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October 17, 2013

Ms. Joyce Kahn
Acting Director, EP Rulings & Agreements
Internal Revenue Service
1111 Constitution Ave NW
Washington, DC 20224-0002

RE: Mid-Year Amendments to Safe Harbor 401(k) Plans

Dear Ms. Kahn:

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on additional guidance that is needed regarding mid-year amendments to safe harbor 401(k) plans.

ASPPA is a national organization of more than 16,000 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

Summary

As the popularity of safe harbor 401(k) plans continues to grow, the uncertainty about whether many types of mid-year amendments can be made to such plans also increases. The only official guidance on this topic (Announcement 2007-59) is limited in scope, and merely permitted sponsors of safe harbor 401(k) plans to adopt mid-year amendments for the limited purposes of adding the availability of Roth contribution or a hardship withdrawal feature to the plan. Subsequently, Notice 2010-84 permitted mid-year amendments of safe harbor plans to add in-plan Roth rollovers before December 31, 2011.

Most of the operational concerns of safe harbor plan sponsors have not yet been addressed, and many sponsors have been left wondering whether the amendments listed in Announcement 2007-59 are the only amendments that may be adopted mid-year (a position that has been supported, at least informally, by several Internal Revenue Service (IRS) speakers). On the other hand, other speakers informally indicate that amendments

to modify other items unrelated to the contributions and nondiscrimination status of the plan contributions may be permissible.

The lack of concrete guidance over the years has produced significant uncertainty for plan sponsors faced with mid-year documentation-related issues, including: (a) extension of coverage to employee groups added through company acquisitions; (b) adopting amendments required for maintaining plan qualification; and (c) voluntarily augmenting the benefits or features of a plan during the year. This uncertainty stymies the plan sponsors, commonly delaying changes that would be beneficial to the plan participants until the following plan year.

To address these concerns and to alleviate the inaction caused by this uncertainty, ASPPA respectfully requests that the IRS issue guidance that provides a comprehensive list of amendments or a reasoned criteria for determining amendments that may be adopted during the year without endangering a plan's safe harbor status under Internal Revenue Code ("Code") Sections 401(k)(12), 401(k)(13), 401(m)(11) and 401(m)(12).

Discussion

Customarily, 401(k) plans or plans with matching contributions must be tested annually (*i.e.,* the actual deferral percentage (ADP) and actual contribution percentage (ACP) tests) to demonstrate that the salary deferrals and the matching contributions do not discriminate impermissibly in favor of highly compensated employees (HCEs). Alternatively, such plans may contain provisions that grant participants additional employer contributions and rights, either in relation to salary deferrals alone or in relation to both salary deferrals and matching contributions, that qualify the plan to be deemed to be nondiscriminatory (i.e., "safe harbor" provisions).[1] Plans that are excused from the nondiscrimination testing under these sections are generally referred to as "safe harbor 401(k) plans."

Safe harbor 401(k) plans must satisfy the specific contribution and notice requirements of Code Section 401(k)(12)(D) and, if applicable, Code Section 401(m)(11). These sections of the Code require that a notice be provided a reasonable time before each plan year, outlining the participants' "rights and obligations" under the safe harbor plan. The notice requirement has been interpreted by the Department of the Treasury (Treasury) in regulations to include explanations of: (a) the safe harbor and other plan contributions; (b) the type and amount of compensation that may be deferred to the plan; (c) the mechanics of salary deferral elections; (d) available withdrawals and vesting rules; and (e) how to obtain other information about the plan.[2] Furthermore, the regulations provide that a safe harbor plan must not be amended during the year to modify "the provisions that satisfy the rules of this section."[3]

[1] *See,* Code §§401(k)(12), 401(k)(13), 401(m)(11), and 401(m)(12).
[2] Treas. Reg. §1.401(k)-3(d).
[3] Treas. Reg. §1.401(k)-3(e)(1).

The IRS has issued other guidance that broadly interpret the regulatory limitation on plan amendments in Treas. Reg. §1.401(k)-3(e)(1) to substantially prohibit mid-year amendments in safe harbor plans, with only a limited exceptions.[4] Accordingly, as a general rule, plan sponsors must make any desired amendments to their safe harbor plans effective only at the beginning of the plan year. Notice must also be provided to the plan's participants prior to the beginning of that plan year. Such notice contains not only the relevant safe harbor provisions, but also other information about the plan that may affect the participant's decision to defer.[5] Informal comments from IRS officials, as well as the context of the regulatory limitation on amendments, both suggest concerns about modifications to provisions that are described in the annual notice, as well as changes that could affect a participant's decision regarding whether to defer or how much to defer.

ASPPA understands the IRS's concern that certain plan amendments could affect the plan's safe harbor obligations and/or a participant's decision as to deferrals. This limitation on amendments is consistent with ensuring that the information provided in the annually required safe harbor notice and relied upon by the participants is accurate. Nonetheless, there are many modifications to a plan that are desirable, that relate to provisions not discussed in the notice, and that are unlikely to impact a participant's decision as to whether to defer and how much. Many of these modifications would have the effect of enhancing the plan benefits provided to participants (which, in turn, might have the incidental effect of encouraging salary deferrals). ASPPA urges the IRS to interpret the Treasury regulations' limitations on mid-year amendments narrowly, rather than broadly, to permit these types of modifications to occur without affecting a plan's safe harbor status.

We have organized the proposed permissible amendments into four categories:

- Amendments affecting contributions or participation that are, nonetheless, important to permit for plan operations purposes;
- Amendments needed to protect plan qualification;
- Amendments that affect participants' rights but do not affect the items required to be included in the safe harbor notice; and
- Amendments that do not affect the operation of the safe harbor provisions or the 401(k) feature in general and are generally administrative or informative in nature.

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[4] *See,* Treas. Reg §1.401(k)-3(e)(1), IRS Announcement 2007-59, IRS Notice 2010-84.
[5] *See,* IRS Notice 98-52.

I. Amendments Affecting Contributions or Participation

A. Corrective Amendments to Cure a Coverage or Nondiscrimination Failure

Treas. Reg. §1.401(a)(4)-11(g) allows a plan sponsor to adopt a corrective amendment within 9½ months after the close of the plan year to remedy coverage and/or nondiscrimination testing failures. These corrective amendments may expand the group of nonhighly compensated employees (NHCEs) who benefit under the plan or augment allocations or accruals for existing NHCE participants. Because these amendments are intended to repair what would otherwise be demographic qualification failures, they generally occur after the year has ended – that is, sometime during the plan year following the year of the failure. As such, they constitute "mid-year amendments" that potentially run afoul of Treas. Reg. §1.401(k)-3(e)(1).

Because the plan at issue is a safe harbor 401(k) plan, any nondiscrimination testing failure requiring a corrective amendment will relate to employer nonelective contributions.[6] A failure of coverage that is corrected after year-end must also provide for an additional employer nonelective contribution for certain NHCEs, as it is too late for any participants added through a corrective amendment to make elective contributions for the prior year. Therefore, corrective amendments must, by their nature, provide for additional employer contributions for NHCEs that are completely independent of salary deferrals.

ASPPA recommends that the IRS clarify that corrective amendments to safe harbor 401(k) plans made in accordance with Treas. Reg. §1.401(a)(4)-11(g) are not in violation of the prohibition on midyear amendment in Treas. Reg. §1.401(k)-3(e)(1) and will not cause the plan to fail to satisfy the safe harbor requirements for either the year for which the corrective amendment is effective for the year in which such corrective amendment is adopted.

B. Amendment to Add a New Group of Participating Employees

There are many reasons why a plan sponsor may want to expand availability of the plan to a new group of participants during a plan year. Most notably, there may be an acquisition of the stock or assets of a new entity by the plan sponsor with a related influx of new employees who would otherwise not be covered by the plan, or a decision by the plan sponsor to expand the group of its employees who are eligible for plan participation. If the plan cannot be amended during the year to expand availability of the plan, the only options available are to: (a) decline to cover the affected employees for the balance of the year; or (b) adopt a

[6] A failure of ACP testing in a plan that is a safe harbor plan only with regard to the ADP test would not require amendment under Treas. Reg. §1.401(a)(4)-11(g)(3), as such failure may be corrected without amendment pursuant to Code Section 401(m)(6) (distribution of excess aggregate contributions) or Treas. Reg. §1.401(m)-2(b)(i)(A) (additional employer contributions made to meet ACP).

new plan to cover those individuals for the transition year (with a likely merger of the new plan into the existing safe harbor plan at the first of the next year). Neither option is reasonable. The first leaves the affected employees with no benefits for the relevant year, and the second results in a significant financial and administrative burden for very little advantage.

A change in the group of participating employees affects the new entrants, but does not affect existing plan participants. IRS guidance provides a means by which mid-year plan entrants are informed of the safe harbor provisions through a notice before they enter the plan.[7] The requirements of this guidance properly protect the interests of the new entrants. Furthermore, expanding plan coverage to additional participants is consistent with the public policy of encouraging employers to provide retirement benefits to their employees.

ASPPA recommends that the IRS allow plan sponsors to increase availability of a safe harbor 401(k) plan to a new group of participants during the year through amendment to liberalize eligibility requirements or the class of employees participating in the plan or by permitting the mid-year adoption of the plan by a related or acquired entity, provided the safe harbor notice requirements for mid-year entrants are satisfied.

C. Prospective Cessation of Safe Harbor Contributions for Highly Compensated Employees

Safe harbor 401(k) plans may exclude HCEs from both safe harbor nonelective and safe harbor matching contributions.[8] Plan sponsors may also amend their safe harbor 401(k) plans prospectively to suspend safe harbor matching contributions or to eliminate safe harbor nonelective contributions during the plan year for all employees if certain conditions are satisfied, including: (a) a 30-day advance notice is provided to participants; (b) participants have an opportunity to change deferral elections, (c) the ADP (and, if applicable, the ACP) test is satisfied; and (d) in the case of the elimination of nonelective contributions, the existence of a substantial business hardship.[9]

At times, however, the financial constraints of a business may not be so severe as to require the suspension of contributions for all employees. An employer may find that the necessary cost reductions can be effectuated by prospectively eliminating the employer contribution requirement for the HCEs only. This partial suspension of contributions is not authorized by the Code or other guidance, notwithstanding the fact that such elimination would not affect the nondiscrimination rules (in fact, it would make the plan *less* discriminatory).

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[7] *See,* IRS Announcement 2007-59.
[8] *See,* Treas. Reg. §1.401(k)-3(b)(1).
[9] *See* Treas. Reg. §§1.401(k)-3(g), 1.401(m)-3(h); Prop. Treas. Reg. §§1.401(k)-3(g)(1)(ii), 1.401(m)-3(h)(1)(ii).

ASPPA recommends that the IRS clarify that suspension or elimination of safe harbor contributions for HCEs is permissible if the conditions for suspension or elimination of safe harbor contributions for all employees under Treas. Reg. §1.401(k)-3(g) or Prop. Treas. Reg. §1.401(k)-3(g)(1)(ii) are satisfied.

II. Amendments to Protect Plan Qualification

It is not uncommon for legislative or regulatory changes to mandate amendments to required plan language. Such amendments do not always align with the first day of the plan year.[10] Furthermore, individually designed plans commonly require remedial amendments as part of the favorable determination letter program that must be adopted within a certain period of the issuance of such letters, commonly mid-year.

ASPPA recommends that the IRS clarify that mid-year modifications to plan documents to maintain the plan's qualification (such as in relation to mandatory amendments or remedial amendments in relation to favorable determination letter applications, or a plan restatement to comply with the plan's 5- or 6-year remedial amendment cycle) will not violate the prohibition on midyear amendments under Treas. Reg. §1.401(k)-3(e)(1).

III. Amendments That Affect Participants' Rights or Contributions Other Than Those Related to Salary Deferrals and Do Not Affect the Information Provided in the Safe Harbor Notice

The amendments discussed in this section all relate to the expansion or elimination of plan features that are not protected under Code Section 411(d)(6) and are not required to be discussed in the safe harbor notice provided to participants at the beginning of the year. Prohibiting mid-year amendments is inconsistent with the language of the Treas. Reg. §1.401(k)-(3)(e)(1), which only requires that "plan provisions that satisfy the rules of this section" be adopted before the beginning of a plan year. The "rules of this section" refer to the safe harbor rules found in Treas. Reg §1.401(k)-3.

By specifically listing only "the rules of this section" as having to be adopted before the beginning of the plan year, the regulation clearly contemplates that other plan provisions may be adopted or modified without violating the requirements of Code Section 401(k)(12). The current uncertainty as to the amendments that may be adopted mid-year is particularly problematic even for a plan sponsor who wishes to add a plan feature that will expand benefits for participants.

ASPPA recommends that the IRS clarify that midyear amendments that do not violate Code Section 411(d)(6) or affect the language of the safe harbor notice will not cause a safe harbor 401(k) plan to violate Treas. Reg. §1.401(k)-3(e)(1).

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[10] For example, amendments to comply with the changes to the cash-out provisions and automatic rollovers were required to be adopted and effective by March 28, 2005. *See,* DOL Reg. §2550.404a-2(e).

A. Amendment to Add or Remove Life Insurance

Life insurance benefits are not discussed in the safe harbor notice, are not protected under Code Section 411(d)(6) and should not be subject to any prohibition on mid-year amendments.

B. Amendment to Add or Remove Participant Loans or to Modify Existing Loan Policy

Although the availability of a participant loan program may have some impact on a participant's decision to contribute, Treasury regulations do not require that information about loans be provided in the safe harbor notice. Furthermore, a loan program is not a protected benefit under Code Section 411(d)(6). Therefore, the plan sponsor may add or remove this feature at will. Because the safe harbor notice is not required to include any information regarding loan programs, the timing of the plan amendment vis-à-vis the notice does not change the information that the participant has at either the beginning of the plan year, the time at which the participant makes salary deferral decisions, or when the program is added or removed. As a result, there is no reason to prohibit mid-year modifications to a loan program.

C. Amendment to Allow for Participant Direction of Investment of Employer Nonelective Contributions

Similar to the comment above regarding loan provisions, the ability to direct investments of one's account may be a factor in a participant's decision whether to defer. Nonetheless, also similar to the discussion above, the ability to self-invest is neither a Code Section 411(d)(6) protected benefit nor a subject of disclosure the mandatory safe harbor notice. As a result, modifications to the plan to add, delete, or modify the ability of participants to direct plan investments should not violate Treas. Reg. §1.401(k)-3(e)(1).

D. Amendment to Increase Valuation Frequency

This issue is also analogous to the discussion regarding loans and participant direction of investments. Amendments to modify valuation frequency should not violate Treas. Reg. §1.401(k)-3(e)(1). Furthermore, the decision to modify the valuation date may involve fiduciary judgment, which must be permitted to operate unhindered without a significant contrary legal or participant interest.

E. Amendment to Allow Rollovers or to Modify Existing Rollover Policy

This issue is also analogous to the discussions above. Furthermore, it is analogous to the ability to add Roth provisions or permit in-plan rollovers, both of which have previously been permitted by IRS guidance.

F. Amendment to Change Frequency of Deferral Elections

This issue is similar to the discussion above regarding loans and participant direction of investments.

G. Amendment to Add Catch-Up Contribution Provisions

This issue is similar to the discussions above regarding loans, participant direction of investments, and deferral election modifications.

H. Amendment to Reduce the Plan's Normal Retirement Age

While a participant's normal retirement age (NRA) is a protected benefit under Code Section 411(d)(6), our proposal relates to amendments that reduce the NRA. Therefore, by definition, these amendments would not violate Code Section 411(d)(6). Furthermore, the NRA is not a provision that needs to be included in the safe harbor notice.

I. Amendment to Change the Plan's Definition of Disability

This issue is similar to the NRA discussion above, in that it is a protected benefit under Code Section 411(d)(6), particularly if the effect of a disability relates only to the timing of distribution or the vesting of benefits upon distribution. Any amendment to this plan provision, whether adopted mid-year or at the beginning of the year, must protect these benefits. Nonetheless, amendments to this plan provision are unlikely to affect salary deferral rates by participants. Furthermore, this provision need not be included in any safe harbor notice. Therefore, there is no reason to believe that mid-year amendments of disability provisions will violate Treas. Reg. §1.401(k)-3(e)(1).

J. Amendment to Allow Immediate Distribution to Alternate Payees in Qualified Domestic Relations Orders

This issue is analogous to the disability discussion above, although it really does not affect the participant at all.

IV. Amendments That Do Not Affect Operation of the Safe Harbor or Other 401(k) Features That Are Administrative or Informative in Nature

These types of amendments affect details about the plan sponsor or adopting employers (such as addresses, phone numbers, and the like) that are not needed for plan operations, but may be included in the plan document, commonly in prototypes. The plan may also reference the sponsor's taxable year. Modifications of this information do not affect plan operations, and should be permitted at any time. Keeping plan sponsor information up to date should not represent a violation of

Treas. Reg. §401(k)-3(e)(2). Similarly, mid-year amendments to change the name of the plan or the plan trustee should be permitted.

ASPPA Recommends that the IRS clarify that midyear amendments that do not affect plan operations will not cause a safe harbor 401(k) plan to violate Treas. Reg. §1.401(k)-3(e)(1).

These comments were prepared by ASPPA's Government Affairs 401(k) Plans Subcommittee. Please contact Craig P. Hoffman, Esq., APM, General Counsel and Director of Regulatory Affairs, at (703) 516-9300 if you have any comments or questions on the matters discussed above. Thank you for your time and consideration.

Sincerely,

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/s/
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