

IRS ISSUES NEW MODEL 402(F) SAFE HARBOR NOTICE

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Practices & Industries

Employee Benefits

Plan administrators of plans qualified under Internal Revenue Code (Code) Section 401(a) (401(k) plans, profit sharing plans, defined benefit pension plans, etc.) must provide a prescribed tax notice (sometimes referred to as the “special tax notice”) described in Code Section 402(f) to any recipient of an eligible rollover distribution. A similar requirement is applicable to other retirement plans, including Code Section 403(b) plans and governmental Code Section 457(b) plans. The special tax notice must be provided within a reasonable period of time before making an eligible rollover distribution.

To help plan administrators comply with the 402(f) special tax notice requirement, the IRS, for several years, has been periodically publishing safe harbor notices that plan administrators may use to satisfy the notice requirement. From time to time, the IRS will update and republish the safe harbor notices when there are significant rule changes that need to be incorporated into the 402(f) notice.

A plan administrator may customize a safe harbor explanation by omitting any information that does not apply to the plan. A plan administrator also may satisfy the 402(f) notice requirement by providing an explanation that is different from a safe harbor notice. Any explanation must contain the information required by Code Section 402(f) and must be written in a manner designed to be easily understood.

In September, the IRS issued Notice 2018-74 in which it published two updated safe harbor 402(f) notices – one notice reflects the rules relating to distributions *not* made by designated Roth accounts, and the other is for distributions from designated Roth accounts. The two updated safe harbor explanations modify previously published safe harbor special tax notices to reflect certain legislative changes and guidance issued after December 8, 2014, including:

- The extended rollover deadline for qualified plan loan offset amounts under the Tax Cuts and Jobs Act of 2017;
- The exception to the 10% additional tax under Code Section 72(t) for phased retirement distributions to certain federal retirees under the Moving Ahead for Progress in the 21st Century Act;
- The expanded exception to the 10% additional tax under Code Section 72(t) for certain qualified public safety employees who participate in a governmental

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retirement plan and have reached age 50; and

- The self-certification procedures for claiming eligibility for a waiver of the 60-day deadline for making rollovers.

The safe harbor explanations also include other modifications –

- Clarifying that the 10% additional tax under Code Section 72(t) for early distributions applies only to amounts includable in income;
- Explaining how the rollover rules apply to governmental Code Section 457(b) plans that include designated Roth accounts;
- Clarifying that the Code Section 72(t) exception for qualified public safety employees does not apply to payments from IRAs; and
- Recognizing the possibility that taxpayers affected by federally declared disasters and other events may have an extended deadline for making rollovers.

A plan administrator is not necessarily required to replace an existing safe harbor notice with the new safe harbor notices. Instead, a plan administrator may update a pre-existing safe harbor notice using amendments described in detail in new Notice 2018-74.

Notice 2018-74 does not specify an effective date or deadline by which a plan administrator must either begin using the new safe harbor 402(f) notices or amend a plan's existing 402(f) notice, but plan administrators will want to take steps to ensure the 402(f) notices they use, or that are being used by a third party administrator, are up to date.