



Employee Benefits & Executive Compensation ADVISORY ■

NOVEMBER 15, 2013

Do You Need to Send an Annual Notice to Plan Participants? If So, You May Need to Do So by December 1, 2013*

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.

Important News... IRS Announces 2014 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 2014.

The following is a list of some important retirement plan limits for 2014:

- The annual limit on **elective deferrals** to Section 401(k) plans, Section 403(b) annuity contracts and eligible Section 457 plans is \$17,500 (unchanged from 2013).
- 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 2013).
- The limit on **total compensation** used in computing contributions and benefits under Section 401(a)(17) is \$260,000.
- The dollar limit on **aggregate annual additions to defined contribution plans** is \$52,000 (plus any catch-up contributions).
- The dollar limit on annual benefits in a **defined benefit plan** under § 415(b) (before adjustment for age and form) is \$210,000.
- An individual earning more than \$115,000 in 2013 will generally be a **highly compensated employee** in 2014 (unchanged from 2013).

Please contact your Alston & Bird LLP attorney if you have any questions about the 2014 plan limits.

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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 	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).	Likely a qualification defect. Possible loss of safe harbor status.
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 	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).	Possible qualification defect. Possible loss of safe harbor status. 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.
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 QACA – Safe Harbor 401(k) Notice above • The employee’s right to make a permissive withdrawal and the procedures for electing such a withdrawal 	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).	Possible loss of ability to return contributions to participants. Possible qualification defect.

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.
Annual Fee Disclosures under ERISA Section 404	<ul style="list-style-type: none"> Tabular disclosure showing performance over 1-, 3- and 10-year periods Summary of investment fees Information on how to change investments 	Annually to each participant or beneficiary who can direct investment of an account – see "More on Fee Disclosure" below for deadline.	Possible breach of fiduciary duty.

More on Fee Disclosure

The annual fee disclosure notice under ERISA Section 404 was originally required no later than August 30, 2012, as well as annually thereafter. In this context, "annually" means once every 12 months, which generally means plans must provide these disclosures each summer. For simplicity, some plans may wish instead to provide the notices at the same time as other year-end notices. There are effectively two options to accomplish this.

1. Preparing and furnishing a second disclosure during the year, timed to be distributed at the end of the calendar year. If a plan administrator elects to provide an updated annual notice at year's end, future annual fee notices can also be given at year's end.
2. A second option offered by the Department of Labor is for plan administrators to delay issuing the annual fee disclosure from August 2013 to no later than December 1, 2013. Alternatively, if the plan administrator already

Breaking News:

In the past few days (mid-November), the IRS issued new guidance clarifying the rules regarding mid-year changes to 3-percent qualified non-elective contributions in safe harbor plans. Changes to your plan's safe harbor notice may be necessary on account of this news.

If your plan incorporates a 3-percent non-elective safe harbor contribution feature, you should contact your plan's advisor to discuss the impact of this new guidance.

issued its annual fee disclosure in August 2013, the plan sponsor may delay the 2014 fee disclosure notice until no later than December 1, 2014.¹ In either case, the plan fiduciary must determine that it is in the best interests of participants to receive this notice at the end of the year.

If a plan administrator does not change the 12-month cycle, the deadline for the next annual fee disclosure is 12 months from the time your plan sent the disclosure in 2013. In general, this would be no later than the end of August 2014.

In addition to the annual fee notice, plan administrators may be required to issue a mid-year amended fee notice in advance of a change in fees. For example, if there are changes in a plan's administrative fees or individual fees (e.g., fees for QDRO processing or loan processing), an amended notice must be given no more than 90 days and no later than 30 days in advance of the change.

Because changes in fees must be disclosed 30 to 90 days in advance of their becoming effective, the annual fee disclosure is an excellent opportunity to reconsider whether any such fees may become necessary.

Practice Pointer. 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.

Practice Pointer. 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.

Practice Pointer. Plan sponsors can combine multiple notices in a single notice.

Practice Pointer. These notices may also require distribution during the plan year to newly eligible participants or rehired participants.

Practice Pointer. 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.

¹ The December 1 deadline is selected so as to align the annual fee disclosure with other annual notices. The DOL option also allows issuing the notice as late as February 2014 for the 2013 year or February 2015 for the 2014 year. See DOL Field Assistance Bulletin 2013-2 for details.

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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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