

IRS Significantly Liberalizes Permitted Mid-Year Changes to Safe Harbor Plans

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On January 29, 2016, the IRS issued [Notice 2016-16](#) that provides guidance on mid-year changes to a safe harbor plan under sections 401(k) and 401(m) of the Internal Revenue Code. The guidance provides that a mid-year change either to a safe harbor plan or to a plan's safe harbor notice does not violate the safe harbor rules, provided that applicable notice and election opportunity conditions are satisfied and the mid-year change is not a prohibited mid-year change, as described in the IRS Notice.

The IRS Notice doesn't require any additional notice or election conditions for changes to information that is not required safe harbor notice content, even if that information is provided in a plan's safe harbor notice. For purposes of the guidance, a mid-year change is a change that is first effective during the plan year, but not effective as of the beginning of the plan year, or a change that is effective as of the beginning of the plan year, but adopted after the beginning of the plan year.

Notice Conditions

The notice conditions require that an updated safe harbor notice describing the mid-year change and its effective date be delivered to each employee otherwise required to be provided the safe harbor notice, within a reasonable period before the effective date of the change. Whether the timing requirement is met is based on all of the relevant facts and circumstances, but is deemed to be satisfied if the updated safe harbor notice is provided at least 30 days (and not more than 90 days) before the effective date of the change.

If it is not practicable for the updated safe harbor notice to be provided before the effective date of the change (for example, in the case of a mid-year change to increase matching contributions retroactively to the beginning of the plan year), the guidance provides that the notice is treated as timely if it is provided as soon as practicable, but not more than 30 days after the date the change is adopted.

If the required information about the mid-year change and its effective date was provided with the pre-plan year annual safe harbor notice, an updated safe harbor notice is not required.

Election Opportunity Conditions

Each employee required to be provided an updated safe harbor notice must be given a reasonable opportunity (including a reasonable period after receipt of the updated notice) before the effective date of the mid-year change to change the employee's cash or deferred election (and/or any after-tax employee contribution election). The guidance provides that a 30-day election period is deemed to be a reasonable period for this purpose.

If it is not practicable for the election opportunity to be provided before the effective date of the change (for example, in the case of a mid-year change to increase matching contributions retroactively for the entire plan year), the guidance provides that an employee is treated as having a reasonable opportunity to make or change an election if the election opportunity begins as soon as practicable after the date the updated notice is provided to the employee, but not later than 30 days after the date the change is adopted.

The following mid-year changes are not subject to the relief provided by the IRS Notice and would violate the safe harbor plan requirements under sections 401(k) and 401(m), unless the applicable regulatory conditions corresponding to each specified change are satisfied:

1. adoption of a short plan year or any change to the plan year;
2. adoption of a safe harbor plan status on or after the beginning of the plan year; and
3. reduction or suspension of safe harbor contributions or changes from safe harbor plan status to non-safe harbor plan status.

Prohibited Mid-Year Changes

In the guidance, the IRS listed the following four mid-year changes that safe harbor plans are prohibited from making unless they are specifically required by applicable law to be made mid-year (e.g., a change required by a change in statute or a court decision):

1. increases in the number of completed years of service that are required for an employee to have a nonforfeitable right to the employee's account balance attributable to safe harbor contributions under a qualified automatic contribution arrangement (QACA);
2. reductions in or other narrowing of the number of a group of employees who are eligible to get safe harbor contributions (excluding certain changes for employees not already eligible to receive safe harbor contributions);
3. in type of safe harbor plan (for example, from a traditional safe harbor plan to a QACA safe harbor plan); and
4. a modification to the formula used to determine matching contributions if it increases the amount of matching contributions, or one that permits discretionary matching contributions (with a limited exception where the change is adopted at least 3 months prior to the end of the plan year, the updated safe harbor notice and election opportunity are provided, and if the change is made retroactively effective for the entire plan year).

Application to 403(b) Plans

The IRS Notice also provides that the guidance on mid-year changes to safe harbor plans and notices also applies on similar terms to Section 403(b) plans that apply the Section 401(m) safe harbor rules pursuant to Section 403(b)(12).

Effective Date

The IRS Notice is effective for mid-year changes made on or after January 29, 2016.

It revokes prior IRS guidance in Announcement 2007-59, which limited permissible mid-year changes to a safe harbor plan to certain hardship withdrawal changes and designated Roth contribution changes.

Comments Requested

The IRS Notice requests comments no later than April 28, 2016 on additional guidance that may be needed, in particular with respect to mid-year changes to safe harbor plans in cases in which a plan sponsor is involved in a merger or acquisition.

Proskauer's perspective: IRS Notice 2016-16 provides the concrete guidance that plan sponsors have long sought with respect to mid-year changes to safe harbor plans. For years there has been much uncertainty about whether the amendments listed in Announcement 2007-59 were the only amendments that may be adopted mid-year by a safe harbor plan without endangering the plan's safe harbor status. By removing the significant uncertainty that plan sponsors have faced with mid-year plan changes, plan sponsors no longer have to delay most changes to the following plan year. In addition, this guidance may encourage employers who have not adopted safe harbor plans or who eliminated safe harbor features during the financial downturn to reconsider that decision.

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