

Employee Benefits & Executive Compensation ADVISORY

October 31, 2011

Do You Need to Send an Annual Notice to Plan Participants? If So, You May Need to Do So by December 1, 2011 *

Plan sponsors of defined contribution qualified plans may need to issue one or more annual notices to participants before the end of each plan year. Failure to issue a required annual notice can have significant consequences. 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 serves as a reminder of the multiple year-end notices that defined contribution plans must issue to participants. These notices must be distributed within a reasonable period of time, typically 30 days, prior to the start of the plan year.

The following table provides a list of the content and deadlines for the most common notices that plan sponsors may need to distribute. It includes:

- 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

* This deadline applies to calendar year plans. Non-calendar year plans have similar requirements, though their deadlines may be different.

Breaking News...

IRS Announces 2012 Cost-of-Living Adjustments for Retirement Plans

The IRS recently announced changes in the dollar limits for qualified retirement plans (and generally for 403(b) and 457(b) plans) for 2012 because the applicable cost-of-living indices have increased.

The following is a list of some important retirement plan limits for 2012:

- The annual limit on **elective deferrals** to Section 401(k) plans, Section 403(b) annuity contracts and eligible Section 457 plans is \$17,000.
- The annual limit for **catch-up contributions** for individuals age 50 and older to Section 401(k) plans, Section 403(b) annuity contracts and eligible Section 457 plans sponsored by governmental entities is \$5,500 (unchanged from 2011).
- The limit on **total compensation** used in computing contributions and benefits under Section 401(a)(17) is \$250,000.
- The dollar limit on **aggregate annual additions to defined contribution plans** is \$50,000 (plus any catch-up contributions).
- The dollar limit on annual benefits in a **defined benefit plan** under Section 415(b) (before adjustment for age and form) is \$200,000.
- An individual earning more than \$115,000 in 2012 will generally be a **highly compensated employee** in 2013.

Please contact your Alston & Bird LLP attorney if you have any questions about the 2012 plan limits.

Notice	Summary of Content	When/To Whom	Potential Consequence for Failing to Timely Deliver Notice
Traditional Safe Harbor 401(k) Notice (Code Section 401(k)(12))	<ul style="list-style-type: none"> • Description of safe harbor matching contribution formula or safe harbor nonelective contribution formula • Other available employer contributions • Type and amount of compensation that can be deferred • How and when to make a cash or deferred election (including administrative requirements) • Withdrawal and vesting provisions • How to obtain additional information such as an SPD 	<p>Disclosure is required to all eligible employees. 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). Could be a qualification defect.</p>
Qualified Automatic Contribution Arrangements (QACA) – Safe Harbor 401(k) Notice (Code Section 401(k) (13))	<ul style="list-style-type: none"> • The same items described in the traditional safe harbor 401(k) notice above • The level of elective contributions that will be made if the employee does not make an affirmative election • The employee’s right to not have elective contributions made, or to change the amounts • How contributions will be invested, including how contributions will be invested in the absence of an investment election by the employee 	<p>Disclosure is required to all eligible employees. 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>If the QACA arrangement uses a QDIA, under DOL Regulation 2560.502c-4, a civil penalty of \$1,100 per day per violation may be assessed if the notice is not provided.</p>
Eligible Automatic Contribution Arrangement (EACA) (Code Section 414(w))	<ul style="list-style-type: none"> • The same items described in the traditional safe harbor 401(k) notice above (to the extent applicable) • The same items described in the Qualified Automatic Contribution Arrangement – Safe Harbor 401(k) Notice above • The employee’s right to make a permissive withdrawal and the procedures for electing such a withdrawal 	<p>Disclosure is required to all eligible employees. 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"> • A description of the conditions under which assets will be invested in a QDIA • An explanation of the right of participants to direct the investment of assets in their individual accounts • A description of the QDIA, including a description of the fees, investment objectives and risk and return characteristics 	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"> • The same items described in the QDIA notice above • The level of elective contributions that will be made if the employee does not make an affirmative election • The employee’s right to not have elective contributions made, or to change the amounts 	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 penalty of \$1,100 per day per violation may be assessed if the notice is not provided.

Practice Pointers

- The IRS has generally taken the position that mid-year changes to any plan 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, and thus 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 include a disclaimer in the notice specifically stating which plan provisions described in the notice may be amended mid-year, so as not to turn your notice into an unnecessary promise.
- Plan sponsors can combine multiple notices in a single notice.
- These notices may also require distribution during the plan year to newly eligible participants or rehired participants.
- Sponsors of defined contribution plans may also 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 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.

This advisory was written by Kyle R. Woods.

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. Be sure to put “**subscribe**” in the subject line.

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