

Larry C. Starr, CPC, QPFC, Craig P. Hoffman, APM, and Tom Poje, CPC, QPA, QKA, met with James Holland, Manager, EP Technical, and Marty Pippins, EP Technical Guidance and Quality Assurance of the Internal Revenue Service on September 29, 2006. Lisa Mojiri-Azad, Assistant Branch Chief, Office of Chief Counsel, was in attendance via phone conference.

The purpose of the meeting and calls was to provide the IRS officials with questions which were submitted by members of ASPPA. A number of these questions pertained to the DOL and so were not answered. There were also a large number of questions dealing with PPA. The answers to these will be deferred to a later date. This material also includes a number of questions (as noted) that were answered at the 2006 Western Benefits Conference list of questions. Questions pertaining to Defined Benefit Plans are answered in a separate session.

It is intended that the responses or deferrals to the questions provide the basis for discussion at the 2006 Pension Actuaries and Consultants Conference during the IRS Question and Answer session. The answers reflected in this presentation are the ASPPA representatives' interpretation of the IRS officials' responses, and are not direct quotes. They are intended to reflect as accurately as possible the statements made by the government representatives. This material does not represent the official position of the Internal Revenue Service, the Treasury Department, or any other government agency; nor has it been reviewed or approved by the Service or the Treasury.

It is intended that this written material will meet the requirements necessary to qualify for Continuing Education Credits.

ASPPA wishes to thank all those involved for their cooperation and assistance in making this portion of the program a success.

<u>Question Topic</u>	<u>Page</u>
Defined Contribution	2
Amendments	11
Miscellaneous	15
Nondiscrimination	25
IRA	29
5500	33

Defined Contribution

1. With the automatic safe harbor (effective in 2008) can a plan sponsor set the automatic deferral rate at 10%? A plan sponsor would like to do this because they anticipate their new hires will opt out of the plan due to the high deferral rate and will likely not participate. This would allow the plan sponsor to have an ADP/ACP safe harbor plan with little additional cost impact due to the high opt out rate. (In other words there would not be an escalation factor-- participants would be set at 10% upon plan entry.)

A. To be discussed from the podium.

This will probably result in an effective availability problem.

2. I have a 401(k) Plan that was transferred to us. There are old forfeiture \$ that were left in the plan from 1999-2003. These represent Match forfeitures. The plan uses forfeitures to reduce the Employers Match; however, the Employer never used them. So, the monies should then be allocated as a Matching contribution. My problem is if I go back to 1999 and forward, allocate the monies for each of the appropriate plan years, these contributions would have to pass the ACP tests for each of the years. At this point it would be too late to correct a failed test. So should I just allocate all of the money in the current plan year and forget about the prior years?

A. You have an operational failure – failure to follow the terms of the document. If the match formula is fixed (e.g. 50% up to 3% deferred) then use up the forfeiture as soon as possible in future years. If the match is discretionary, then use the guidelines suggested under EPCRS. To be discussed from the podium.

Depending on facts and circumstances, might not be available for EPCRS.

3. If an employer with a 5 yr cliff vesting schedule profit sharing plan now has to amend due to PPA06 in 2007 and elects to choose a 6 yr graded, does the participant with at least 3 years of vesting still have the right to continue with the 5 yr cliff (i.e. the schedule that PPA06 is taking away for PS)?

A. To be discussed from the podium.

Guidance coming.

4. Facts: Plan is Top Heavy, Standardized Document
Per terms of the document, only NHCE's are eligible to get a matching contribution

The company made a matching contribution - 100% up to 3% deferred, all NHCE's received a 3% match – which was used to meet the Top Heavy minimum requirement.

One HCE, who is not a key, did not receive a matching contribution (per document not eligible for a match); therefore he had to receive the Top Heavy minimum as a profit sharing contribution.

Only one participant receives a Top Heavy minimum profit sharing contribution and that person is an HCE so coverage would fail. All NHCE's received the minimum as a matching contribution. Since all required participants received the required TH minimum, is coverage even an issue?

A. Yes, there is a coverage issue. Follow the terms of the document in regards to possible QNEC correction.

5. If an age 50+ participant chooses not to max at the deferral limit (including catch-up) for any given plan year, is it allowable to maximize that participant in discretionary contributions, including the catch-up amount (415 limit + catch-up)?

A. Timing issue. Check document for 415 language to see what gets kicked out first. To be discussed from podium.

6. Can a QNEC, used to satisfy ADP and/or ACP testing, also be used to satisfy Gateway testing?

A. No. The QNEC can not be used for double duty (Unless the plan was a safe harbor 401(k) in which case this is permitted)

7. A safe harbor 401(k) plan provides an enhanced safe harbor match formula of 100% up to 6% and a discretionary employer match of 100% up to 4%. There would be no other, additional employer contributions for the plan year. Is an ACP Test required?

If an ACP Test is required, what matching contributions would need to be included in the ACP Test?

If no ACP Test is required, and the only employer contributions for the plan year are those originally stated, 100% up to 6% enhanced safe harbor match and discretionary match of 100% up to 4%, would such a plan be deemed NOT TOP HEAVY?

A. To be discussed from the podium.

8. This question concerns the 90-day "rewind" of automatic contributions and whether these contributions are taken into account in the ADP test. Originally, we thought they were excluded from the ADP test, which is consistent with the Joint Committee Explanation. However, the statute itself is a little ambiguous. The statute says the "withdrawal" is not taken into account in the ADP test. It's unclear whether it is the dollars withdrawn that are ignored in the ADP test, or whether it is 'the fact that a withdrawal occurred' that is ignored (which would result in the withdrawn dollars being counted in the ADP test). Apparently, some are taking the position that the refunded dollars should be counted in the ADP test and that just seems to be contrary to the spirit of the "rewinding".

A. Wait for future guidance. This issue will not take effect until 2008.

9. A plan sponsor starts a 401(k) plan mid year and has already made contributions to a SIMPLE. What happens to the contributions in the SIMPLE? Are they now taxable?

Can they be rolled to the new 401(k)?

Should they now show up in box 1 of the W2?

A. You have excess contributions to an IRA.

10. For the safe harbor nonelective contribution, does the document or notice have to specify the exact % or can it simply say "at least 3%", providing the employer to contribute a larger % if they so desire?
11. A notice is provided to participants 30 days before plan year begins that the plan 'might' contribute a 3% safe harbor nonelective contribution. 30 days before plan year end, the company provides a supplemental notice that the 3% safe harbor nonelective contribution will indeed be made for the current year (and 'maybe' again next year). What exactly needs to be in the amendment for the year in question, especially since the preamble to the regulations indicates the IRS frowns upon their being language referring to how the ADP test will be performed in a safe harbor plan.
12. In determining the "representative matching rate", for the alternative calculation of using the lowest matching rate for all eligible NHCEs in the plan who are employed by the employer on the last day of the plan year and who make elective deferrals for the plan year, can you respond to:

(1) Does the "all eligible" "who make elective deferrals" mean that if a plan requires 1000 hours to receive a match, that you have to include in that group of employees who made deferrals, employees that did not receive a match due to completing less than 1000 hours. In responding to this, it is assumed the plan passes coverage for the match.

(2) when testing using the "otherwise excludable" rule, can we assume that those in the otherwise excludable group are not included in the calculation?

The following questions were discussed at the 2006 Western Benefits Conference. Craig Hoffman and Marty Pippins were in attendance at the meeting.

13. When using the 3% safe harbor non-elective contribution and the plan definition of compensation is from date of participation, there appears to be some confusion that you could not use date of participation compensation and still rely on the safe harbor plan to satisfy top heavy. If the plan is using no other contributions but the 3% safe harbor non-elective contribution, I was under the impression that the plan was considered not top heavy even if the top heavy ratio was over 60%. Please clarify.

A: If safe harbor is only contribution, then it is top-heavy free.

14. Would the following situations meet the requirements of IRC Section 416(g)(4)(H) so that they are not subject to the top-heavy rules in Section 416?

Situation 1: A non-governmental 401(k) Plan utilizes a 3% non-elective safe harbor to satisfy the ADP test. The Plan permits a discretionary non-elective contribution. The Plan also permits a discretionary matching contribution that satisfies the ACP safe harbor matching contribution limitations, including a limitation that the discretionary match shall not exceed 4% of compensation. For the Plan year, there are no Employer contributions made other than the 3% safe harbor contribution. No forfeitures are allocated for the year.

A: same as above – plan is not subject to top-heavy rules.

Situation 2: The same Plan as in Situation 1, except that the Employer makes a discretionary matching contribution.

A: Plan is top heavy(?) maybe. Further discussion on the issue needed someday.

15. Under the ADP/ACP Safe Harbor rules, a plan is considered to have met top heavy requirements if the only employer contribution is the safe harbor matching dollars. The question has to do with the time period during which a discretionary contribution is made and the plan year that must be tested for Top Heavy purposes.

For example. Plan year runs 1/1/03 to 12/31/03. As of the determination date (12/31/03), the only contributions made for the plan year were deferrals and

employer matching contributions. Plan sponsor makes a discretionary profit sharing contribution in March 2004 for the 2003 plan year.

Do you deem the 1/1/03 to 12/31/03 plan as consisting "solely" of safe harbor money since the profit sharing contribution was made after the determination date and under Top Heavy rules contributions made after the determination date are not considered in determining top heaviness?

If not, it would seem that you would need to test the 2003 plan year for top heavy purposes and the determination date is 12/31/02.

Or, do you perform the top heavy test for the year in which the contribution is actually made, in this case the 2004 plan year, and the determination date is 12/31/03?

A: Timing of contribution not important. Since an additional profit sharing contribution for the plan year, the plan must also satisfy top-heavy requirements.

16. In a Safe Harbor 401(k) design, is it permissible to eliminate an optional form of benefit (annuity) mid year? These plans are required to send an annual notice which discusses various provisions in the plan - including distributions options. If this is OK, what is the prescribed notice period?

A: It is unclear about eliminating an option. Adding an option (e.g. ability to make a Roth contribution) – at least informally, would seem possible by issuing a supplemental notice, since this involves new deferrals only. Watch for forthcoming guidance. Note: At least in the case of Roth contributions this makes a difference because the 5 year clock for distributions starts with the beginning of the plan year in which an individual makes a contribution – not when contributions are made. The IRS expresses concerns about adding a match.

Along a somewhat related issue regarding changes to the plan, a safe harbor 401(k) plan has 3 month eligibility and SH is given to all who are eligible. The plan sponsor wants to change eligibility to 1 year and do it mid-year. This would prevent some recent hires from entering the plan in the next few months of 2006 and push them back to 2007. Is this permissible?

In a safe harbor plan (Basic Match), is there a problem with liberalizing the eligibility during the year? The Plan is a calendar year and currently uses 6 months of service for eligibility and the client is interested in changing to 3 months. The safe harbor notice would be updated to clarify the change and would be provided to those newly eligible. No highly compensated would benefit from this change and the plan is not top heavy. Would the answer change if an HCE benefited from the change?

A 401(k) plan using a safe harbor match requires age 21 and 1 year of service to be eligible to make deferrals. If the Plan is amended mid-year to allow deferrals after age 21 and 6 months of service, will this cause a problem with the ADP/ACP safe harbor?

Would the answer change if the amendment specifies that otherwise excludables do not receive the safe harbor match?

Would either answer change if the Plan used a 3% non-elective safe harbor?

Does reg. section 1.401(k)-3(e)(1) prohibit an amendment to a safe harbor 401(k) plan during the plan year that would increase the safe harbor contribution level?

17. Why does the Service prohibit employers/plan sponsors from adopting the 3% non-elective safe harbor amendment/language beyond the normal "30 day" notice prior to the start of the plan year? I can understand why the safe harbor notice should be distributed 30-90 days in advance of plan year for plans that utilize the matching contribution requirement as participation in the 401(k) will have a direct impact on their employer contribution allocation. However, an employee's participation in 401(k) under the non-elective safe harbor would have absolutely no impact on amount of employer contribution allocation.

A: Since you can issue a 'maybe' notice on 3% non-elective contribution, there is really no excuse not to use that method.

18. The 401k regulations make clear that if a safe harbor 401k plan promises the 3% non-elective contribution (as opposed to using the "maybe" notice) that there is no way to get out of the contribution before the close of the plan year, unless the 401k plan terminates. Could the employer, in lieu of terminating the 401k plan, just amend the PY to create a short PY. This would still cause the plan to lose its safe harbor status, but at least the PY would end, cutting off the safe harbor contribution thereafter, if the plan is amended out of being a SH plan for the following plan year, and termination of the 401k has been avoided.

A: Final regulations imply you can not do this.

19. Fact pattern: Joe makes an elective deferral out of his 12/31/03 bonus. These deferrals are not deposited until 3 months later. When does his deferral get classified as late? Is it late for the 2003 plan year and therefore requires a 2003 5330 or does it become late in 2004 and only require a 2004 5330?

Answer: If it is paid in 2003, then it should be considered a prohibited transaction in 2003 as well. However, this is a facts and circumstance case – one needs to consider when the money could have been segregated. Reminder that Rev Ruling 2006-38 states the amount involved is interest only.

20. If a plan allows for an administrative cap on deferrals, but does not expressly state the capped percentage, how should a participant's deferrals in excess of this cap be treated? Does the answer change if the participant is an HCE?

Issues - should the deferrals be left in the plan or returned to the participant? Should the attributable match be forfeited or paid to the participant? Should the deferrals be included in the ADP test?

Answer: This does not sound like an enforceable cap, so leave deferrals in the plan. If it was considered an effective cap, then one has an operational defect, and the amounts need to be corrected through EPCRS (or possible treat the deferrals as catch-up contributions. (Remove and forfeit match, if not allowed)

21. At a recent seminar, the instructor opined that no election was even necessary for a catch up contribution - rather that the catch up contribution was simply an addition to the 402(g) limit. However, if a plan has a 50% cap on the deferral rate, although unlikely, those making less than \$26,000 would not reach the 402(g) limit, but may still be catch up eligible. Would you think the catch up election would need to be made available for this lower paid group?

Answer: Universal rule applies- all have to be able for the catch-up. For example, suppose an employee make \$20,000 for the year and defers \$1000/month (\$12,000 for the year). This employee would have \$2000 in catch-up contributions.

22. What period of compensation should be used in the ADP test for a calendar plan year in which the 401(k) plan is terminated as of 9/30? Should the comp be for the period of 1/1 - 12/31 or 1/1 - 9/30?

Answer: Not entirely clear. If everything was paid out by that date then comp through 9/30.

23. Match on Excess Contribution that is recharacterized as Catch-up: Assume you have a 401(k) plan that does not match the catch-up contributions but does match regular deferrals at a rate of 50% of all deferrals. The ADP test fails and a HCE over the age of 50 deferred \$10,000, yet the maximum that would be allowed and still pass the test is \$7,000. He was matched on the whole \$10,000, since the \$10,000 was considered regular deferrals during the year. Now we recharacterize the excess contribution of \$3,000 as a catch-up. What happens to the match on this \$3,000? Since we are now calling the \$3,000 a "catch-up", is the person entitled to the match on the \$3,000 since the plan says there is NO match on catch-up contributions? Can he keep the match? Should it be forfeited?

Answer: Most likely the match should be forfeited. Follow terms of the document.

24. A 401(k) plan allows participant to direct investments from the funds selected by the Trustees. An HCE wants to invest in a fund that the Trustees have not included in the list of funds available. The HCE wants to add this fund but limit the availability to only that HCE as an investment option. Is it permissible for the plan to exclude all other participants from investing in this "new" investment?

Answer: No.

What if the fund will be available to everyone in the plan but has an initial investment requirement of \$100,000?

25. 1.401(a)(4)-4(e)(3)(iii)(G): Regulation states: The right to each rate of allocation of matching contributions described in 1.401(m)-1(f)(12)...but also treating different rates as existing if they are based on definitions of compensation or other requirements or formulas that are not substantially the same.

If the plan does not use a definition of compensation that meets 414(s) in computing the allocation of the matching contribution, does the allocation of match represent different benefits, rights and features that require 401(a)(4) testing?

For example, if a plan has one HCE who has \$80,000 salary, and total compensation of \$100,000, due to a bonus, of which \$80,000 is considered in the allocation of the match, and has one NHCE who has \$6,000 wages, and total compensation of \$10,000, due to overtime, of which \$6,000 is considered in the allocation of the match. Does this require BRF testing?

Would this change if no bonus was paid during the year and the HCE had 100% of total compensation counted but the NHCE only had 60% counted?

Answer: If the same definition is used for the match for all participants, then no BRF. (You would still, of course, need to pass 414s)

26. We understand that this question has been posed in prior ASPPA conferences, but for clarity, please confirm the IRS' stand on disaggregation of otherwise excludable employees in the following example:

401(k) Plan, calendar year; Eligibility for deferrals and matching is: 12 months, monthly entry, age 21

Can this plan can impose disaggregation in ADP/ACP testing because the entry dates are more liberal than the dual entry method? Do entry dates in the plan have any impact on the ability to disaggregate otherwise excludables?

Same example BUT plan requires a minimum age 18 to enter?

Answer: (Prior conferences have suggested you can probably use maximum entry dates) This year it was indicated to use plan's entry dates, though you could add language that for testing purposes you would use maximum entry dates.

27. How closely is the TPA expected to review a client's salary deferral deposit history to determine if there were late deposits? Does the TPA risk incurring liability for unreported late deposits if he/she relies on the client's statement that there were no late deposits?

Is it possible for a plan to provide for alternate methods of allocating QNECs? (e.g. allocation using "bottom up" (subject to the new limits) – but if test is not passed using that method, then pro-rata allocation to all) – or would this fail the definitely determinable requirement?

Amendments

1. In January 2006 we applied for a determination letter for a non-standardized document and didn't get approval until mid September. Typically we have had response times less than six months on terminations. Is there a targeted or average turnaround time we can advise our plan sponsors who want to amend or terminate their plan with the assurance of a determination letter?

A. Response time, of course, depends on a number of factors, such as complexity of submission. The response time you indicated fits within the average..

2. Would adding the 2 yrs in the Trust (Rev Rul 68-24) or 5 yrs of participation (rev rule 54-231) requirement to the employer portion of an already existing 59 1/2 in service withdrawal provision violate 411(d)(6)? This could force someone in the plan at the time of the amendment to wait longer than age 59 1/2 to get their in service withdrawal.

A. Yes that could possibly force someone to wait a longer period of time before being eligible for an in service distribution.

3. At the recent conference, it was discussed at length the ability or lack thereof to amend the Plan for allocation conditions on any discretionary match for the 2006 Plan Year. In the material that I have read there is a consistent reference that if the safe harbor notice included information regarding allocation conditions the IRS can view the elimination of the allocation conditions as a problem for 2006. I have a small Plan that includes a 500 hour requirement for terminated participants on the discretionary match. Therefore, only term's less than 500 would not receive the contribution. They intend to make the discretionary match this year and want to maintain the ACP safe harbor. I checked the safe harbor notice and the notice does not include any details on employer discretionary contributions or allocation conditions. There is only a reference to the SPD. Is it permissible to remove the allocation conditions even at this late date?

A. To be discussed from the podium. Expanding eligibility probably not a problem.

4. Does the automatic rollover amendment and/or the final 401(k) reg amendments have to be adopted by the end of the 2006 plan year, or can they be adopted as part of the EGTRRA restatement? (Of course, terminating plans must adopt sooner, with their termination amendments.) In addition, how far back should plan documents be kept if there is no IRS favorable determination letter?

A. The automatic enrollment amendment should be in place. The final 401(k) regulation amendments depends on whether the particular item is one that is required to be qualified (e.g. GAP period income on excess deferrals) or one that is discretionary (e.g. hardships for funeral expenses). Discretionary options have to be on place by plan year end, required items have until 9 1/2 months after plan year end. It is expected most people

would amend everything at once for the new 401(k) regulations, but it is possible to amend in steps.

5. I was told by an actuary that the Service is not issuing determination letters for cash balance plans. Is that true and if so when will they start again?

A. New plans have no problem. The IRS is moving on the plans that are amending a prior DB plan.

6. Have a document with an approved opinion letter. Some minor modifications were made (some not available under the volume submitter) and it was submitted for a determination letter as a volume submitter document using form 5307 (no additional user fee was required). How do we know if the IRS still considers it a volume submitter document or an individually designed document?

A. IRS recognizes some minor modifications. It would still be considered a volume submitter rather than an individual designed plan.

7. In a plan takeover, a plan has a prototype document that is sponsored by the prior investment carrier. You decide not to restate the plan on a new document (either one that is sponsored by the new investment carrier or your own prototype document). Is it possible to amend the plan with the interim amendments for the new final regulation language and still rely on the Favorable Determination letter of that prototype or has the plan become an individually designed plan and therefore have to be submitted to the IRS to issue a Favorable Determination letter on that final regulations amendment?

*A. There is no requirement of a vendor ‘match’ – that is, there is nothing to prevent you from adopting amendments from a different vendor as long as there are no other conflicts. **To be discussed from the podium.***

8. For the EPCRS correction of amending a Plan to conform to the eligibility operations for including an ineligible employee to participate, it indicates that the amendment be submitted to the IRS. It is my understanding that a VCP filing would be required in addition to a submission fee for a determination letter. Please confirm this is necessary even if the plan is on a prototype or volume submitter document.

9. Will the IRS let us fix a problem with the HCE Top-Paid Group Election Consistency Rule by plan amendment? For example, in a controlled group scenario, one plan says use top paid group election, the other plan does not. How is this to be corrected or handled after plan year end?

10. Doesn't the “last day of the plan year” deadline for purely “discretionary” amendments conflict, in some cases, with the provisions of IRC section 412(c)

(8) [retroactive amendments adopted within 2 ½ months of plan year end, doesn't reduce accrued benefits of participants and is permitted due to business hardship.]

11. If a client is currently on an IDP document, does signing a certification of intent to restate onto a prototype or volume submitter document, relieve the client of the need to restate their IDP for EGTRRA as of 1/31/2007 if their EIN ends in 1 or 6? If so, would the certification need to be signed by 1/31/2007?

Also, if we later find that there is a provision the client can't live without that is not supported by the prototype or volume submitter document, what are the repercussions or restatement options?

12. I find that many qualified plans have been established with standardized or non-standardized prototype plans, without the benefit of an IRS determination letter. Now I bring the plan up to date with our documents and attempt to file for a determination letter, I find it almost impossible to get all the prior documents, including amendments, opinion letters, etc. for a complete filing to the Service. I notice a disturbing trend that many of the documents were not dated, if a signed copy can be found.

Why does a determination letter have to include all past documents? Why couldn't a determination letter have a current effective date to start the determination of the document?

A: Probably do-able, but only if letter is specific as to date of approval runs from. IRS really wants verification that a plan actually exists.

13. A document provider has an IRS pre-approved GUST Multiple Employer Volume Submitter Defined Contribution Plan Document. This same document provider submitted an EGTRRA Multiple Employer Volume Submitter Defined Contribution Plan Document to the IRS for approval prior to 1/31/2006. Let's assume that this document provider receives an EGTRRA Advisory Letter on its Multiple Employer Volume Submitter Defined Contribution Plan Document sometime in 2007. Section 10.03 of Rev. Proc. 2005-66 states that "For a plan that is a multiple employer plan, the plan's five-year remedial amendment cycle is Cycle B."

Would an employer who had adopted the pre-approved GUST Multiple Employer Volume Submitter Defined Contribution Plan Document and then timely adopted the pre-approved EGTRRA Multiple Employer Volume Submitter Defined Contribution Plan Document be eligible for the six-year amendment/approval cycle for pre-approved plans?

Would an employer who had NOT adopted the pre-approved GUST Multiple Employer Volume Submitter Defined Contribution Plan Document (either because the employer did not previously sponsor a plan or because the prior

multiple employer plan document was individually designed) but who timely adopted the pre-approved EGTRRA Multiple Employer Volume Submitter Defined Contribution Plan Document be eligible for the six-year amendment/approval cycle for pre-approved plans?

Would having the employer and the document provider execute Form 8905 allow the employer to be eligible for the six-year amendment/approval cycle for pre-approved plans?

If the employer would be eligible for the six-year amendment/approval cycle for pre-approved plans, would the employer be allowed to submit its multiple employer plan for a favorable determination letter using Form 5307?

14. Form 8905

1) A fairly new DC client is on a GUST prototype. They now sign the Form 8905 and it shows they intend to adopt an EGTRRA prototype. In 2008, the EGTRRA restatement door opens, and a change occurring in 2008 makes it so the client MUST adopt a volume submitter plan to maintain their qualified plan status going forward. Their EIN ends in a 1. They did not sign a form 8905 by 1-31-2007 to adopt a volume submitter plan (because they had no intent or need to do so back in January 2007). What guidance can we be provided with - is it impossible to restate timely now?

2) A DC client is on a GUST prototype. They now sign the Form 8905 and it shows they intend to adopt an EGTRRA prototype sponsored by document sponsor Z. On August 1, 2007, document sponsor Z gets fired. Document sponsor A takes over the responsibility for the plan, and restates the plan to Sponsor A's prototype. The form 8905 signed on 1-31-2007 included the name of a prototype that this sponsor will not be adopting now. Their EIN ends in a 1. What guidance can we be provided with - is it impossible to restate timely now?

Miscellaneous

1. Plan audits are probably a necessary IRS tool to ensure adherence to the law and protect qualified plan status. Some clients seem paranoid about IRS limits and others seem to flaunt them greatly. What is the likelihood of a first time audit for a DC and for a DB plan and what are the primary issues investigated? How do corrective measures for minor errors compare to sanctions for major violations?

2. If I understand correctly, a plan cannot have different conditions or restrictions for employer securities [in a 401(k) plan] compared to other investments. Does this mean that if a plan imposes a restriction on new contributions invested in ER stock - say 20% - then the plan must also impose the same 20% limitation on new contributions on all other investment funds?

3. Rev. Rul. 2006-38 established that the DOL calculator may be used to calculate earnings for purposes of calculating the prohibited transaction excise tax. If a Plan does not correct the late deposit through VFCP, can the plan administrator calculate lost earnings for purposes of making the plan whole by using the DOL calculator without considering hypothetical lost earnings?

Correction of Late Deposits - Form 5330

Lost Earnings

Principal	Loss Date	Recovery Date	Final Payment Date	Amount Due
\$769.00	8/4/2005	9/1/2005	9/29/2006	\$3.83
\$769.00	9/15/2005	10/28/2005	9/29/2006	\$6.47
\$769.00	7/21/2005	9/1/2005	9/29/2006	\$5.75
\$769.00	8/18/2005	9/1/2005	9/29/2006	\$1.91
\$769.00	9/29/2005	10/28/2005	9/29/2006	\$4.56
\$769.00	10/13/2005	10/28/2005	9/29/2006	\$2.37
\$769.00	10/27/2005	10/28/2005	9/29/2006	\$0.16
\$769.00	11/10/2005	12/21/2005	9/29/2006	\$6.42
\$769.00	11/24/2005	12/21/2005	9/29/2006	\$4.22
\$769.00	12/8/2005	12/21/2005	9/29/2006	\$2.03
\$762.96	1/6/2006	7/3/2006	9/29/2006	\$27.07
\$762.96	1/19/2006	7/3/2006	9/29/2006	\$25.07
\$762.96	2/2/2006	7/3/2006	9/29/2006	\$22.92
\$762.96	2/16/2006	7/3/2006	9/29/2006	\$20.77
\$762.96	3/2/2006	7/3/2006	9/29/2006	\$18.63
\$762.96	3/16/2006	7/3/2006	9/29/2006	\$16.49
\$762.96	3/31/2006	7/3/2006	9/29/2006	\$14.21
\$762.96	4/13/2006	8/1/2006	9/29/2006	\$17.17
\$762.96	4/27/2006	8/1/2006	9/29/2006	\$15.05
\$762.96	5/11/2006	8/1/2006	9/29/2006	\$12.94
\$762.96	5/25/2006	8/1/2006	9/29/2006	\$10.83
\$762.96	6/8/2006	8/1/2006	9/29/2006	\$8.73

\$762.96	6/22/2006	8/1/2006	9/29/2006	\$6.63
\$762.96	7/6/2006	8/1/2006	9/29/2006	\$4.42
Total Lost Earnings:				\$258.65

Above is an actual lost earnings calculation from the DOL website. 24 of 26 payrolls were deposited late for the plan year ended June 30, 2006. The employer's tax year is also 6/30. The question is: which transactions do I list on the 5330 for the tax year ended 6/30/06, and which do I list on the 5330 for the tax year ended 6/30/07? (In actuality, I listed all transactions on both 5330s, and the client payed the interest penalty of \$39 three times (once on 6/30/06, and again on lines 6a and 6b on 6/30/07)). The question arises because all the transactions related to the 6/30/06 plan year, but half of the payrolls weren't even deposited until the 6/30/07 plan year, and of course none of the interest was deposited until the 6/30/07 plan year. And, the final payroll of the year wasn't considered "late" until the next plan year. We did call the IRS, and the person who called us back seemed to have no idea what we were talking about and said to use "any reasonable method! ".

A. This is really a DOL issue. However, you still have a prohibited transaction and a 5330 filing.

4. If the beneficiary is a nonspouse and the death of the qualified plan participant occurred after his/her Required Beginning Date, may he/she roll the assets into a inherited IRA after satisfying the required minimum distribution due for the year and at that point take required minimum distributions based on the inherited individual's life expectancy or is he/she still required to satisfy required minimum distributions of the original participant's life expectancy?
5. Is spousal consent required for the RMD? If yes, is it required each year, or only when benefits increase?
6. I have a plan which excludes part time, temporary, etc in the definition of eligible employee. I read recently that the IRS said one really needs to watch if those part time, etc. work over the 1,000 hours required for eligibility.

For example, let's say a plan excludes part time, temporary, etc. employees. A handful of those excluded work over the 1,000 hours in a particular year.

Am I now required to bring those previously excluded people into the plan even though I pass the coverage test without them?

And this holds even though I have an IRS determination letter on the plan - correct?

A. To be discussed from podium.

7. In general, a plan loan cannot be amortized over a larger period than 5 years (unless it is for a principal residence).

Is there any limit on how many years it can be spread over? For example, is 30 okay? What if the participant is already in their 50's and the loan is being paid through payroll deduction? Is there some kind of reasonableness test to say a 50 year old isn't reasonably expected to continue paying back through payroll deduction on a loan in his 80's...or must the plan allow the 30 year loan?

8. Do the Separate Accounting Requirements under section 402A of the IRC, require that separate Self-Directed Accounts be established for all Roth account balances versus all other plan account balances within a SDA? Or, is one single account (per participant) opened at the brokerage firm, and all money sources are commingled into this one account, resulting in a blended investment experience for all source, regardless of the underlying investments, in violation? A follow-up question to this issue related to Roth, then is, if separate Roth SDA's must be established for the participant, due the same requirements for a separate SDA apply to any After-Tax accounts invested into a Self-Direct Account?

A. As long as you can track the dollars this should be ok.

9. What is the proper 1099 code for the distribution of ineligible contributions?
10.
 - A) Did PPA 2006 make it clear that an Indian casino 401(k) plan is not viewed as a governmental plan?
 - B) Please discuss the portions of ERISA and following laws that an Indian casino 401(k) plan does not have to comply?
 - C) Does the Tribal Government have the right and the authority to make a determination as to the legality of a QDRO?

A. Guidance is coming.

11. When do you expect the IRS to issue regulations to permit active employees of a terminated 403b plan to withdraw their account balances or roll it over to another qualified retirement plan or IRA?

A. Soon.

12. A company allowed 2 employees to withdraw salary deferral monies from their 401(k) plan in 2004. At the time the employees were still employed and under age 59 1/2. An unsuccessful attempt was made to have the money returned to the plan. To make the plan whole the plan administrator instructed the employer to pay the same amount of money back to the plan as an employer contribution to everyone other than the two who were distributed. 1 year later (in 2005) both of these participants in question terminated from the company. Was the correct

procedure followed in having the employer make the plan whole with the contribution? Would the employer have to pay the money back to the plan in this case if the employees had terminated a year later?

To summarize, how does one really handle impermissible distributions?

13. As a Third Party Administrator we have several clients who forward the IRS inquiry letters/notices to our office to respond to IRS. Currently, most of the notices are regarding the Form 945, 941c and Federal Withholding accessing penalties.

1. We respond in writing with explanation and attach whatever copies are necessary to waive the penalty.
2. A few weeks later the client receives another notice with penalty and interest. This goes on several months. Notice after notice for months with increasing interest.
3. Now, we try to contact the IRS, by calling their phone number on their notice.
4. IRS would respond only if we as TPAs file a Form 8821 or 2848.
5. IRS gives us a fax number to use for the California State to register the Form 8821 or 2848, so that IRS could see on their data base the authorized person's name, etc.
6. We are told that it takes about 4-6 weeks to get registered. Then the authorized person can call and actually speak to an agent.
7. Sometimes, IRS agent cannot still locate on the data base the authorized person because it never was registered or the fax number is incorrect.
8. One agent told us that the forms were not done correctly, when we precisely followed the instruction of the prior agent we spoke to.

Each agent tells us something different. It is very frustrating when we are not given specific instructions or their policies are not consistent.

We would like to suggest to the IRS to have some instructions on the web for us to follow or file it on the web address for faster service. May be one web site for each Form 2848 or 8821.

We would like to type the form on the web and submit it directly on their site. And also a confirmation of the registration whether it was accepted or not and what number to call to contract.

14. A DC prototype plan requires spousal consent for a distribution in amounts over \$5,000. When the plan was amended to include the new automatic rollover provision, the option to not allow automatic payments was selected, even those below \$5,000. Does that mean that the spousal consent is now needed for all distributions or just for those above \$5,000, as previously required?
15. Large numbers of small (under \$15.00) terminated deferred vested accounts are still a plague for large plans. The investment fees and administration costs are

inflated by hundreds of small accounts that high turnover clients create. Can we just forfeit some minimum amount that represents less than the cost to distribute that is ordinarily charged to the terminated participant account?

16. Has there been any movement to allow sponsors to terminate 403(b) plans and allow the assets to transfer into another retirement plan simply as a result of the termination?
17. Would the IRS consider allowing an eligible organization to file a group VCP submission on behalf of fewer than 20 plans? Assuming the fee remains the same, it shouldn't be a burden to review a filing for less than 20 plans and I believe the need is there - especially where an error and/or correction is not specified in the appendices to Rev Proc 2003-44.
18. An individual, prior to leaving for military duty in Iraq, gives his/her spouse power-of-attorney. May the spouse, who is a participant in a QP the plan and is entitled to a distribution, sign the spouses' waiver on behalf of his/her spouse?
19. A participant dies with an account balance of \$42,000. Of the \$42,000, \$6,000 of it is in the form of an outstanding participant loan. Who is responsible for the income tax due on the outstanding loan amount? There is no clear guidance in this regard. Is the decedent's estate is responsible for the income tax due on the outstanding loan and that the beneficiary responsible for the amount of the remainder of the death benefit?
20. A corporate employer adopts a new DB plan and a new 401(k) PS Plan.

End of Year 1: The 401(k) deferrals and the DB minimum required contributions are made and deducted. The DB amount alone is 40 pct of payroll, so the 3 pct PS contribution is not deducted and a 5330 is filed and they pay a whopping 2,000 excise tax.

End of Year 2: The DB minimum contributions do not get made until after the corporate tax return deadline for year 2, so no DB deduction for year 2, but deferrals in year 2 are deducted and a 5 pct PS contribution made in year 2 is deducted and the 3 pct PS amount from year 1 is now deducted.

End of Year 3: The 401(k) deferrals and the minimum required DB contributions for year 2 are deducted, plus the minimum required DB contribution for year 3 is made by the time the corporate tax return is due, so it is also deducted. The DB amounts alone exceed 25 pct of payroll, so the 3 pct PS contribution for year 3 is not deducted and a 5330 is filed and they pay 2,200 excise tax.

Year 4 is like year 2, Year 5 is like year 3 and so on.

Do you see any potential problems with the above design?

Has the IRS already commented on the above type of arrangement? If so, what have they said?

21. DOL is now enforcing LM-10, LM-30 reporting requirements originally established in 1959. Several questions have been raised with respect to the reporting requirements:

Is the Pension Trust a reporting employer?

Has the \$25 per event requirement been superseded by the \$250 year allowance?

Is the reporting requirement applicable to Pension Trust Trustees, or only to employees?

22. Can a plan offer an alternate form which complies with 401(a)(9) only to those who are required to receive RMDs?

Example: Plan offers a certain annuity as an alternate form of distribution. The plan wants to make this particular alternate form available only to those who must take RMDs from the plan.

Plan provides that in-service RMDs are only required of those who are 5% owners. Plan further provides that RMDs are payable to non-5% owners who have separated and attained age 70 1/2. The certain annuity option would be offered to this group of participants only.

Assume that there are no participants in the plan who are grandfathered in the right to receive in-service RMDs under prior law (when it was required that all participants begin RMDs at 70 and 1/2, not just 5% owners).

23. A KSOP is sponsored by a corporation with publicly traded securities. Plan permits distribution of dividends and investment of dividends in employer securities, to take advantage of IRC 404(k). Sponsor proposes to amend the plan to allow immediate diversification of employer securities (eliminate age 55/10 years participation rules). If immediate diversification is extended to stock acquired with dividends, will the sponsor still be able to claim the deduction for dividends?

24. Money Purchase plan has a TPA who relies upon participant representation regarding marital status. The participant 'claims' he/she is unmarried and payments begin. At a later date, a spouse is discovered. Will the plan sponsor be held liable?

25. Some of our plans contain non-liquid assets which are not valued annually. Instructions to those examining plans say this could be problematic. What are our options in dealing with these types of investments e.g. parking lots, buildings, etc.?
26. Section 1102(b)(1) of the PPA instructs the Treasury to amend the regulations under IRC §411(a)(11) to provide that the description of a participant's right to defer payment must include an explanation of the consequences of failing to defer receipt. This is effective for years beginning in 2007 or later. However, until 90 days after final regulations are issued incorporating this requirement, the plan administrator must make a "reasonable attempt" to comply.

This raises the issue of whether the explanation of the consequences of failing to defer receipt should include, in the context of a DB plan, that changes in the interest rates under 417(e), starting in 2008, coupled with anti-cutback relief, could result in a smaller present value if a lump sum distribution is delayed beyond 2007.

Since we are talking about the distribution notices, we should also raise the following 2 questions:

- (1) The effective date is stated as plan years beginning on or after January 1, 2007. Does this mean that notices given for annuity starting dates occurring in the 2007 year must comply with this rule, i.e., an explanation of the consequences of failing to defer receipt, even if the notice is given in 2006?
 - (2) Continuing along the lines of (1), could a notice given in 2006 with respect to an annuity starting date falling within the 2007 plan year, be given 180 days before such annuity starting date?
27. Are distributions from a terminated plan paid to active employees treated as in-service withdrawals (included in account balances for 5-years in TH test) or as termination withdrawals (included in account balance for 1 year in top-heavy test)?
 28. Please clarify the use of tax ID numbers for retirement plan trusts. There is a lot of confusion in the field. Is the number permanent or should each successive trustee apply for a new one?
 29. Publication 560 (2005) defines a highly compensated employee as follows:

Highly compensated employee. A highly compensated employee is an individual who:

- Owned more than 5% of the interest in your business at any time during the year or the preceding year, or
- For the preceding year, received compensation from you of more than \$95,000 and, if you so

choose, was in the top 20% of employees when ranked by compensation. This \$95,000 amount increases to \$100,000 in 2006.

Since this is a 2005 publication, the wording seems to say if an individual made \$95,000 in the preceding plan year he would be considered highly compensated. This would seem to go against what the IRS has said in the past – namely that the dollar amount applies to lookback years that begin in the calendar year.

30. Please confirm the ER security diversification requirements that would apply under PPA for all participant directed plans, do not apply to stand alone ESOPs, even if the sponsor maintains a separate plan that allows participant direction.
31. If the client has a shift in ownership such that another company becomes a member of a controlled group of companies and both companies have a calendar year defined contribution plan, what is the procedure for determining the top heavy status for the first plan year the companies are related? For example, Company A had a top heavy ratio of 65% as of 12/31/2005 and would normally give top heavy minimum contributions to its employees as of 12/31/2006. Company B's plan only has a top heavy ratio of 20% as of 12/31/2005 which not require a top heavy contribution. If the employers became related after 12/31/2005 but before 12/31/2006 would Company A need to give a top heavy contribution if the top heavy ratio of the combined plans as of 12/31/2005 was under 60%?
32. Employees of the corporation own 76% of the corporation (a public company). The remaining shares are in "street name." Are the shares in "street name" used in determining ownership for the controlled group calculation?
33. Does the summary plan description need to contain information about what fees are charged to the participant accounts? If so, what are the penalties for not providing the info in the SPD? And can the fee information be provided in a supplementary notice?
34. Will the IRS clarify whether plans already providing the 3% safe harbor NEC have the option to add auto enroll and apply the new vesting schedule to all future accruals, even to those hired prior to the amendment?
35. The VEBA and Welfare Benefit Trust vendors are now marketing essentially the same kinds of products/plans as before, only now they are called §419(e) Single Employer Welfare Plans (as opposed to multiple employer arrangements). IRS Notice 95-34 talks about “these arrangements and other similar arrangements” as failing to provide the tax deductions claimed by their promoters. Is a §419(e) Plan a “similar arrangement”? Further, would a §419(e) Plan be a listed transaction under Notice 2000-15 or any other notice?

A. To be discussed from podium.

36. A plan (sponsored by an LLC) has a safe harbor 3% contribution to make by April 15, 2006. We provided the amount to the accountant a couple of weeks before the deadline, and no check was written to the plan by April 15. So I assumed the client had put their taxes on extension until October 15. In September I learned that there was no extension form prepared. Therefore, it's possible the client took a deduction for a contribution they never made. Because the safe harbor contribution may be made up to 12 months after the plan year, they could make it before 12/31/2006, although it would not be deductible at this point. Should they: (a) Re-do their 2005 taxes, taking no deduction for the contribution, or (b) Make the contribution to the plan now, and file a 5330 for the prohibited transaction over the lending of plan assets to the sponsor for five months (as one would do with a late 401(k) deposit), or (C) something else?
37. Can you provide a status on IRC Section 409A and nonqualified deferred comp plans?
38. We receive sub-TA revenue through our trading partner for our clients who trade via their platform. We invoice quarterly for our services and offset the fees with 100% of the sub-TA revenue received for that client. Based on the fund line-ups several of our clients have, the sub-TA revenue that is generated exceeds our invoiced fees, creating a situation where we have excess. We have several questions pertaining to how to handle this:
 1. We know that the excess can be used to pay qualified plan expenses, such as auditor fees, but we need to know if there is a limit to the length of time that these funds can be earmarked for use for future plan expenses, i.e. does the excess have to be used in the year it is generated?
 - a. Is there any guidance on this issue?
 - b. Is this a document issue or an administrative decision of the plan sponsor?
 2. If there are no qualifying plan expenses and the excess is to be put back into the trust, are there any rules on how it should be allocated – pro-rata, flat, to those in the fund, across the plan participants, etc?
 - a. Are there guidelines on how often this excess should be allocated, i.e. quarterly, annually?
 - b. Should it be allocated to the participants who were in the fund at the time the excess occurred?
 3. Can the excess sub-TA revenue be returned to the Plan Sponsor for them to determine how it is to be used? Can it be used to offset future employer contributions similar to the way forfeiture can be used?
39. If a non-spouse death beneficiary began receiving payments in 2006 (or earlier), will he/she be able to rollover the remaining death benefits in 2007?

40. If a non-spouse death beneficiary began receiving payments in 2006 (or earlier), will he/she be able to rollover the remaining death benefits in 2007?

41. What criteria do we need to look at to determine if a person should be setup under 1099R or 1042s. For example, a U.S citizen/ or (a Green Card holder) living in Germany receives a monthly pension payment from U.S. Does the U.S treaty rate apply to the tax withholding? Should the retiree be setup under 1099R or 1042s?

Nondiscrimination

1. A plan requires a certain level of deferral in order to receive a match (for example, a participant is required to defer at least 5% of pay to receive a match of 100% of 5% of pay). Assume that the ACP test is passed. How do you test effective availability? What if there're no HCEs?

A. If there are no HCEs, then it there is no problem. If there are HCEs, this is a facts and circumstances issue.

2. Last year, we attended a seminar which brought forth a rule concerning the use of a "grandfathered eligibility provision," wherein those employed on a given "grandfather date" are eligible to begin participation on that date; thereafter, the Plan's "regular eligibility provision" governs.

The seminar speaker, and our subsequent research, focused on a rule requiring inclusion of all employees hired after the grandfather date (in the Plan Year) for purposes of minimum coverage compliance testing who had the same eligibility satisfaction as any grandfathered employee. Hence, e.g., if a new Plan which started on 1/1/06 grandfathered anyone employed on 12/31/05, then any employee who had one day of service in 2006 would be included for minimum coverage testing in the 2006 Plan Year.

Suppose, as a result, the 401(k) portion of the plan fails coverage testing. Does the plan have to contribute the average rate of deferrals of NHCEs to enough 'ineligibles' to pass coverage, or will any amount of QNEC suffice?

A. In most cases, permissive disaggregation (testing otherwise excludables separately) would be sufficient to pass testing. If the plan fails coverage, correct with an amendment under -11(g) (e.g. QNEC = ADP average). If the plan is a standardized document then you probably do not have a problem.

3. Is it required that you pass the average benefits percentage test before you can even begin to restructure?

A. Plan must satisfy 410(b) before restructuring. A component plan satisfies the average benefits percentage test if the plan which it is a part satisfies the average benefits percentage test.

4. Some volume submitter practitioners have approval letters which allow each participant to be treated as a separate category. We are hearing rumors that some people in IRS are saying this can be a problem for plans maintained by certain types of entities because the profit sharing allocation could end up being a disguised cash or deferred option for the owner or owners. For which, if any, of the following types of entities could this be a potential problem: sole proprietor, partnership, S Corp, C Corp, LLC taxed as a partnership, LLC taxed as an S Corp?

A. This is a factual issue. It depends on who has the ultimate decision on how much of a contribution is to be made.

5. A plan is jointly sponsored by a number of organizations. Several of these entities have sufficient common ownership to constitute a controlled group. Discrimination testing has been done by separating the unrelated entities. Since permissive aggregation is allowed when you combine two or more plans, can this technique be applied to unrelated entities if they participate in the same plan?

A. No. Plans sponsored by employers who are not related under the rules of IRC 414 may not be aggregated. If unrelated employers maintain the same plan, it constitutes a multiple employer plan subject to mandatory disaggregation of the unrelated entities when testing for discrimination.

6. Employer has 3 plans - 401k, defined benefit and cash balance. The NRA is 65 for the defined benefit and 65 and 5 years of participation for the cash balance (don't ask why they would do something like this but they have). This has caused the owner to have a retirement age of 66 in the cash balance plan. Both of the retirement ages are uniform. The profit sharing has a NRA of 65.

The calculation of the gateway requires the use of testing age in the present value. Does this mean that the accrued benefit of the defined benefit must be adjusted to age 66 before calculating the present value so both DB plans have the same testing age?? (This would appear to satisfy the second definition of testing age)

If the 401k plan did not exist, would the same adjustment have to be made in calculating the EBARs for nondiscrimination purposes?

A similar situation is where the employer has 2 plans - 401k and cash balance. The plans were drafted so that the NRA in the 401k is 65 but the NRA in the cash balance is 66 for the owner. Do the regulations require the EBAR of the DC to be projected to 66 so that the testing age is the same?

Regulation 1.401(a)(4)-9 appears to allow the DB plans to be treated as a 'plan' and the DC plans to be treated as a 'plan' but the question is whether testing age can be different and are adjustments required.

7. In Revenue Procedure 2004-11 the Internal Revenue Service clearly stated that the Section 401(b)(6)(C) transition period rules do not apply to the requirement that an acquired entity be aggregated for ADP/ACP testing purposes. Confirmation is requested that after the acquisition [within the transition period and thereafter], the acquired entity can be excluded/disaggregated for ADP/ACP testing purposes if each plan [both the acquired entity's and the acquirer's] meets the 410(b) ratio percentage test without the acquired entity's plan.

The following questions were discussed at the 2006 Western Benefits Conference. Craig Hoffman and Marty Pippins were in attendance at the meeting.

8. Section 1.401(k)-3(h)(3) (ADP safe harbor early participation rules) specifically provides that a plan is permitted to apply the rules of Code section 410(b)(4)(B) to treat the plan as two separate plans for purposes of section 410(b) and apply the 401(k) safe harbor requirements to one plan and apply the requirements of section 1.401(k)-2 to the other plan.

However, the corresponding section for the ACP safe harbor early participation rules (section 1.401(m)-3(j)(3)) omits the specific reference to Code section 410(b)(4)(B). Does this mean that the rules of Code section 410(b)(4)(B) do not apply to the ACP safe harbor?

Both IRS Notice 98-52 IX B 1 and Notice 2000-3 Q-10 only refer to the ADP safe harbor as well and make no reference to the ACP safe harbor.

Does this mean that the rules of Code section 410(b)(4)(B) do not apply to the ACP safe harbor?

9. Let's say we have a plan that is top heavy and cross-tested. There is immediate entry for the 401(k) and twice-a-year entry after a year of service for the profit sharing contributions

A participant is hired in March 2004, and so is immediately eligible for the 401(k) but not eligible for the profit sharing. However, they must receive a top heavy minimum, equal to 3% of full-year pay. For gateway purposes, they must receive 5% of 415 compensation, but this can be limited to their post-participation date. However, for purposes of the profit sharing, they don't have an entry date yet, and so could I argue that they must receive at least 5% of zero?

Answer: No.

Assuming that it's not feasible to run a separate test for otherwise excludable employees, what's the gateway minimum for a person in this situation for 2004?

10. For profit sharing allocation purposes a 401(k) plan consists of 2 classes -
class 1 - employees with 5 or more years of service.
class 2 - all others. Plan eligibility is 1 year of service.
Usually the plan allocates 2% to class 1, and 1% to class 2. This year the allocation is 1% to class 1 and 0% to class 2. Does the plan run afoul with the 410(a) regulations because, in effect, the plan for the current year has a 5 year participation requirement? Or, if not, does this become a coverage issue, and the

group is not considered 'reasonable' and therefore no average benefits test is permitted.

Answer: Test for 410(b). Answer is unclear.

11. A 401(k) plan uses matching contributions to satisfy the top-heavy requirement. Suppose all NHCEs have received 3% in match, but one non-key HCE receives a 3% non-elective contribution to satisfy top-heavy. As a result, does such a plan fail the coverage test for non-elective contributions?

Answer: Yes, this is a problem.

12. A 401(k) plan performs its coverage testing as follows:

401(k) – statutory includable
401(k) – otherwise excludable
nonelective – all participants

Suppose all three coverage tests fail the ratio % test. Does this result in 3 average benefits percentage tests – one for each coverage test condition tested?

Answer: One average benefits percentage test for the plan.

13. When the April 15 deadline for making refunds of excess deferrals under IRC 402(g) falls on a weekend or holiday (as was the case this year and will be next year), is the deadline for making such refunds extended until the next business day? IRC Section 7503 is not clear on this issue.

Answer: Probably ok. If it says 2 ½ months you have a little leeway. If it says 15th day you are probably stuck.

14. A participant received an ACP refund of \$800 by 3/15/06 due to a failed 2005 ACP test. The ACP test was later revised and it was discovered that the participant was not entitled to a refund at all. The participant in question had terminated employment by 12/31/05 and is over age 59 1/2. Our company had sent a letter to the participant requesting the return of the distribution made in error but have not received a response from the participant. Since the participant has not responded can we go ahead and reclassify this distribution as a normal distribution? Or does this overpayment have to be returned to the trust? In either case please provide specific guidance on how to correct in order to prevent the Plan from disqualification.

Answer: might have to restore lost earnings.

IRA

1. How will the IRS require custodians, as well as tax filers to report the Charitable IRA Rollover for tax years 2006 & 2007? Will a distribution code be added to form 1099R reflecting the direct roll to the charity, or will the distribution be treated as a normal distribution, and then left up to the tax payer to report the charitable contribution on his/her return.

A. Answer forthcoming.

2. An individual died, leaving a profit sharing plan and an IRA to multiple non-spouse beneficiaries. Under the new rules a non-spouse can now roll over benefits from a Profit Sharing Plan to an IRA, can they roll into the Beneficiary IRA they set up from the IRA or must it be a separate IRA, and if so, how would you title this non-spouse rollover IRA.

Jim Holland will supply answer

3. A company sponsors a SIMPLE IRA and mid-year decides that a Safe Harbor 401(k) is really the right choice.

- 1) Is it correct that all SIMPLE IRA deferrals and earnings must be returned to the employees who contributed?

- 2) If the employer has not as yet matched his/her employees, is the match still payable to the employees who deferred even though it too would need to be refunded? If yes, is it deductible?

- 3) Deferrals made to a SIMPLE IRA count as a part of 402(g). If a refund was necessary as a result of the employer starting a new plan, are the deferrals made to the SIMPLE still counted toward the 402(g) limit? If no, then it would follow that each eligible participant can defer the maximum under 402(g) in the new Safe Harbor 401(k). This could also affect a participant who works two jobs and has a 401(k) or 403(b) somewhere else.

- 4) Does the employer have any fiduciary responsibility in causing the loss of tax qualification (under Code section 408) of his company's SIMPLE IRA plan? I think not since IRAs do not come under Title I but there must certainly be some civil implications.

May an employer, separate situation, decide in June that it no longer wants to sponsor a SIMPLE IRA. We have guidance as to how to limit matching contributions in a Safe Harbor 401(k) but I know of nothing to guide us regarding terminating a SIMPLE IRA after the plan year begins.

4. Will the plan sponsor of a daily valuation plan be in violation of the "automatic IRA rollover" rules if a cash-out (no IRA rollover) is initiated when the

participant's vested interest is \$999, but when the check is actually issued the amount is over \$1,000? If yes, to avoid this problem, could the sponsor adopt a policy that would specify automatic IRA rollovers for vested interests between \$950 and \$5,000 based on the participant's vested interest in the plan as of the date of termination and any subsequent last day of the calendar (or plan year) quarter? Since most daily valuation plans don't keep records of daily balances, but they do keep records of quarterly balances, such a policy would allow the plan administrator to process a terminatee's cash-out or automatic IRA rollover without having to worry if the vested balance goes above or below the \$1,000 threshold on the date the check or rollover is actually processed. Note that a similar policy could be used! for the \$5,000 limit on cashouts by adopting a \$4,500 cash-out limit based on the vested balance as of termination or any subsequent last day of the quarter.

5. An individual died on 3/27/94 naming our taxpayer as the non-spouse beneficiary of an IRA. The taxpayer became aware of being named as beneficiary of the IRA in December, 1998 and filed a claim for the proceeds on 12/4/1998. The claim was denied by the custodian of the IRA because, according to the custodian, "the claim should have been made within one year of the date of death." The taxpayer objected and spent until 9/2004 attempting to have the funds transferred to his name. The custodian of the IRA finally agreed in 9/2004 to pay the proceeds to the taxpayer, with interest.

Questions:(1) What year are the proceeds taxable to the beneficiary? 1994, 1998 or 2004? (2)Is the taxpayer eligible to elect to have the proceeds paid out over his life expectancy thus deferring income tax? If so, by what date must the election be made?

6. Suppose a MP plan terminates, a missing participant has an \$8,000 account balance. This is more than the \$5,000 cashout limit. The plan sponsor tries all the methods of DOL FAB 2004-2 to locate the participant without success. The plan attempts to purchase an annuity for this participant, but no insurer will issue one since the participant is not available and the amount is too small. Can this \$8,000 account balance be distributed without participant consent to an IRA rollover per FAB 2004-2? Consider 1.411(a)-11(e)which provides special non-consent cashout rules for terminating plans. One of the criteria is the "plan does not offer an annuity option (purchased from a commercial provider)" Since the plan tried and cannot purchase an annuity, it would seem to meet the criteria for this regulation for a cashout without consent
7. When the assets of a terminating plan are less than the present value of accrued benefits, does the ruling apply to plans that are not subject to section 4044 of ERISA? If a participant rolls his balance to an IRA as part of an in-service distribution (at age 59½, for instance), and then rolls it back into the plan, is this now considered an unrelated rollover, because it has passed through an outside custodian? Would the five-year lookback period be in effect, or is the distribution

"re-set to zero" by its subsequent re-rollover back into the plan (as EGTRRA permits IRA-to-plan rollovers)

8. Rather than exposing benefits to anticipated inferior investment results in small IRA accounts, some plan sponsors are thinking about an alternative to default IRA rollover distributions. Some have said they would like to lower the automatic cashout threshold to \$1,000 (this would be okay under the exceptions in the anticutback reg), and then offer cashouts at the participant's option from \$1,000 to the cashout limit (\$5,000 + rollover account). In the absence of an affirmative election, the benefit would stay in the plan. That is, the default is a deferred benefit.

For these voluntary elections, do you agree that a plan subject to the QJSA rules would not need to offer an immediate QJSA, get spousal consent or provide relative value information?

In light of the approach to EGTRRA of having to actually adopt amendments rather than relying on operational compliance, will the Service soon issue sample amendments?

9. Please confirm whether the following is true or false: The requirement to provide automatic IRA rollover on a cash-out in excess of \$1,000 applies to ALL cash-outs over \$1,000, even if the benefit attributable to employer contributions is less than \$1,000 but the plan ignores amounts attributable to prior rollovers in making cash-outs and the total amount of the cash-out, when including the prior rollover, is greater than \$1,000 (or even greater than \$5,000)
10. May a provision that says that future employees will be required to satisfy an age or service requirement greater than applicable to current employees be allowed in a SEP? Would an individually designed SEP be required? Would the IRS approve a prototype SEP with such a provision? It should be noted that SEP (or SIMPLE IRA) rules do not expressly prohibit such a provision.

Same Question, but regarding the service and compensation requirements of a SIMPLE-IRA(?).

11. Under EPCRS, a plan sponsor is allowed to correct a situation where the exclusive plan rule has been violated by refunding contributions to employees under the SIMPLE IRA plan. We have the following questions.
Please confirm that refunding contributions to employees includes both elective deferrals and any employer contributions.
Can an employer follow this correction method even if they intentionally violated the exclusive plan rule (that is, they intentionally set up a new plan)?
12. After an eligible plan rolls over a distribution to a Roth IRA, starting after Dec. 31, 2007, what happens if someone wants to recharacterize (deconvert) their Roth rollover?

5500

1. When the Schedule P goes away, will the statute of limitations go back to 7 years or will the default automatically be 3 years?

A. *Wait for guidance.*

2. Just wanted to clarify that the 5558 no longer needs to be signed when mailing it to the IRS for an extension of the 5500 filing date?

A. *Yes.*

3. Why do we continue to have to send in a form 5558 to request an extension of the Form 5500? This form is automatically approved anyway so I fail to see the necessity of the filing.

A. *“That is life”*

4. If the Form 5500 is required to be filed electronically, is there going to be some way for a TPA to access the Signer ID & PIN for our clients? Currently we prepare and mail the applications but the clients lose the numbers, throw them away, or just don't look at the mail.

A. *This is a DOL issue.*

5. The use of specific private delivery services is listed in the Form 5500 instructions for 2003. To be timely filed, could a service such as UPS Groundtrack be utilized where the 5500 form is not sent at the end of the filing period but significantly in advance. In other words, why pay the expense for next day, etc. when time is not a factor?

6. There seems to be a fair amount of confusion about trust EIN's and the Schedule P of form 5500. The instructions indicate that it's acceptable to use the payor number as reported on form 1099. Is this still acceptable when that number is for an omnibus withholding submitter and is used for multiple, unrelated plans? Should each trust EIN be specific to a single plan and be portable regardless of the service provider handling the withholding submissions? DOL has said this is an IRS EIN issue and IRS has referred me back to DOL as a form 5500 issue.

7. If a plan freezes benefit accruals and merges into another plan (without terminating) how do I answer question 5a on Schedule I? Does it matter that this will be the final filing and we have not marked the box that says the plan is terminated?

8. DOL issued FAB 2004-2, re distributions to missing participants when a plan is terminating. One of the required steps is to use IRS or SSA letter forwarding to attempt to contact the participant. Can IRS representatives give us some indication as to how quickly they forward such letters, so we can determine an appropriate waiting period before proceeding with plan distribution? We want to be sure to allow enough time for IRS to forward the letter, then assuming it gets to the participant, give them 30 days to respond.
9. Question 8 on Schedule R of Form 5500 asks, "If this is a defined benefit pension plan, were any amendments adopted during this plan year that increased the value of benefits?" Since almost all defined benefit pension plans have automatic 415 and 401(a)(17) cost-of-living adjustments (cola), and one of these two adjustments is likely almost every year, does that mean that all plans in which these cola increased benefits (and hence the value of benefits) should answer yes to the Schedule R question or does the IRS/EBSA only want to know about the increased value of benefits due to other non-automatic amendments?
10. I would like further clarification on reporting change in actuary. Does the actuary's enrollment number get reported or the firm's EIN - particularly when the change in actuary is within the same firm. How do we get the instructions further clarified?
11. If a plan only has 401k contributions and there are 200 eligible participants, but only 30 participants actually defer into the plan then why could we just say there are only 30 participants and avoid an auditors report. Also, we would then be able to do a schedule I instead of an H and save the client time and expense. It does not make sense to do a schedule H and auditors report if you have a situation with over 100 participants, but only a handful participate. I am sure other TPA's have brought this up.
12. Currently, 403b plans with more than 100 participants are exempt from attaching an Accountants Opinion to their 5500 Form. In light of the new regulations now being promulgated, will this exemption be removed and if not, will it be more likely to be removed in the near future?
13. The 2006 release of the Form 5500 did not contain any revision to the Schedule R. So for example, a plan uses a very complex design and passes coverage only through the most clever application of the average benefits test. Please confirm that unless there is a distribution made from the plan during the plan year the method of satisfying coverage requirements will not be reported for that plan year.
14. The Federal Register, Internal Revenue Bulletin and Employee Plan News have each reported that a signature is not required on the Form 5558 for extending the

due date of the Form 5500. However, EFAST continues to advise filers that a signature is required. For a plan year ended December 31, 2006, is a signature required on the Form 5558 to extend the due date of the Form 5500? Will EFAST reject the Form 5500 if the Form 5558 is not signed?

15. If hard to value assets are held within a participant's self directed brokerage account, are these assets required to be reported as hard to value on the Schedule I or H fiduciary question as there is no impact to other participants' accounts?
16. Does an SAR need to be completed for life and health 5500s who just report participant counts and a schedule A? What about a 403(b) plan which doesn't even report participant counts?
17. With the forthcoming 403(b) Regs, will the Service require, or be more likely to soon require, an accountants opinion, similar to what is now required of 401(a)plans? Whether yes or no, elaboration would be helpful.