



---

## IRS RELAXES RESTRICTIONS ON MID-YEAR CHANGES TO SAFE HARBOR 401(K) AND 403(B) PLANS

---

The Internal Revenue Service (the “IRS”) has released Notice 2016-16 providing guidance on mid-year changes to safe harbor plans under Sections 401(k) and 401(m) of the Internal Revenue Code. The guidance is welcome relief from previously inflexible rules that restricted mid-year amendments to such plans. Under the new guidance, a mid-year change to a safe harbor plan or to a plan’s safe harbor notice does not violate the Section 401(k) and 401(m) requirements so long as certain notice and election opportunity conditions are satisfied and the change is not a prohibited mid-year change.

**Background.** 401(k) plans and certain 403(b) plans are subject to nondiscrimination requirements for which they must either satisfy annual tests or be structured as “safe harbor” plans. Safe harbor plans must satisfy a number of regulatory requirements, including that they must provide annual safe harbor notices to participants and that they generally must remain in effect for an entire plan year. Prior to the issuance of Notice 2016-16, the IRS’s position appeared to be that no mid-year amendments were permitted to safe harbor plans unless expressly permitted by the regulations or other IRS guidance. Effective January 29, 2016, the IRS now will permit most mid-year changes, which Notice 2016-16 defines as either (i) a change that is first effective during a plan year, but not effective as of the beginning of the plan year, or (ii) a change that is effective as of the beginning of the plan year, but adopted after the beginning of the plan year.

**Notice and Election Opportunity Conditions.** In the event a mid-year change affects the content of the prior safe harbor notice, Notice 2016-16 requires that an updated safe harbor notice describing the mid-year change and its effective date be provided a reasonable period (generally at least 30 days and not more than 90 days) before the effective date of the change. Each employee also must be given a reasonable opportunity before the effective date of the mid-year change to change the employee’s deferral election. A 30-day election period is deemed to be reasonable for this purpose. If a mid-year change is made that does not affect the required content of a plan’s safe harbor notice, no additional action is required under Notice 2016-16.

**Prohibited Mid-Year Changes.** Safe harbor plans are prohibited from making the following mid-year changes unless required by applicable law to be made mid-year:

- Any increase in the years of service required for an employee to vest in his or her account balance attributable to safe harbor contributions under a qualified automatic contribution arrangement (“QACA”)

- Any reduction in or narrowing of the group of employees eligible to receive safe harbor contributions (except for certain permitted changes for employees not already eligible to receive safe harbor contributions)
- Any change to the type of safe harbor plan (e.g., a change from a traditional 401(k) safe harbor plan to a QACA safe harbor plan)
- Any change (i) to modify or add a matching contribution formula (or the definition of compensation used to determine matching contributions) if the change increases the amount of matching contributions or (ii) to permit discretionary matching contributions (except, in either case, where the change is adopted at least three months prior to the end of the plan year, the updated safe harbor notice and election opportunity are provided, and the change is made retroactively effective for the entire plan year)

In addition, certain mid-year changes remain subject to applicable requirements of the safe harbor plan regulations. These include (i) the adoption of a short plan year or a change to the plan year, (ii) the adoption of safe harbor plan status on or after the beginning of the plan year, and (iii) the reduction or suspension of safe harbor contributions or changes from safe harbor plan status to non-safe harbor plan status.

**Impact.** Notice 2016-16 provides long-awaited guidance on mid-year changes to safe harbor plans. The uncertain IRS treatment of such changes is no longer an obstacle for safe harbor plan sponsors who previously may have delayed plan changes to the end of a plan year or for employers considering adopting a safe harbor plan.

Please contact the Thompson & Knight attorney with whom you regularly work or any of the following employee benefits attorneys to discuss this development.

---

**CONTACTS:****Sharon M. Fountain**

214.969.1518

[Sharon.Fountain@tklaw.com](mailto:Sharon.Fountain@tklaw.com)**Russell G. Gully**

214.969.1511

[Russell.Gully@tklaw.com](mailto:Russell.Gully@tklaw.com)**Jason Patrick Loden**

214.969.1556

[Jason.Loden@tklaw.com](mailto:Jason.Loden@tklaw.com)**Jessica S. Morrison**

817.347.1704

[Jessica.Morrison@tklaw.com](mailto:Jessica.Morrison@tklaw.com)**Neely P. Munnerlyn**

214.969.1585

[Neely.Munnerlyn@tklaw.com](mailto:Neely.Munnerlyn@tklaw.com)**Shelly A. Youree**

310.203.6901

[Shelly.Youree@tklaw.com](mailto:Shelly.Youree@tklaw.com)

*This Client Alert is sent for the information of our clients and friends. It is not intended as legal advice or an opinion on specific circumstances.*

© 2016 Thompson & Knight LLP