

## Employee Benefits & Executive Compensation ADVISORY

October 30, 2008

### Do You Need to Send an Annual Notice to Plan Participants? If So, You May Need to Do So by December 1, 2008

Plan sponsors of 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 401(k) plan will violate the safe harbor requirements.

Several years ago, the IRS introduced us to the concept of annual notices by requiring plan sponsors of 401(k) safe harbor plans to issue an annual notice to participants. Today, the number of annual notice requirements has increased. This advisory focuses on typical annual notices that defined contribution plans must issue to participants. For these typical notices, plan sponsors must distribute the notices no later than 30 days before the end of the plan year. For a 2009 calendar year plan, the deadline would be December 1, 2008.

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 Arrangement – Safe Harbor 401(k) Notice
- Eligible Automatic Contribution Arrangement Notice
- Qualified Default Investment Alternative Notice (QDIA)

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Notice	Summary of Content	When/To Whom	Potential Consequence for Failing to Timely Deliver Notice
<b>Traditional Safe Harbor 401(k) Notice (Code Section 401(k)(12))</b>	<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. The notice is considered 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>Correction may require voluntary filing with the IRS, including compliance fee (VCP); Possible loss of safe harbor status (requiring discrimination testing)</p>
<b>Qualified Automatic Contribution Arrangement – Safe Harbor 401(k) Notice (Code Section 401(k)(13))</b>	<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. The notice is considered 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>Correction may require voluntary filing with the IRS, including compliance fee (VCP); Possible loss of safe harbor status (requiring discrimination testing)</p>
<b>Eligible Automatic Contribution Arrangement Notice (Code Section 414(w))</b>	<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. The notice is considered 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>Correction may require voluntary filing with the IRS, including compliance fee (VCP); Possible loss of ability to return contributions to participants</p>
<b>Qualified Default Investment Alternative “QDIA Notice”</b>	<ul style="list-style-type: none"> <li>a description of when 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>	<p>Notice must be provided to each individual who has not made an affirmative deferral election under the plan at least 30 days before plan eligibility or 30 days in advance of the first investment in a QDIA.</p>	<p>Potential loss of 404(c) fiduciary protection for default investments until corrected</p>

If more than one notice must be sent to participants, plan sponsors can combine the notices in a single mailing. 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 to participants, such as diversification notices (ERISA Section 101(m); IRC Section 401(a)(35)) and participant statements (ERISA Section 105(a)).

Plan sponsors should review their qualified retirement plans to ensure compliance with the notice deadlines. Please do not hesitate to contact your Alston & Bird LLP attorney if you have any questions about notice obligations, or if we can assist you in providing proper notices for your qualified retirement plan.

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If you would like to receive future *Employee Benefits and 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.

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