AMERICAN RETIREMENT ASSOCIATION

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Working for America's Retirement

May 11, 2020

Mr. Eric D. Slack
Director, Employee Plans (SE:TEGE:EP)
Internal Revenue Service
999 N. Capitol Street, NE
Washington, DC 20002
Submitted via email

Re: Request for Improvements in Interim Amendment Process for Pre-Approved Plans

Dear Mr. Slack,

The American Retirement Association ("ARA") is writing to recommend improvements in the interim amendment process for pre-approved plan documents. In December 2019, during a conference call relating to the amendment deadline for the final hardship distribution regulations, IRS staff indicated it was reviewing current procedures applicable for pre-approved plans. During the call, practitioners discussed their concerns about the current interim amendment[1] requirements for pre-approved plans. IRS staff asked for a recommendation on improvements to these requirements, and this letter provides that recommendation:

- The Treasury/IRS should adopt an interim amendment approach for §401(a) pre-approved and §403(b) pre-approved plans that is identical (or similar to) that taken for plan amendments for §401(a) individually designed plans. That is, interim amendments for all pre-approved plans will not be required until the end of the second calendar year that begins after the issuance of the Required Amendments List in which the change in qualification requirements appears.

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the American Society of Enrolled Actuaries ("ASEA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation which sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has nearly 28,000 individual members who provide consulting and administrative services to sponsors

[1] In general, as described in Rev. Proc. 2016-37, an interim amendment is an amendment with respect to a disqualifying provision that results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements or that is integral to such disqualifying provision. A similar definition applies to §403(b) plans under Rev. Proc. 2019-39.

of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Introduction

ARA appreciates your ongoing consideration for improvements to pre-approved plan document programs, which are used by the vast majority of qualified and 403(b) plan sponsors. Through the years, the IRS and the Department of the Treasury have revised and improved its procedures relating to pre-approved plans, often incorporating input from the benefits practitioner community. Recently, with respect to interim amendments for §401(a) pre-approved plans, the IRS issued Rev. Proc. 2020-9, which extended the deadline for §401(a) pre-approved plan providers and adopting employers to adopt interim amendments relating to the final hardship distribution regulations. We appreciate how quickly the IRS recognized and reacted to issues raised by the current interim amendment deadline rules by practitioners, including the ARA.

The current rules generally applicable to interim amendments vary depending on the type of plan, which can affect compliance with the rules. Different type of plans—§401(a) pre-approved plans, §403(b) pre-approved plans, §401(a) individually designed plans and §403(b) individually designed plans—have different amendment deadlines for the same changes in the law and regulations. This leads to confusion on the part of plan sponsors, document providers, and mass submitters. This can lead to explanations needing to be given to IRS examiners in some cases.

Current Rules Relating to Interim Amendments

Interim Amendment Rules for §401(a) Pre-Approved Plans

The most recent procedures for §401(a) pre-approved plans under Rev. Proc. 2017-41 incorporated several practitioner recommendations that expanded the ability to use pre-approved plans by adopting employers. One recommendation that was not reflected in Rev. Proc. 2017-41 was to provide a uniform, consistent and reasonable deadline for interim amendments for §401(a) pre-approved plans. Instead, Rev. Proc. 2017-41 cites the requirements under Rev. Proc. 2016-37 that the adoption of interim amendments generally is required in accordance with the rules set forth in section 15 of Rev. Proc. 2016-37.

Section 15.04 of Rev. Proc. 2016-37 generally states that, in the case of an interim amendment, an employer (or document provider, if applicable) is considered to have timely adopted an interim amendment if the interim amendment is adopted by the end of the remedial amendment period described in Treasury Regulation §1.401(b)-1(b)(3). (Governmental and tax-exempt employers have special deadlines.) Section 2.07 of Rev. Proc. 2016-37 describes the remedial amendment period as follows:

> *For a disqualifying provision described in §1.401(b)-1(b)(3), the remedial amendment period begins on the date on which the change becomes effective with respect to the plan or, in the case of a provision that is integral to a qualification requirement that has been changed, the first day on which the plan is operated in accordance with the provision as amended. In the*

case of a plan maintained by one employer, the remedial amendment period for a disqualifying provision described in §1.401(b)-1(b)(3) ends on the later of: (i) the due date (including extensions) for filing the income tax return for the employer's taxable year that includes the date on which the remedial amendment period begins; or (ii) the last day of the plan year that includes the date on which the remedial amendment period begins. In the case of a plan maintained by more than one employer the remedial amendment period ends on the last day of the tenth month following the last day of the plan year in which the remedial amendment period begins.

The IRS provides no specific guidance, such as a Required Amendments List, as to what constitutes a disqualifying provision for a §401(a) pre-approved plan.

Interim Amendments for §403(b) Plans
Under Rev. Proc. 2013-22, the IRS introduced its new §403(b) pre-approved plan program. Employers and practitioners have welcomed this addition to the pre-approved plan program. More recently, in Rev. Proc. 2019-39, the IRS issued procedures setting forth a system of recurring remedial amendment periods for correcting form defects in §403(b) individually designed plans and §403(b) pre-approved plans. With respect to interim amendments for §403(b) pre-approved plans, Rev. Proc. 2019-39 generally provides that an interim amendment is timely if the amendment is adopted by the end of the calendar year after the calendar year in which the change in §403(b) requirements is effective with respect to the plan.

The IRS provides no specific guidance, such as a Required Amendments List, on the laws and regulations as to what constitutes a disqualifying provision for a §403(b) pre-approved plan. (Rev. Proc. 2019-39 does use the Required Amendments List approach for §403(b) individually designed plans.)

Amendments for §401(a) Individually Designed Plans
Under Rev. Proc. 2016-37, §401(a) individually designed plans no longer have an interim amendment requirement. Instead, the remedial amendment period for a disqualifying provision arising as a result of a change in qualification requirements generally is extended to the end of the second calendar year that begins after the issuance of the Required Amendments List in which the change in qualification requirements appears.

Recommendation

The current rules relating to interim amendments can be confusing and inconsistent. This confusion impacts plan sponsors, document providers, and mass submitters. With respect to §401(a) pre-approved plans, this is particularly problematic because the interim amendment deadline is tied to the plan sponsor's tax return due date, which varies by plan sponsor. For this and other reasons set forth below, **ARA recommends** the following:

- The Treasury Department and IRS should adopt an interim amendment approach for §401(a) pre-approved and §403(b) pre-approved plans that is identical (or similar) to that taken for plan amendments for 401(a) individually designed plans. That is, interim

amendments for pre-approved plans will not be required until the end of the second calendar year that begins after the issuance of the Required Amendments List in which the change in qualification requirements appears.

Reasons for Recommendation

- This recommendation provides a reasonable, uniform interim amendment deadline for all plans types—§401(a) pre-approved plans (including defined contribution and defined benefit plans), §403(b) pre-approved plans and §401(a) and §403(b) individually designed plans. A reasonable, uniform interim amendment deadline promotes compliance by plan sponsors, service providers, document providers and mass submitters.

- The use of the Required Amendments List for pre-approved plans would serve the same purpose as it does for individually designed plans—providing clarity with respect to law and regulatory changes that require plan amendment. This reduces the guesswork on the part of plan sponsors, document providers and mass submitters on what changes require plan amendment. Since the IRS already issues the Required Amendments List, no additional IRS resources would be needed in taking this approach.

- A fixed deadline—the end of the second calendar year that begins after the issuance of the Required Amendments List in which the change in qualification requirements appears—provides a reasonable period of time to complete the amendment drafting and adoption process regardless of the timing of legislation and related IRS/Treasury Department guidance. This will lead to more complete and accurate interim amendments.

- A fixed deadline will assist IRS examiners when determining whether a plan sponsor has timely adopted required interim amendments.

Thank you for your consideration of these comments. We are happy to participate in a call if desired to discuss the issues raised herein. Please contact Martin L. Pippins, MSEA, Executive Director of ASEA and Director of Regulatory Policy (mpippins@usaretirement.org; 703-516-9300, ext. 146), if you have any comments or questions regarding the matters discussed above.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/
Martin L. Pippins, MSEA
Executive Director
American Society of Enrolled Actuaries

Cc: Louis Leslie, Senior Technical Advisor, Internal Revenue Service (SE:TEGE:EP)