Qualified Automatic Contribution Arrangement – Safe Harbor 401(k) Notice above</li> <li>• The employee’s right to make a permissive withdrawal and the procedures for electing such a withdrawal</li> </ul>	<p>Disclosure is required to all eligible employees</p> <p>The notice is deemed to have been given timely if it is provided 30 to 90 days before the beginning of the plan year (exceptions for new plan and newly eligible employees)</p>	<p>Possible loss of ability to return contributions to participants</p>

Notice	Summary of Content	When/To Whom	Potential Consequence for Failing to Timely Deliver Notice
Qualified Default Investment Alternative “QDIA Notice” (ERISA Section 404(c)(5))	<ul style="list-style-type: none"> <li>• A description of the conditions under which assets will be invested in a QDIA</li> <li>• An explanation of the right of participants to direct the investment of assets in their individual accounts</li> <li>• A description of the QDIA including a description of the fees, investment objectives and risk and return characteristics</li> </ul>	Annual notice must be provided to each individual who has not made an affirmative deferral election under the plan at least 30 days before each plan year	Potential loss of 404(c) fiduciary protection for default investments until corrected
Non-Safe Harbor Automatic Enrollment Feature with a QDIA feature (ERISA Sections 404(c)(5); 514(e))	<ul style="list-style-type: none"> <li>• The same items described in the QDIA notice above</li> <li>• The level of elective contributions that will be made if the employee does not make an affirmative election</li> <li>• The employee’s right to not have elective contributions made, or to change the amounts</li> </ul>	Disclosure is required to all eligible employees  Notice must be provided within a “reasonable time” before each plan year (e.g., at least 30 days)	Under DOL Regulation 2560.502c-4, a civil monetary penalty of \$1,100 per day for each violation may be assessed

Plan sponsors should pay careful attention to these notices, especially those for the traditional 401(k) safe harbor and for the Qualified Automatic Contribution Arrangement (QACA). The IRS has generally taken the position that mid-year changes to any plan design feature described in a plan’s annual safe harbor notice may cause the plan to violate the 401(k) safe harbor requirements. The IRS has provided specific exceptions for the addition of a Roth 401(k) feature and certain changes to hardship distribution procedures (*see Announcement 2007-59*). Plan sponsors may not be able to make any other changes to plan features that were previously described in the annual safe harbor notice (e.g., changes to the plan’s vesting schedule). The IRS’s reasoning is that the notice may cause the participants to rely on the information contained in the notice, so that mid-year changes would harm the participants. We hope the IRS clarifies its position in the future, but in the meantime, it may be helpful to consider including a disclaimer in the notice stating that plan provisions described in the notice that are not required for safe harbor treatment may be amended mid-year.

Plan sponsors can combine multiple notices in a single notice. You should also note that these notices may also require distribution during the plan year to newly eligible participants or rehired participants. Finally, please keep in mind that sponsors of defined contribution plans may have other notices they must provide participants, such as diversification notices ((ERISA Section 101(m); IRC Section 401(a)(35)) and quarterly or annual participant statements (ERISA Section 105(a)).

Please do not hesitate to contact your Alston & Bird attorney if you have any questions about notice obligations or if we can assist you in providing proper notices for your qualified retirement plan.

If you would like to receive future *Employee Benefits & Executive Compensation Advisories* electronically, please forward your contact information including email address to [employeebenefits.advisory@alston.com](mailto:employeebenefits.advisory@alston.com). Be sure to put “**subscribe**” in the subject line.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

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