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Response to Request for Comments on Reducing Regulatory Burden; Retrospective Review Under E.O. 13563

April 29, 2011

Department of the Treasury

The American Society of Pension Professionals and Actuaries (ASPPA) appreciates the opportunity to respond to the request by the Department of the Treasury ("Department") for comments about which regulations should be modified, expanded, streamlined, or repealed in order to make the Department's regulations more effective or less burdensome or both (the "Request").[1]

ASPPA is a national organization of more than 7,500 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, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-based retirement plan system.

Summary

ASPPA applauds the Department for undertaking this initiative and supports the Department's efforts. ASPPA has frequently provided comments on various Department regulations, requesting modifications and streamlined procedures. In light of the Request, we would like to highlight a number of recommendations for existing regulations to support innovation and reduce administrative burdens for the retirement plan system.

I. Safe Harbor 401(k) Plans - ASPPA recommends that mid-year changes to a safe harbor 401(k) plan be permitted (and updated notices provided), to the extent that the changes would not be expected to significantly impact a participant's deferral decision.

II. Electronic Communications - ASPPA recommends that the Department work with the U.S. Department of Labor to create a unified approach for electronic disclosures for retirement plans.

III. Plan Sponsor Elections Under Pension Protection Act of 2006 - ASPPA and **the ASPPA College of Pension Actuaries (ACOPA) recommend** that all elections that affect

[1] 76 Fed. Reg. 17572 (Mar. 30, 2011).

the funding for a plan year be formalized in an attachment to the Schedule SB for the year and that elections regarding credit balances be permitted in all instances to specify a determinable formula in lieu of stating a specific dollar amount. ASPPA and ACOPA also recommend that the ability to make standing elections be expanded, so employers are not required to make the same election each and every plan year and that standing elections be permitted to be written in a manner so as to remain in force as long as the employer continues the business relationship with the individual or company named on the election, even in the event of a change in the individual actuary who prepares the Schedule SB for that plan.

IV. Participant Communications - ASPPA recommends that the Department simplify the required employee communication items by combining and integrating required notices where possible, coordinating timing requirements so that participants do not receive multiple notices on various topics throughout the year, and coordinating with the U.S. Department of Labor to eliminate duplicative disclosures.

V. Interim Amendments - ASPPA recommends that the interim amendments only be required once every three years.

Discussion

I. Safe Harbor 401(k) Plans

To qualify for the Actual Deferral Percentage (ADP) test safe harbor of Internal Revenue Code ("Code") § 401(k)(12), plans must satisfy specific contribution and notice requirements of Code § 401(k)(12)(D). Similar requirements appear in Code § 401(m)(11) to qualify for the Actual Contribution Percentage (ACP) test safe harbor.

In general, plan sponsors must provide notices to participants, and include safe harbor provisions in their plans, prior to the beginning of the plan year for which the safe harbor provisions will apply. Sponsors of safe harbor plans, and their advisors, are concerned about whether certain mid-year changes to a plan may be made without jeopardizing the plan's safe harbor status and whether permissible mid-year changes may require that an updated notice be provided to participants. In Announcement 2007-59, the IRS provided welcome relief to plan sponsors and practitioners by stating that safe harbor plans may add Roth contribution programs and expand hardship withdrawal provisions in accordance with Part III of Notice 2007-7 after the start of a plan year (i.e., mid-year) without causing the plan to fail the requirements of Code § 401(k)(12) or § 401(m)(11).

ASPPA has submitted comment letters to the Department in which we made a number of recommendations regarding mid-year changes to safe harbor 401(k) plans.[2] We reiterate our recommendations that the regulations should be expanded to permit mid-year changes that do not significantly impact a participant's deferral decision in order to facilitate the use of safe harbor plans.

[2] See ASPPA's comment letters dated November 16, 2007, available at http://www.asppa.org/document-vault/pdfs/gac/2007/irsshplanspdf.aspx and June 4, 2010, available at http://www.asppa.org/document-vault/pdfs/GAC/2010/safeharbor642010.aspx.

ASPPA recommends that Treasury Regulation § 1.401(k)-3 be amended to permit the following mid-year changes:

1. The addition of hardship provisions to a plan that does not currently contain any such provisions;

2. Adding or changing a nonelective contribution source to a plan (which is separate and distinct from the plan's safe harbor contributions);

3. Altering the allocation method for nonelective contributions other than the safe harbor contributions (while protecting benefits already accrued);

4. Altering allocation requirements for nonelective contributions other than safe harbor contributions;

5. Adding a participant loan provision;

6. Amending the definition of compensation for allocations of nonelective contributions other than the safe harbor contributions;

7. Changing the eligibility terms of the plan (e.g., adding a new division or group of participants);

8. Amending the vesting schedule for accounts subject to a vesting schedule;

9. Adding an automatic enrollment feature to the plan;

10. Modifying distribution provisions (i.e., timing or form of distributions) with respect to accounts attributable to contributions other than elective deferrals and safe harbor contributions;

11. Modifying investment provisions (e.g., participant directed investment provisions);

12. Liberalizing eligibility provisions for any type of contribution;

13. Adoption of permissive retroactive amendments under Revenue Procedure 2008-50 (SCP or VCP); and

14. Adding a Roth 401(k) in-plan conversion feature after December 31, 2011.[3]

ASPPA further recommends that a 60-day notice period following the change should be sufficient to the extent an additional participant notice is required.

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[3] Notice 2010-84 provides in Q&A-18 for an extension of time for plan amendments for adding a Roth 401(k) in-plan conversion feature to a safe harbor plan described in Code § 401(k)(12) or (13) until "the later of December 31, 2011, or the time specified in § 1.401(k)-3(e)(1) (requiring generally, that safe harbor plan provisions be adopted before the first day of the plan year in which they are effective)."

II. Electronic Communications

The Department has previously published Treasury Regulation § 1.401(a)-21 with respect to the provision of notices required by Code and participant elections by electronic methods. The U.S. Department of Labor ("DOL") has also issued regulations that provide similar, but not identical, rules for retirement plans to make disclosures electronically.[4] For example, the DOL regulations expressly permit electronic communications to active employees where the employees' duties require regular access to a computer and require plan administrators to take certain steps to ensure receipt. In contrast, the Treasury regulations permit electronic delivery where the recipient has the "effective ability" to access the communication and do not expressly require steps to ensure receipt.

The DOL recently issued a "Request for Information Regarding Electronic Disclosure by Employee Benefit Plans."[5] ASPPA anticipates that the DOL may modify its regulations regarding electronic disclosures after it has reviewed the responses to its Request for Information.

Providing information to participants that is clear, readable and meets their needs helps participants understand their plans and make decisions in connection with them. Electronic disclosures have the ability to communicate more effectively than paper documents by directing the reader's attention to important information and providing the ability to link to additional information. Plans could maximize their efforts in this area if they were only subject to one set of regulations.

ASPPA requests that the Department work with the DOL to create a uniform set of rules for electronic disclosures for retirement plans that would apply under the Code and the Employee Retirement Income Security Act of 1974, as amended (ERISA).

III. Plan Sponsor Elections Under Pension Protection Act of 2006

The Pension Protection Act of 2006 ("PPA") requires employers that sponsor defined benefit plans to make "elections" regarding the plan's funding method and the treatment of carryover and prefunding balances (referred to herein as "credit balances") under the plans. Final regulations regarding the timing, form, and content of these elections were published in 2009, effective for plan year beginning in 2010, with guidance reserved on certain issues related to plans with end of year valuation dates.

Regulations regarding elections related to credit balances should be streamlined to ease the burden of regulatory compliance and reduce the likelihood of inadvertent timing problems. ASPPA and ACOPA recommend the following modifications.

A. Timing of Plan Sponsor Election Notices

Current regulations require employers to make certain elections before the end of a plan year. However, small plan sponsors are permitted to wait up to 8½ months after

[4] 29 CFR § 2520.104b-1.
[5] 76 Fed. Reg. 19285 (Apr. 7, 2011).

the end of a plan year to fund the plan and often do not begin the process of making funding decisions until after the end of the plan year.

For example, consider a defined benefit plan sponsor that has the option to carry a prefunding balance in a plan. In the absence of a deemed burn under Code § 436, the statute provides plan sponsors with the flexibility to elect to maintain or to waive a credit balance each year. Plan sponsors generally will maintain the balance until funding requirements, or benefit restriction issues, lead to a business decision to "spend" all or part of the balance. The minimum required contributions for the year, the adjusted funding target attainment percentage (AFTAP) that will result for the following year, and the cash position or tax liability of the business all can factor into that decision, and these pieces of the puzzle may not be known until after the end of the plan year. Because regulations demand that an election to waive a credit balance be made no later than the end of a plan year for which the election applies, many employers will not have the information required to make a thoughtful, timely election. In effect, current regulations have removed the flexibility Congress gave plan sponsors under PPA.

ASPPA and ACOPA recommend that all elections that affect the funding for a plan year be formalized in an attachment to the Schedule SB for the year. As a practical matter, all decisions will have been made by the deadline for funding the plan, that is, within 8½ months following the end of the plan year. However, it will be more efficient for the plan sponsor, the actuary and IRS if elections are formalized in a single document that is completed at the same time as the annual reporting for the plan.

B. Content of Plan Sponsor Elections

Final regulations state that elections regarding credit balances made by the plan sponsor generally must state a specific dollar amount. For small plan sponsors, a decision regarding an election may occur before a specific dollar amount is known.

For example, a plan sponsor may decide, based on the recommendations of the plan actuary, to add to a prefunding balance only so much of a plan year's excess contributions as will allow the current AFTAP to remain at 100%. Because employers often do not make funding decisions until minimum funding requirements can be determined and tax preparation is being completed following a plan year, this general decision regarding the election may be required long before the exact amount of either the funding target or the amount of excess contributions is known.

ASPPA and ACOPA recommend that elections regarding credit balances be permitted in all instances to specify a determinable formula in lieu of stating a specific dollar amount. Existing regulations already allow employers to make elections based on a determinable formula in certain limited circumstances. For example, an employer may elect to place 100% of all excess contributions into a plan's prefunding balance before the exact amount is known. This option should be extended to all elections regarding credit balances.

ASPPA and ACOPA also recommend that the ability to make standing elections be expanded, so employers are not required to make the same election each and every plan year. Current regulations already permit standing elections in specified circumstances and that option should be extended to all funding-related elections under PPA, including elections related to quarterly contributions.

C. Applicability of Standing Elections

Current regulations state that a standing election for a plan must name the specific individual acting as plan actuary and that such election becomes invalid if the individual actuary is changed. While it is true that some plan sponsors hire and maintain a business relationship with an individual actuary, many others form the relationship with a company, such as an actuarial or third party administration firm that employs, or contracts with, the actuary.

ASPPA and ACOPA recommend that standing elections be permitted to be written in a manner so as to remain in force as long as the employer continues the business relationship with the individual or company named on the election, even in the event of a change in the individual actuary who prepares the Schedule SB for that plan.

IV. Participant Communications

Plans are required under both the Code and ERISA to provide participants with numerous types of disclosures throughout the plan year. For example, the Code requires plans to provide 402(f) rollover distribution notices; qualified joint and survivor annuity (QJSA) notices, elections and consents; qualified preretirement survivor annuity (QPSA) notices, elections and consents; safe harbor notices; notices to interested parties when a plan is requesting a determination letter; and a disclosure to communicate a plan's adoption to employees. Additionally, plans are required by ERISA to distribute summary plan descriptions (SPDs); summaries of material modifications (SMMs); benefit statements; summary annual reports (SARs); and information required for a plan to comply with ERISA section 404(c). In addition, fiduciaries of individual account plans will soon be required to disclose certain information concerning the plan, as well as investment and fee information and additional information if target date funds are offered to participants.

As a result of these numerous required communications, participants can become overwhelmed by the amount of information they receive. These communication pieces also result in plan administration costs, which are often passed through to participants. Additionally, the volume of the disclosures results in increased opportunities for plan errors.

ASPPA recommends that the Department simplify the required employee communication items by combining and integrating required notices where possible, coordinating timing requirements so that participants do not receive multiple notices on various topics throughout the year, and coordinating with the DOL to eliminate duplicative disclosures. For example, we recommend the following changes:

- Treasury regulations require a safe harbor 401(k) plan to provide a notice to participants before the beginning of each plan year that must include information about employer and employee contributions to the plan, compensation that may be deferred, timing and procedure for making elections to defer compensation, and vesting and distribution information. DOL regulations require similar types of information in Summary Plan Descriptions and Periodic Benefit Statements. These requirements should be coordinated to eliminate duplicative information and/or to permit cross-references to basic plan information.

- IRS guidance requires plans to provide a notice of the consequences of failing to defer a distribution, including information about plan investment options, fees and expenses. DOL regulations now require extensive annual disclosures to participants about investment options, fees, expenses and related information. These requirements should be coordinated to eliminate duplicative information.

- The IRS 402(f) model notice should be integrated with the required notice of the consequences of failing to defer a distribution.

- If a plan offers a Qualified Default Investment Alternative, DOL regulations require an annual notice that includes information about when a participant's account will be invested in the default option, applicable fees and expenses, rights to choose other investments, etc. This requirement should be coordinated with the required safe harbor 401(k) notice, as well as other investment disclosures that are now required annually.

- Upon becoming eligible, a participant must be provided with a Summary Plan Description, information about fees and investments, a 401(k) safe harbor notice (if applicable) and a notice about any Qualified Default Investment Alternative. These requirements should be consolidated to provide a single, integrated disclosure for newly eligible participants.

V. Interim Amendments

Although well intentioned, our experience has shown many problems with the interim amendment process as it presently exists. Among our concerns is that the process of preparing and distributing the documentation for an interim amendment is both expensive and time consuming. It increases the burden and costs of maintaining a plan, which is felt disproportionately by small plans, where expenses of a relatively fixed nature are spread over fewer participants thereby driving up the per capita cost.

The current process is incredibly complicated, with different amendment deadlines that vary based upon the type of amendment and the plan's fiscal year. This leads to mistakes being made by well meaning plan sponsors (who, in most cases, are voluntarily providing this benefit). Small plan sponsors in particular are shocked and surprised when asked to pay thousands of dollars in sanctions when an inadvertent amendment mistake is uncovered during an IRS audit.

The interim amendment rules need to be modified to strike a balance between the need to hold down unnecessary costs and the desire to keep plan documents current.

ASPPA recommends that the "default" be changed from requiring interim amendments whenever there is a change in applicable law to requiring interim amendments only once every three years.

These comments were prepared by ASPPA's IRS Subcommittee of the Government Affairs Committee and primarily authored by Elizabeth T. Dold, APM, Chair of the IRS Subcommittee. We welcome the opportunity to discuss these issues with the Department. If you have any questions regarding the matters discussed herein, please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at (703) 516-9300.

Thank you for your time and consideration.

Sincerely,

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