

## Employee Benefits & Executive Compensation ADVISORY

September 26, 2012

### Do You Need to Send an Annual Notice to Plan Participants? If so, You May Need to Do so by December 1, 2012\*

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 (QACA) 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

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

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. 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>

Notice	Summary of Content	When/to Whom	Potential Consequence for Failing to Timely Deliver Notice
<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. 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>

Notice	Summary of Content	When/to Whom	Potential Consequence for Failing to Timely Deliver Notice
<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 QACA – 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 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
<p>Qualified Default Investment Alternative “QDIA Notice” (ERISA Section 404(c)(5))</p>	<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>	<p>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.</p>	<p>Potential loss of 404(c) fiduciary protection for default investments until corrected.</p>
Notice	Summary of Content	When/to Whom	Potential Consequence for Failing to Timely Deliver Notice
<p>Non-Safe Harbor Automatic Enrollment Feature with a QDIA feature (ERISA Sections 404(c)(5); 514(e))</p>	<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>	<p>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).</p>	<p>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>

Notice	Summary of Content	When/to Whom	Potential Consequence for Failing to Timely Deliver Notice
Annual Fee Disclosures under ERISA Section 404.	<ul style="list-style-type: none"> <li>• Tabular disclosure showing performance over 1, 3, and 10 year periods</li> <li>• Summary of investment fees</li> <li>• Information on how to change investments</li> </ul>	Annually to each participant or beneficiary who can direct investment of an account – see “More on Fee Disclosure” below (no later than August 29, 2013).	Fees deemed unreasonable, causing a potential prohibited transaction.

### More on Fee Disclosure

No later than August 30, 2012, plan administrators were required to provide participants with fee disclosures. These notices are required at least annually thereafter. Calendar year plans may find it beneficial to provide these disclosures at the same time as year-end notices. If a plan administrator elects to provide an updated annual notice at year-end, future annual fee notices can also be given at year-end. In addition, a plan administrator can presumably change the 12-month reporting cycle by simply giving an annual notice at any time. If a plan administrator does not change the 12-month cycle, the deadline for the next annual fee disclosure is August 29, 2013.

In addition to the annual fee notice, plan administrators may be required to issue a mid-year amended fee notice in advance of the change. For example, if the investment fund line-up changes during the year, an updated notice must be distributed prior to the change. Similarly, if there are changes in a plan’s administrative fees or individual fees, an amended notice must be given in advance.

Because the fee disclosure requirements are new this year, we recommend contacting your Alston & Bird lawyer if any changes are made to your investment funds or plan fees to determine if a mid-year, advance notice is required.

### Practice Pointers

- In addition to the year-end notices described above, there are several additional notices that must be provided from time-to-time. These include Summaries of Material Modifications (SMMs) and notices regarding changes to investment funds.
- 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.

- 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 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**, **Blake C. MacKay** and **Craig R. Pett**.*

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

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