



AMERICAN BENEFITS
COUNCIL

April 27, 2016

Filed electronically at notice.comments@irs.counsel.treas.gov

Internal Revenue Service
CC:PA:LPD:PR (Notice 2016-16)
Room 5203
P.O. Box 7604
Ben Franklin Station, Washington, DC 20044

RE: Mid-Year Changes to Safe Harbor Plans and Safe Harbor Notices

Dear Sir or Madam:

The American Benefits Council (Council) appreciates the opportunity to provide comments in connection with Notice 2016-16, which provided guidance on mid-year changes to safe harbor 401(k) plans and how they must be treated under the Internal Revenue Code nondiscrimination rules. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

First and foremost we would like to thank the Internal Revenue Service (Service) and the Treasury Department (Treasury) for providing this guidance which allows flexibility for plan sponsors desiring or needing to make mid-year changes to their 401(k) safe harbor plans. We really appreciate the hard work and obvious consideration of the needs of plan sponsors that went into this project. We also appreciate that Service and Treasury addressed concerns expressed in our comment letter dated September 12, 2014, such as allowing changes that do not affect safe harbor features or any information contained in the notice without further requirements. This guidance is very welcome.

Notice 2016-16 asks for comments on where additional guidance may be needed and this letter outlines some of the issues that have been raised by Council members as

needing guidance or clarification. One general request is for transition relief, which we believe should always be provided when guidance is immediately effective. Although plan sponsors are very grateful for the guidance, some areas need clarification and further guidance and they should not be punished for good faith efforts to meet the new requirements. With the immediate effective date and the advance notice requirements in the Notice, we heard from service providers that significant resources had to be diverted unexpectedly from other projects because systems and operational changes were necessary with little time to raise concerns or plan for changes. In this guidance and future guidance the Council asks Treasury and the Service to consider providing advance notice and substantial transition relief so that resources can be applied in a more orderly fashion and minimize disruption to the service provider community that supports plan sponsors.

The Council requests additional guidance and/or clarification in the following six areas as described in more detail below:

1. Participant notices
2. Qualified Automatic Contribution Arrangement (QACA) changes
3. Changes with no impact on plan benefits
4. Increasing matching contributions
5. Mergers and acquisitions
6. EACAs

PARTICIPANT NOTICES

Does the updated notice requirement for a mid-year change to a safe harbor plan require a reissuance of the entire safe harbor notice {i.e. content requirements of Treas. Reg. §§1.401(k)-3(d)(2) and §1.401(k)-3(k)(4)}? Or can it be satisfied by a shorter version which describes the mid-year change, its effective date and the information regarding the additional election opportunity?

Example:

Assume a safe harbor plan is amended mid-plan year to add an age 59 ½ in-service withdrawal provision. Instead of re-issuing the entire notice, the plan sponsor provides an updated notice highlighting only the mid-year change which added the 59 ½ withdrawal provision, the effective date of the change, a description of the additional election opportunity in accordance with section III.C.of Notice 2016-16, and information on where to go or who to contact for additional information about the plan. We believe that giving employers this flexibility will *enhance participant understanding, because it focuses employee attention on what has changed.* It is important that any contrary guidance on this point provide transition relief.

If a plan sponsor has a traditional 401(k) safe harbor plan with an automatic contribution arrangement (ACA) and provides the annual notice as two separate

notices; one for the safe harbor plan to satisfy Treas. Reg. §1.401(k)-3(d)(2) and one for the ACA to satisfy ERISA §514(e)(3), AND decides to make a mid-year change to the ACA provision, can the plan sponsor just issue an updated notice for the ACA provision only?

This should be sufficient if the plan sponsor identifies this is a mid-year change to a safe harbor plan, the effective date of the change, a description of the additional election opportunity in accordance with section III.C. of Notice 2016-16, and information on where to go or who to contact for additional information about the plan.

QUALIFIED AUTOMATIC CONTRIBUTION ARRANGEMENT (QACA) CHANGES

Can a plan sponsor with a QACA plan arrangement change its automatic enrollment and automatic increase provisions mid-year if it satisfies the notice and additional election opportunities as outlined in Notice 2016-16?

Example:

Assume a plan with a QACA has an existing minimum default deferral percentage of 6%. Assume the plan sponsor wants to change the provision mid-year to a minimum default of 8% and apply these provisions to new entrants and existing defaulted participants (i.e. those defaulted at 6% would all be moved to 8%).

This should be allowed as the plan sponsor is treating all QACA plan participants uniformly and the change does not violate any of the prohibited changes outlined in III.D of Notice 2016-16. Further the plan sponsor is not changing the *type* of safe harbor.

Can a plan sponsor with a QACA arrangement amend its plan mid-year to add language to expire existing affirmative elections and permit the re-enrollment of the QACA provisions for existing eligible participants under the minimum default percentage unless they opt-out again?

Example:

Assume a plan with a QACA has a minimum deferral default percentage of 6% with a 1% annual increase to a maximum deferral of 10%. Assume the plan sponsor amends the plan mid-year to apply the QACA provisions again to anyone who is deferring less than 6%, unless such participants make another affirmative election.

This should be permissible (presuming the rest of the notice and election opportunity requirements of Notice 2016-16 are met) as the final automatic contribution arrangement regulations allow for affirmative elections to expire and require a participant to make a new affirmative election.

CHANGES WITH NO IMPACT ON PLAN BENEFITS

Some of the required content of the safe harbor notice (such as administrative requirements that apply to participant elections and contact information for participants who want to know more about the plan) have no impact on plan benefits, but changes to this information appear to trigger an updated notice and new election opportunity. No notice should be required since the changes do not affect plan benefits.

INCREASING MATCHING CONTRIBUTIONS

Notice 2016-16 explicitly permits a midyear amendment that increases both safe harbor and non-safe-harbor matching contributions, or adds a discretionary match subject to certain conditions including that any increased or additional discretionary match must apply retroactively to the first day of the plan year. Some plans impose a service condition, such as an end-of-year condition, on the additional match. This should be permitted since the condition is placed on the additional match, not the safe harbor match.

Another condition of an increase in matching contributions is that at least 3 months prior to the end of the plan year, the change must be adopted and the updated safe harbor notice and election opportunity are provided. It is unclear whether this requirement modifies the general 30-day notice and election opportunity deadline for a retroactive change to add another “but before the last quarter of the plan year” requirement. Clarification would be helpful that the 3 month requirement does not affect the 30-day notice requirement so that, for example in a calendar year plan, both the plan amendment adoption and provision of the notice can occur on September 30.

MERGERS & ACQUISITIONS

Many issues arise during corporate transactions. Here are a few that Council member have struggled with over the years.

Can employees acquired in a corporate acquisition be added to a safe harbor plan in the middle of the plan year?

Does the answer depend on whether they participated in a 401(k) plan at the seller and whether the plan transferred as part of the transaction? Is the answer different for a stock and asset acquisition? Can a safe harbor plan split midyear in connection with the sale of a business?

Notice 2016-16 prohibits midyear plan amendments that reduce a plan's coverage but does not explicitly prohibit amendments that expand coverage. These corporate transactions should be permitted without affecting the safe harbor status of the plan.

Can two traditional 401(k) safe harbor plans with identical match formulas merge mid-plan year?

Example:

Two safe harbor plans each with a match formula of 100% up to 4% of pay calculated on a per payroll period basis with the same definition of compensation are merged.

Since the match formulas and compensation definitions are the same, this should be permissible if the mid-year change: (1) occurred with at least 3 months prior to the end of the year; and (2) notice and election opportunity requirements per Notice 2016-16 are satisfied.

Can two plans that had different safe harbor matching formulas merge mid-year with the same match formula going forward while maintaining their safe harbor status for each respective plan prior to the merger?

Example:

As a result of a business transaction on 2/1/16, Employer A becomes part of a controlled group with Employer B as defined in IRC 414(b) and (c). Both have existing traditional 401(k) safe harbor plans with match formulas. Employer A has a 100% up to 4% match and Employer B has the basic match formula of 100% up to 3% and 50% on the next 2%.

Allowing this would involve the same rationale as the exception allowed for certain short final plan years allowed as result of a business transaction. Each respective 401(k) plan fully satisfied the safe harbor rules up to the point of the merger date. They then proceeded with the same uniform formula for the same group going forward.

Can two traditional safe harbor plans with different plan years merge mid-year and maintain safe harbor status?

Example:

Disappearing plan merges into the on-going plan at the beginning of the on-going plan's plan year. Effective 7/1/16 Company A sponsors a 7/1 plan year safe harbor plan and Company B of controlled group AB sponsors a 1/1 plan year safe harbor plan. Company A's plan merges into Company B's plan effective 12/31/2016.

Proposed answer:

- Company A will be a safe harbor plan for the short plan year created 7/1/2016-12/31/2016 (assuming the plan year immediately following the short plan year also satisfies the safe harbor rules).
- Since Company B will continue to have its safe harbor status in 2015 and 2016 this is acceptable.
- Plan provisions can differ between the two plans (including the required employer contribution and definition of compensation)
- All participants of Company A and B receive the 2017 safe harbor notice at least 30 but no more than 90 days prior to 1/1/2017.
- We propose the requirement that the plan year immediately preceding the short plan year (for Company A) satisfied the safe harbor rules as defined in Treas. Reg. §§1.401(k)-3(e)(3) and 1.401(m)-3(f)(3) not apply in plan merger situations.

Further example:

Disappearing plan merges into the on-going plan at the middle of the plan year for the on-going plan. Same scenario as Situation 1, but effective date of plan merger is 4/1/2017.

Proposed answer:

- The plans can merge on this date under the following circumstances:
 - Because Company A is merging into a plan with an overlapping plan year, the safe harbor contribution must align (or be the better of the two formulas as long as 3 months left in year) and cannot narrow the group eligible for the safe harbor contribution.
 - In addition, if one plan uses a match and the other uses a QNEC to satisfy safe harbor they must wait until the beginning of a plan year to merge (situation 1)
 - All participants of Company A receive the safe harbor notice for Company B plan at least 30 but not more than 90 days prior to the effective date of plan merger.
- Company A will be a safe harbor plan for the short plan year created 7/1/2016-4/1/2017 (assuming the plan year immediately *following* the short plan year also satisfies the safe harbor rules).
- Company B will continue to have its safe harbor status in 2017.
- We propose the requirement that the plan year immediately preceding the short plan year (for Company A) satisfied the safe harbor rules as defined in Treas. Reg. §§1.401(k)-3(e)(3) and 1.401(m)-3(f)(3) not apply in plan merger situations.

EACAs

Finally, the IRS asked for comments on Eligible Automatic Contribution Arrangements (EACAs). We believe EACAs do not present the same issues as those addressed

in Notice 2016-16 because the EACA is simply an automatic enrollment plan that allows permissive withdrawals and, therefore, must provide a notice before the beginning of each plan year explaining the automatic contribution arrangement. Unlike in the context of safe harbor plans, there is no basis to impose any special restrictions on mid-year changes to the plan. If the IRS does decide to address EACAs, however, any requirements or conditions to a midyear change should be accompanied by significant advance notice and substantial transition relief.

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Again, we appreciate this opportunity to comments on Notice 2016-16 and where additional guidance and/or clarification are needed. If you have any question or would like to discuss these comments further, please contact Jan Jacobson at 202-289-6700.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson
Senior Counsel, Retirement Policy