



IRS Issues New Guidance Regarding Mid-Year Amendments to Safe Harbor 401(k) Plans

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The IRS finally has issued guidance [Notice 2016-16] regarding the types of amendments that may be made during the plan year under a safe harbor 401(k) plan. There has been much debate in the pension community regarding the ability to amend a safe harbor 401(k) plan mid-year and the IRS generally has been silent on the extent to which mid-year amendments could be made under a safe harbor 401(k) plan without jeopardizing the safe harbor status of the plan. Now, with the issuance of Notice 2016-16, many of the questions surrounding mid-year amendments have been answered and, in most cases, such amendments will be allowed as long as the plan meets certain notice and timing issues. This article is designed to answer many of the questions that have been addressed (or not addressed) under Notice 2016-16. [See Q&A-4 for the application of Notice 2016-16 to safe harbor 403(b) plans.]

ASC Insight: As discussed in this ASC Alert, Notice 2016-16 generally allows for mid-year amendments to safe harbor 401(k) and 403(b) plans effective January 29, 2016. One question that is not answered in Notice 2016-16 is whether (and when) plans must be amended to address the mid-year amendment provisions under Notice 2016-16. Although the ASCi plans do not specifically prohibit the adoption of mid-year amendments under the safe harbor 401(k) or 403(b) plans, it is our intention to adopt an interim amendment specifically allowing for mid-year amendments as authorized under Notice 2016-16. Given the possibility of additional guidance and additional interim amendments from the IRS, we will probably not issue an interim amendment until sometime in early December. The adoption of the interim amendment in December 2016 will allow employers to adopt mid-year amendments during 2016 as permitted under Notice 2016-16.

Q&A-1 *Why are mid-year amendments restricted under safe harbor 401(k) plans?*

Treas. Reg. §1.401(k)-3(e)(1) provides that a plan will fail to satisfy the safe harbor requirements under Code §§401(k)(12) ('traditional' safe harbor 401(k) plans) and 401(k)(13) (qualified automatic contribution arrangements (QACAs)) and Treas. Reg. §1.401(k)-3 unless the safe harbor plan provisions are adopted before

the first day of the plan year and remain in effect for the entire 12-month plan year. Treas. Reg. §1.401(k)-3(e)(1) also provides that a safe harbor plan will not satisfy the nondiscrimination requirements for a plan year if the safe harbor plan is amended to change those provisions during the plan year. Treas. Reg. §1.401(m)-3(f) includes similar provisions for matching contributions under a safe harbor 401(k) plan.

The safe harbor plan regulations set out certain exceptions to the mid-year amendment requirement, including the ability to amend the plan during the plan year to reduce or suspend safe harbor contributions, provided the plan satisfies certain notice and timing requirements. In addition, the IRS has indicated in informal speeches that certain other mid-year amendments may be permitted. Notice 2016-16 formalizes the situations under which mid-year amendments may be made to a safe harbor 401(k) plan.

Q&A-2 *What is a mid-year amendment for purposes of applying the provisions of Notice 2016-16?*

For purposes of applying the guidance under Notice 2016-16 with respect to mid-year amendments of safe harbor 401(k) plans, a "mid-year amendment" is:

- a change that is first effective during a 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.

In applying the mid-year amendment rules under Notice 2016-16, the rules apply to both traditional safe harbor 401(k) plans and Qualified Automatic Contribution Arrangements (QACAs). See Q&A-4 for application of these rules to 403(b) plans.

Q&A-3 *What are the requirements for making mid-year amendments under Notice 2016-16?*

Under Notice 2016-16, different rules apply based on whether the mid-year amendment modifies the language under the required annual safe harbor notice.

Amendment modifying annual safe harbor notice. If a mid-year amendment modifies the language under the required annual safe harbor notice, the mid-year amendment will not violate the requirements of Treas. Reg. §§1.401(k)-3 and 1.401(m)-3 provided the plan satisfies certain notice and timing requirements, as described in Q&A-5 below, and the mid-year amendment is not one of the prohibited mid-year changes described in Q&A-6 below.

Amendments that do not modify the annual safe harbor notice. If a mid-year amendment does not affect the required annual safe harbor notice, the mid-year amendment need not satisfy the notice and timing requirements described in Q&A-5. The mid-year amendment only needs to be an allowable mid-year amendment (i.e., a mid-year amendment that is not a prohibited mid-year amendment described in Q&A-6 below).

Certain allowable mid-year amendments. Notice 2016-16 lists certain mid-year amendments that are specifically allowed, provided the requirements under the regulations are satisfied:

- 1. Change in plan year, including the adoption of a short plan year.** A safe harbor 401(k) plan may be amended mid-year to change the plan year provided the amendment satisfies the requirements under Treas. Reg. §§1.401(k)-3(e)(2), (3), and (4) and 1.401(m)-3(f)(2), (3), and (4).
- 2. Adoption of safe harbor plan status on or after the beginning of the plan year.** A plan may be converted to a safe harbor 401(k) plan mid-year only to the extent allowed under Treas. Reg. §§1.401(k)-3(f) and 1.401(m)-3(g).
- 3. Reduction or suspension of safe harbor contributions or changes from safe harbor plan status to non-safe harbor plan status.** A safe harbor 401(k) plan may be amended mid-year to reduce or suspend the safe harbor contribution to the extent permitted under Treas. Reg. §§1.401(k)-3(g) and 1.401(m)-3(h).

Q&A-4 *Do the mid-year amendment rules under Notice 2016-16 apply to 403(b) plans?*

The mid-year amendment rules under Notice 2016-16 applicable to safe harbor 401(k) plans apply on similar terms to §403(b) plans. Thus, a safe harbor 403(b) plan may be amended during the plan year if the plan satisfies the mid-year amendment conditions described under Notice 2016-16.

Q&A-5 *What are the requirements for making mid-year amendments that affect the required annual safe harbor notice?*

Under Notice 2016-16, if a mid-year amendment modifies the language included in the required annual safe harbor notice, the plan must satisfy the following notice and timing requirements in order to qualify as a safe harbor 401(k) plan.

- 1. Updated safe harbor notice.** An updated safe harbor notice that describes the mid-year change and its effective date must be provided to each employee otherwise required to be provided a safe harbor notice under Treas. Reg. §§1.401(k)-3(d), 1.401(k)-3(k)(4), or 1.401(m)-3(e), as applicable, within a reasonable period before the effective date of the change.
- 2. Timing of updated safe harbor notice.** Whether the timing requirement is met is based on all of the relevant facts and circumstances. The timing requirement is deemed 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 (e.g., because the plan amendment is made 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.
- 3. Reasonable opportunity to change deferral election.** Each employee required to be provided an updated safe harbor notice must be given a reasonable opportunity before the effective date of the mid-year change to update his/her deferral election. For this purpose, a 30-day election period is deemed to be a reasonable period to make or change a deferral election. If it is not practicable for the election opportunity to be provided before the effective date of the change, 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.

Q&A-6 *Are there any mid-year amendments that are prohibited under Notice 2016-16?*

Section III.D. of Notice 2016-16 lists certain mid-year amendments that are prohibited, regardless of whether the plan otherwise satisfies the mid-year amendment conditions described in Notice 2016-16. However, a mid-year change is not a prohibited mid-year change 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. The following mid-year amendments are prohibited mid-year amendments under Notice 2016-16:

- 1. A mid-year change to increase the years of service required to receive the safe harbor contribution under the plan.**
- 2. A mid-year change to narrow the group of employees eligible to receive the safe harbor contributions.** This prohibition does not apply to an otherwise permissible change that only applies to employees who are not already eligible to receive safe harbor contributions under the plan.
- 3. A mid-year change to the type of safe harbor plan; for example, a change from a traditional § 401(k) safe harbor plan to a QACA § 401(k) safe harbor plan.**

4. A mid-year change to modify (or add) a matching contribution formula if the change increases the amount of matching contributions or allows for a discretionary matching contribution formula. However, this prohibition does not apply if the amendment is adopted and the updated safe harbor notice is provided as required under Q&A-5, and the amendment increasing the matching contribution is made retroactively effective for the entire plan year. This may require an additional amendment to use plan year compensation for purposes of determining the new matching contribution formula. In addition, any amendment under this section to increase the matching contribution formula under the plan must be made at least 3 months prior to the end of the plan year.

Q&A-9 *What is the effective date of the mid-year amendment requirements under Notice 2016-16?*

The mid-year amendment requirements under Notice 2016-16 are effective for mid-year changes made on or after January 29, 2016.

Q&A-10 *How does Notice 2016-16 affect the restatement of pre-approved safe harbor 401(k) plans?*

Notice 2016-16 does not address the restatement of pre-approved plans and whether a mid-year restatement of a pre-approved plan violates the mid-year amendment prohibition. Informally, the IRS has stated the mere restatement of a plan for PPA does not constitute a mid-year amendment, as long as no other changes are made to the plan document that would otherwise qualify as a mid-year amendment. Presumably, this position still applies as long as the restatement does not change any provisions under the required annual safe harbor notice.

Q&A-7 *May a safe harbor 401(k) plan be amended mid-year to change from a safe harbor employer contribution to a safe harbor matching contribution, or vice versa?*

There is no clear guidance in Notice 2016-16 regarding a change from one type of safe harbor contribution to another type of safe harbor contribution. Although the Notice sets out specific requirements for making mid-year amendments and allows for the retroactive addition of matching contributions (see Q&A-6), it does not appear an amendment changing the type of safe harbor contribution would be permitted. The change from one type of safe harbor contribution to another would require the plan to eliminate the original type of safe harbor contribution. Under the regulations, any elimination of a safe harbor contribution can only be done prospectively and causes the safe harbor plan to lose its safe harbor status. Thus, without specific guidance on this issue, it would appear that such an amendment would not be permitted.

Q&A-8 *Are there any special rules that apply to mid-year amendments relating to plans involved in mergers and acquisitions?*

Notice 2016-16 does not specifically address plans involved in a merger/acquisition. However, the IRS has specifically requested comments as to whether additional guidance is needed to address mid-year changes relating to plan sponsors involved in mergers and acquisitions. Comments may be submitted to Internal Revenue Service, CC:PA:LPD:PR (Notice 2016-16, Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044, or electronically to Notice.Comments@irs.counsel.treas.gov.

ASC Insight: Because of the uncertainty surrounding mid-year amendments, ASC encouraged document providers to restate adopting employers' safe harbor 401(k) plans for PPA by the end of 2015 with a January 1, 2016 effective date. If a pre-approved safe harbor 401(k) plan was not restated by the end of 2015, the plan must be restated by April 30, 2016 with a January 1, 2016 effective date. To the extent no provisions are changed that modify the required annual safe harbor notice, the mid-year restatement should not affect the safe harbor status of the plan. If, as part of the restatement, an amendment is made to the plan that would constitute a mid-year amendment, the plan restatement would still need to be effective January 1, 2016 but the mid-year amendment language would need to be effective as of January 1, 2017 or would need to satisfy the requirements of Notice 2016-16, including the notice and timing requirements applicable to mid-year amendments.

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