



## Employee Benefits & Executive Compensation ADVISORY ■

**NOVEMBER 7, 2016**

### Do You Need to Send an Annual Notice to Plan Participants? If So, You May Need to Do So by December 1, 2016\*

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. Note that plan sponsors can generally use a single notice to satisfy many of these requirements.

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
- Annual participant fee disclosures (each plan will have a different deadline for this notice, and the deadline is different each year)

#### **Important News...IRS Announces 2017 Retirement Plan Limits**

The IRS recently announced small increases to some of the dollar limits for qualified retirement plans (and generally for 403(b) and 457(b) plans) for 2017.

The following is a list of some important retirement plan limits for 2017:

- The annual limit on **elective deferrals** to Section 401(k) plans, Section 403(b) annuity contracts and eligible Section 457 plans remains unchanged at \$18,000.
- 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 remains unchanged at \$6,000.
- The limit on **total compensation** used in computing contributions and benefits under Section 401(a)(17) is increased to \$270,000.
- The dollar limit on **aggregate annual additions to defined contribution plans** is increased to \$54,000 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 increased to \$215,000.
- An individual earning more than \$120,000 in 2017 will generally be a **highly compensated employee** in 2018.

Please contact your Alston & Bird attorney if you have any questions about the 2017 plan limits.

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

Plan Provision	Summary of Content of Notice	When/to Whom	Potential Consequence for Failing to Timely Deliver Notice
<b>Traditional Safe Harbor 401(k) (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 a summary plan description.</li> <li>Right to amend employer contributions mid-year.</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>	<ul style="list-style-type: none"> <li>Likely a qualification defect.</li> <li>Possible loss of safe harbor status.</li> </ul>
<b>Qualified Automatic Contribution Arrangements (QACA) – Safe Harbor 401(k) (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 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>	<ul style="list-style-type: none"> <li>Possible qualification defect.</li> <li>Possible loss of safe harbor status.</li> <li>If the QACA arrangement uses a QDIA, under DOL Regulation 2560.502c-4, a civil penalty of \$1,632 per day, per violation, may be assessed if the notice is not provided.</li> </ul>
<b>Eligible Automatic Contribution Arrangement (EACA) (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 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>	<ul style="list-style-type: none"> <li>Possible loss of ability to return contributions to participants.</li> <li>Possible qualification defect.</li> </ul>
<b>Qualified Default Investment Alternative (QDIA) (ERISA Section 404(c)(5))</b>	<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>

Plan Provision	Summary of Content of Notice	When/to Whom	Potential Consequence for Failing to Timely Deliver Notice
<b>Non-Safe-Harbor Automatic Contribution Arrangement (ERISA Sections 404(c)(5), 514(e))</b>	<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>	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 \$1,632 per day, per violation may be assessed if the notice is not provided.
<b>All Plans with Investment Options: Annual Fee Disclosures Under ERISA Section 404</b>	<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>	At least once every 14 months to each participant or beneficiary who can direct investment of an account.	Possible breach of fiduciary duty.

## Special Consideration for Safe Harbor Plans

Prior to 2016, the IRS took a position that most mid-year changes to safe harbor plans were impermissible. However, this year the IRS issued new guidance (Notice 2016-16) significantly relaxing this position.

Under the new guidance, many changes to safe harbor plan terms after the start of the plan year will be permitted (and will not result in a loss of safe harbor treatment). However, if the mid-year change affects something described in the plan's safe harbor notice, participants must be provided with a new safe harbor notice, generally 30 to 90 days in advance of the change.

While this significantly expands a plan sponsor's ability to amend a safe harbor plan, the new guidance lists a few amendments that will not be permitted. For example, plans cannot be amended to change the type of safe harbor used, to narrow the group of employees eligible to receive a safe harbor contribution, or to increase vesting conditions for nonelective contributions under a nonelective contribution safe harbor plan. Also, existing plans cannot be amended to become a safe harbor plan after the start of the plan year. Additionally, safe harbor plans can be amended to add or increase matching contributions only during the first nine months of the plan year and only if the change is retroactive to the start of the plan year.

The new IRS guidance does not provide for the reduction or elimination of employer safe harbor contributions; however, prior guidance does permit this type of change mid-year as long as the safe harbor 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.

Even with the revised IRS position, changes to safe harbor plan provisions can have unintended consequences. We recommend consulting the plan's legal advisor before modifying any safe harbor plan provisions, particularly if those provisions are described in the plan's safe harbor notice.

**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), Summary Annual Reports (SARs) and notices regarding changes to investment funds.
- Plan sponsors can generally combine multiple notices in a single notice.
- These and other 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.

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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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