

IRS Provides Guidance on Mid-Year Changes to Safe Harbor Plans

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On January 29, 2016, the Internal Revenue Service (“IRS”) issued [Notice 2016-16](#) (the “Notice”), providing important guidance on mid-year changes to safe harbor plans under Sections 401(k), 401(m) and 403(b) (collectively referred to as “safe harbor plans”) of the Internal Revenue Code (the “Code”). The Notice is welcome guidance because it clears up the uncertainty that revolved around the ability to amend safe harbor plans mid-year. Plan sponsors have been hesitant to adopt any amendments to safe harbor plans mid-year, including ones that benefited employees (such as eliminating an eligibility service requirement) or that made the simplest of changes (such as changing the plan name). As described below, the Notice 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 merely because it is a mid-year change, provided that (i) applicable notice and election opportunity conditions outlined in the Notice are satisfied and (ii) the mid-year change is not a prohibited mid-year change under the Notice. The Notice is effective for mid-year changes to safe harbor plans made on or after January 29, 2016.

Background

Treasury regulations provide that safe harbor plans generally may not be amended mid-year to modify the provisions that satisfy the safe harbor plan rules. In interpreting the Treasury regulations, the IRS has taken the position that all mid-year amendments to safe harbor plans are prohibited. The rationale for this prohibition is the desire to prevent a plan sponsor from amending its safe harbor plan mid-year when the safe harbor plan provisions, as described in the safe harbor plan notice distributed prior to the beginning of the plan year, may have been the basis for a participant’s deferral elections for the plan year. Thus, a plan sponsor is generally required to amend the features of its safe harbor plan to be effective only at the beginning of a plan year, thereby allowing the amendment to be incorporated into the safe harbor notice provided to employees before the plan year.

The IRS has provided limited exceptions to its general prohibition on mid-year amendments to safe harbor plans. In Announcement 2007-59, the IRS provided that a plan will not fail to be a safe harbor plan merely because of the adoption of a mid-year amendment to implement a Roth 401(k) feature or to expand its hardship withdrawal rules. In [Notice 2014-37](#), the IRS announced that a plan will not fail to be a safe harbor plan merely because of the adoption of a mid-year amendment as required under [Notice 2014-19](#) in order to comply with the Supreme Court’s *Windsor* decision on same-sex marriage.

Mid-Year Changes to Safe Harbor Plans Under Notice 2016-16

In the Notice, the IRS has relaxed its position to broadly permit mid-year changes to a safe harbor plan, or to a plan's required safe harbor notice, if certain conditions are met. For purposes of the Notice, a mid-year change is any change that is first effective during a plan year, but not effective as of the beginning of the plan year, or any change that is effective as of the beginning of the plan year, but adopted after the beginning of the plan year. Also, for purposes of the Notice, required safe harbor notice content refers to the information that is required by the Treasury regulations to be provided in a plan's safe harbor notice.

Conditions for Mid-Year Changes

Mid-year changes to a safe harbor plan are now generally permitted provided an updated safe harbor notice describing the mid-year change and its effective date is distributed to employees within a reasonable period before the effective date of the change, and employees are given a reasonable opportunity before the effective date of the change to change their deferral elections. The Notice provides that 30 days (and not more than 90 days) before the effective date of the change is deemed to be reasonable for this purpose. If it is not practicable for the updated safe harbor notice to be provided, or for the election change 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 notice and election change opportunity are treated as being timely if they are provided as soon as practicable, but not later than 30 days after the date the change is adopted. The Notice clarifies that the additional notice and election change opportunity is not required for mid-year changes to information that is not required safe harbor notice content, even if the plan sponsors elect to include such information in a plan's safe harbor notice. For example, an updated notice and election change opportunity is not required for a mid-year change to a safe harbor plan's entry date, as a safe harbor notice is not required to include the plan entry date.

Prohibited Mid-Year Changes

Under the Notice, the IRS provides that the following mid-year changes to safe harbor plans are always prohibited:

- A mid-year change to increase the number of completed years of service 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;
- A mid-year change to reduce the number, or otherwise narrow the group, of employees eligible to receive safe harbor contributions;
- A mid-year change to change the type of safe harbor plan (e.g., from a traditional safe harbor plan to a qualified automatic contribution arrangement); and
- A mid-year change to modify (or add) a formula used to determine matching contributions (or the definition of compensation used to determine matching contributions) if the change increases the amount of matching contributions, or to permit discretionary

matching contributions, provided that this prohibition does not apply if:

- (i) the change is adopted at least three months prior to the end of the plan year, (ii) an updated notice and election change opportunity is provided to employees, and (iii) the change is made retroactively effective for the entire plan year.

Nonetheless, the IRS states that a mid-year change described above will not be considered a prohibited mid-year change to a safe harbor plan if it is required by applicable law to be made mid-year, such as a change mandated by a statutory law change or court decision.

Mid-Year Changes Not Subject to the Notice

The IRS further provides that the following mid-year changes are not subject to the Notice, but instead would violate the requirements of the Treasury regulations unless the applicable regulatory conditions corresponding to each specified change are satisfied:

- Adoption of a short plan year or any change to the plan year (permitted only as described in Treasury Regulation Sections 1.401(k)-3(e)(2), (3), and (4) and Treasury Regulation Sections 1.401(m)-3(f)(2), (3), and (4));
- Adoption of safe harbor plan status on or after the beginning of the plan year (permitted only as described in Treasury Regulation Section 1.401(k)-3(f) and Treasury Regulation Section 1.401(m)-3(g)); and
- Reduction or suspension of safe harbor contributions or changes from safe harbor plan status to non-safe harbor plan status (permitted only as described in Treasury Regulation Section 1.401(k)-3(g) and Treasury Regulation Section 1.401(m)-3(h)).

In addition, the IRS states that other applicable law may affect the permissibility of mid-year changes to safe harbor plans, including, for example, anti-cutback restrictions under the Code.

Next Steps and Future Guidance

The Notice is effective for mid-year changes made on or after January 29, 2016. The IRS has requested comments on additional guidance that may be needed regarding mid-year changes to safe harbor plans, and specifically whether additional guidance is needed to address mid-year changes relating to plan sponsors involved in mergers and acquisitions or to plans that include an eligible automatic contribution arrangement. Comments may be submitted in writing to the IRS no later than April 28, 2016.

A plan sponsor considering the adoption of a mid-year amendment to its safe harbor plan should consider whether the amendment is one that will require an updated safe harbor notice and an election change opportunity or is one that is prohibited under the Notice. If you have any questions regarding mid-year changes to your safe harbor plan or this Notice, please contact the author of this article or the Trucker Huss attorney with whom you normally work.

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