



Employee Benefits & Executive Compensation ADVISORY ■

OCTOBER 28, 2014

Do You Need to Send an Annual Notice to Plan Participants? If So, You May Need to Do So by December 1, 2014*

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 made 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 2015 Adjustments for Retirement Plan Limits

The IRS recently announced changes in the dollar limits for qualified retirement plans (and generally for 403(b) and 457(b) plans) for 2015.

The following is a list of some important retirement plan limits for 2015:

- The annual limit on *elective deferrals* to Section 401(k) plans, Section 403(b) annuity contracts and eligible Section 457 plans is \$18,000 (increased from \$17,500 in 2014).
- 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 \$6,000 (increased from \$5,500 in 2014).
- The limit on *total compensation* used in computing contributions and benefits under Section 401(a)(17) is \$265,000 (increased from \$260,000 in 2014).
- The dollar limit on *aggregate annual additions to defined contribution plans* is \$53,000 plus any catch-up contributions (increased from \$52,000 in 2014).
- The dollar limit on annual benefits in a *defined benefit plan* under Section 415(b) (before adjustment for age and form) is \$210,000 (unchanged from 2014).
- An individual earning more than \$120,000 in 2014 will generally be a *highly compensated employee* in 2015 (increased from \$115,000 from 2014).

Please contact your Alston & Bird attorney if you have any questions about the 2015 plan limits.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

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. • Right to amend employer contributions mid-year. 	Disclosure to all eligible employees is required. The notice is deemed to be timely if it is provided 30 to 90 days before the beginning of the plan year (with exceptions for new plan and newly eligible employees).	<ul style="list-style-type: none"> • 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 to all eligible employees is required. The notice is deemed to be timely if it is provided 30 to 90 days before the beginning of the plan year (with exceptions for new plan and newly eligible employees).	<ul style="list-style-type: none"> • 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 to all eligible employees is required. The notice is deemed to be timely if it is provided 30 to 90 days before the beginning of the plan year (with exceptions for new plan and newly eligible employees).	<ul style="list-style-type: none"> • Possible qualification defect. • Possible loss of ability to return contributions to participants.

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 ERISA Section 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 to all eligible employees is required. 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. 	Annual notice must be provided to each participant or beneficiary who can direct investment of an account.	Possible breach of fiduciary duty.

Suggested Change to Safe Harbor Notice

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 certain purposes (e.g. the addition of a Roth 401(k) feature). 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.

The IRS does provide an exception for mid-year changes to employer contributions, but only if the notice clearly reserves the employer's right to change these contributions. We suggest adding this language to your safe harbor notice to preserve this option.

More on Fee Disclosure

ERISA Section 404 requires that participants receive an annual fee disclosure notice at least once every 12 months. For 2014, there are two options to accomplish this:

1. Furnish the fee disclosure notice no later than 12 months after the 2013 fee disclosure notice was issued.
2. Furnish the 2014 fee disclosure notice no later than February 2015.¹ For employers that wish to align their fee disclosure notice with other year-end notices, the 2014 fee disclosure notice would be issued no later than December 1, 2014.

No matter when your fee disclosure cycle occurs, we suggest making a note of the timing to help you and your service providers remember when the next fee disclosure is due.

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.
- Plan sponsors can combine multiple notices into 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.

¹ The actual date is 18 months from when the 2013 fee disclosure notice was issued, as long as it was issued before the end of August 2013. For most plans, the latest possible date to issue the 2014 fee disclosure will be the end of February 2015. Note that this option is available only if the employer did not take advantage of the one-time option to delay fee disclosures in 2013. See [DOL Field Assistance Bulletin 2013-02](#).

If you would like to receive future *Employee Benefits & Executive Compensation Advisories* electronically, please forward your contact information to 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:

Members of Alston & Bird’s Employee Benefits & Executive Compensation Group

Robert A. Bauman 202.239.3366 bob.bauman@alston.com	John R. Hickman 404.881.7885 john.hickman@alston.com	Craig R. Pett 404.881.7469 craig.pett@alston.com	Michael L. Stevens 404.881.7970 mike.stevens@alston.com
Saul Ben-Meyer 212.210.9545 saul.ben-meyer@alston.com	H. Douglas Hinson 404.881.7590 doug.hinson@alston.com	Earl Pomeroy 202.239.3835 earl.pomeroy@alston.com	Daniel G. Taylor 404.881.7567 dan.taylor@alston.com
Stacy C. Clark 404.881.7897 stacy.clark@alston.com	Emily C. Hootkins 404.881.4601 emily.hootkins@alston.com	Jonathan G. Rose 202.239.3693 jonathan.rose@alston.com	Elizabeth Vaughan 404.881.4965 beth.vaughan@alston.com
Emily Seymour Costin 202.239.3695 emily.costin@alston.com	James S. Hutchinson 212.210.9552 jamie.hutchinson@alston.com	Syed Fahad Saghir 202.239.3220 fahad.saghir@alston.com	Kerry T. Wenzel 404.881.4983 kerry.wenzel@alston.com
Patrick C. DiCarlo 404.881.4512 pat.dicarlo@alston.com	Johann Lee 202.239.3574 johann.lee@alston.com	Thomas G. Schendt 202.239.3330 thomas.schendt@alston.com	Kyle R. Woods 404.881.7525 kyle.woods@alston.com
Meredith Gage 404.881.7953 meredith.gage@alston.com	Blake Calvin MacKay 404.881.4982 blake.mackay@alston.com	John B. Shannon 404.881.7466 john.shannon@alston.com	
Ashley Gillihan 404.881.7390 ashley.gillihan@alston.com	Emily W. Mao 202.239.3374 emily.mao@alston.com	Richard S. Siegel 202.239.3696 richard.siegel@alston.com	
David R. Godofsky 202.239.3392 david.godofsky@alston.com	Steven Mindy 202.239.3816 steven.mindy@alston.com	Carolyn E. Smith 202.239.3566 carolyn.smith@alston.com	

ALSTON & BIRD LLP

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2014

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
 BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
 CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
 DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
 LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
 NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
 RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
 SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001
 WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333