



PENSION ANALYST COMPLIANCE BULLETIN



IRS allows mid-year changes to safe harbor plans

On January 29, 2016, the IRS issued [Notice 2016-16](#) providing welcome guidance on mid-year changes to safe harbor 401(k) and 403(b) Plans. Safe harbor plans include both traditional safe harbor plans, and qualified automatic contribution arrangements (“QACAs”). Under this guidance, mid-year changes to either safe harbor plans or to required content of safe harbor plan notices are permitted, with some exceptions.

Background

Many 401(k) and 403(b) plans sponsors have adopted safe harbor plans to avoid annual nondiscrimination testing and the potential need to make corrective distributions or contributions in the event of failed tests. These plan designs require the sponsoring employer to make certain levels of nonelective or matching contributions. In general, plan sponsors must commit to making these contributions for an entire 12-month plan year, and must notify participants of these contributions before the start of the plan year. However, the IRS published [final rules in November 2013](#) permitting the mid-year reduction or suspension of employer contributions to safe harbor plans if certain conditions are met. Those final rules also gave the IRS authority to provide guidance regarding other mid-year amendments to safe harbor provisions via notices, announcements, revenue procedures and revenue rulings, as opposed to having to go through the formal (and often lengthy) regulatory process.

IRS Notice 2016-16 is welcome guidance for sponsors of safe harbor plans, as it generally allows mid-year amendments with some exceptions. This approach is a change from past guidance from the IRS on this topic, which generally did not allow mid-year amendments to safe harbor plans, unless specifically permitted.

Definition of mid-year change

For these purposes, a mid-year change is defined as:

- A change that is effective on a day other than the first day 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.

The new guidance applies to both mid-year amendments to the plan document, as well as changes to required safe harbor notice content. The guidance does not apply to mid-year changes that were already permitted under the regulations, such as:

- Adoption of a short plan year or any change to the plan year;
- Adoption of safe harbor plan status by plans that provide for a safe harbor nonelective contribution if contingent and follow-up notices are provided;
- [Reduction or suspension of safe harbor contributions](#) or changes from safe harbor plan status to non-safe harbor plan status.

Prohibited mid-year changes

The following changes may not be made mid-year:

- A change to increase the number of years required on the vesting schedule for QACA safe harbor contributions;
- A change to reduce the number or otherwise narrow the group of employees eligible to receive to receive safe harbor contributions. (This prohibition does not apply to mid-year eligibility or entry date changes regarding employees who are not yet eligible to receive safe harbor contributions.)

- A change to the type of safe harbor plan, such as a change from a traditional safe harbor plan to a QACA plan, or vice versa. However, a plan may add an automatic contribution feature to a traditional safe harbor plan mid-year, as long as it is not changing the plan design to a QACA.
- A change to:
 - Modify (or add) a formula used to determine matching contributions (or definition of compensation used to determine matching contributions) if the change increases the amount of matching contributions; or
 - Permit discretionary matching contributions.

This prohibition does not apply if the change is adopted and the updated safe harbor notice and deferral election opportunity are provided at least 3 months prior to the end of the plan year, and the change is made retroactive for the entire plan year. If the plan provides for periodic matching contributions, the retroactive effective date may require that the employer retroactively amend the plan to provide for matching contributions based on the entire plan year (i.e. a true-up).

Conditions for mid-year changes to required content of safe harbor notices

If the mid-year change affects required content of safe harbor notices, the following conditions apply:

- An updated safe harbor notice describing the change and its effective date must be provided to each employee required to receive a notice, within a reasonable period before the effective date of the change. At least 30 days, but not more than 90 days before the effective date is deemed reasonable. If it is not practicable for the updated notice to be provided before the effective date of the change (such as, in the case of a mid-year change to increase matching contributions retroactively for the entire plan year), the notice is treated as provided timely if it is provided as soon as practicable, but not later than 30 days after the date the change is adopted; and
- Employees must be given a reasonable opportunity before the effective date of the change to change their deferral elections. A 30-day election period is deemed reasonable for these purposes. If it is not practicable for the election opportunity to be provided before the effective date of the change, the election opportunity may begin as soon as practicable after the date the updated notice is provided to the employee, but not later than 30 days after the change is adopted.

For example, Plan Q, a QACA safe harbor plan with multiple investment options, makes a mid-year change in the plan's default investment fund from Fund X to Fund Y. Employees otherwise required to be provided a safe harbor notice are provided both an updated notice that describes Fund Y as the default investment fund and an additional election opportunity.

Mid-year changes that are not prohibited changes and do not impact required content of safe harbor notices may be made without providing notice.

Next steps

Sponsors of safe harbor 401(k) or 403(b) plans that wish to make a plan amendment mid-plan year, may do so without jeopardizing the plan's safe harbor status, as long as the change is not a prohibited change and any applicable updated notice and deferral election opportunity requirements are met. Sponsors that use Prudential's document services should contact their Prudential representative regarding any plan amendments.

Compliance Bulletin by Prudential Retirement

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