



4245 North Fairfax Drive
Suite 750
Arlington, VA 22203
P 703.516.9300 F 703.516.9308
www.asppa.org

May 21, 2013

Mr. Joseph Grant
Commissioner, Tax Exempt & Governmental Entities
Internal Revenue Service
1111 Constitution Ave NW
Washington, DC 20224-0002

Re: In-Plan Roth Rollovers under the American Taxpayer Relief Act of 2012

Dear Mr. Grant:

The American Society of Pension Professionals & Actuaries (“ASPPA”) appreciates this opportunity to further comment on the need for guidance concerning Roth 401(k) plans. Provisions of the American Taxpayer Relief Act of 2012 (“ATRA”),¹ expanded the availability of In-Plan Roth Rollovers (“IRRs”). This has increased the need for additional regulatory guidance regarding several administrative issues related to the implementation of IRRs in eligible plans. The guidance we request will encourage plan sponsors to implement cost-effective ATRA IRR provisions that benefit plan participants, encourage increased plan participation levels, and prevent leakage from participants’ plan accounts. This letter is a supplement to ASPPA’s prior comment letters submitted on February 26, 2013 and May 30, 2012.

ASPPA is a national organization of more than 14,000 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, 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

Plan participants have been permitted to transfer distributable amounts from pre-tax accounts to designated Roth accounts through IRRs since the enactment of the Small Business Jobs Act of 2010 (“SBJA”).² ATRA expanded the internal Roth conversion/transfer option to include all contribution sources and eliminated the requirement that the transferred funds be otherwise eligible for distribution.³

¹ The American Taxpayer Relief Act of 2012, Pub. L. 112-240, 112th Congress (2013).

² See, Pub. L. 111-240, 111th Congress (2010).

³ I.R.C. section 402A(c)(4)(E).

The ATRA provisions have raised several administrative issues that must be resolved before most employers will adopt and implement the new rules. The following is a summary of ASPPA's recommendations, which are described in greater detail in the discussion section that follows.

I. Plan Amendment Timing

ASPPA recommends that the IRS extend the deadline for the adoption of the “discretionary amendment” that will be necessary to put in effect the ATRA provisions until the later of: the last day of the plan year that the amendment is effective; or December 31, 2014.

II. IRR Transfer Vesting Requirements

ASPPA recommends that the IRS issue guidance clarifying that only fully-vested contribution sources are eligible to be transferred through an IRR, or, alternatively, that a plan sponsor may limit IRRs only to contribution sources that are fully vested.

III. IRRs for Non-Spouse Alternate Payees and Non-Spouse Beneficiaries

ASPPA recommends that the IRS issue guidance confirming that section 402A(c)(4)(E)(ii) of the Internal Revenue Code of 1986, as amended (“IRC”), permits non-spouse alternate payees and non-spouse beneficiaries to effect a transfer that is treated as an IRR in plans which permit IRRs.

Discussion

I. Plan Amendment Timing

As a general rule, discretionary plan amendments that add a provision such as the ATRA IRR changes must be adopted by the end of the plan year in which the new provision is effective.⁴ Notice 2010-84 applied this general rule for the amendments that were necessary to effect the SBJA provisions regarding IRRs.⁵ However, the Service recognized that plan sponsors needed additional time beyond the normal deadline to adopt amendments for the SBJA changes. Notice 2010-84 included an extension of the amendment period until the later of: the plan year in the amendment is effective; or December 31, 2011. Similar relief is necessary for the ATRA changes.

ASPPA recommends that the IRS extend the deadline for the adoption of the “discretionary amendment” that will be necessary to put in effect the ATRA IRR provisions until the later of: the last day of the plan year that the amendment is effective; or December 31, 2014.

II. IRR Transfer Vesting Requirements

⁴ See, Section 5.05(2) of Rev. Proc. 2007-44 (stating “In the case of a discretionary amendment (*i.e.*, one which is not an interim amendment described in section 5.02), an employer (or a sponsor or a practitioner, if applicable) will be considered to have timely adopted the amendment, if the plan amendment is adopted by the end of the plan year in which the plan amendment is effective.”).

⁵ See, IRS Notice 2010-84, Q&A 15.

Under prior law, IRRs were limited to vested amounts that were distributable as an eligible rollover distribution.⁶ However, IRC section 402A(c)(4)(E), as amended by ATRA, does not require that amounts be distributable to be the subject of an IRR and therefore it is not clear whether amounts must still be 100% vested. The tax implications and administrative issues of transferring non-vested funds into a taxable source are extensive. Non-vested funds transferred through an IRR would appear to be includible in gross income at the time that they become fully vested, which may be several years after transfer. This will present difficult administrative challenges, particularly if there is a distribution subject to the 5-year recapture rule of IRC section 402A(c)(4)(D) of an amount that became vested after transfer.

Guidance is needed to confirm whether non-vested amounts may be subject of an IRR under the new law. If non-vested amounts are eligible for transfer under an IRR, then it is absolutely imperative that the guidance also confirms that plan provisions may restrict IRRs only to contribution sources that are fully-vested at the time of transfer.

ASPPA recommends that the IRS clarify through guidance that only fully-vested contribution sources are eligible to be transferred through an IRR or, alternatively, that a plan sponsor may limit IRR's only to contribution sources that are fully-vested.

III. IRRs for Non-Spouse Alternate Payees and Non-Spouse Beneficiaries

Under Notice 2010-84, non-spouse alternate payees and non-spouse beneficiaries are prohibited from transferring funds through an IRR.⁷ This is due to the language in IRC section 402A(c)(4)(B) which limits IRRs to distributable amounts that could be contributed in a qualified rollover contribution within the meaning of IRC section 408A(e).

ATRA, however, added a new “Special Rule for Certain Transfers” in IRC section 402A(c)(4)(E). The wording in the new subparagraph provides that amounts that are not distributable may be transferred to a designated Roth account and the transfer will be “treated” as if it were contributed in a qualified rollover contribution. Nothing in subparagraph (E)(i) requires the transfer to be an amount that actually qualifies as to be contributed in a qualified rollover contribution. To the contrary, subparagraph (E)(ii) provides that the transferred amounts “...shall be treated as distribution to which [the “IRR” treatment] applies.”⁸ It would therefore appear that in ATRA, Congress intended a broader application of the IRR rules to include non-spouse alternate payees and non-spouse beneficiaries.

ASPPA recommends that the IRS issue guidance confirming that IRC section 402A(c)(4)(E)(ii) permits non-spouse alternate payees and non-spouse beneficiaries to effect a transfer that is treated as an IRR in plans which permit IRRs.



These comments were prepared by ASPPA's 401(k) Subcommittee, and were primarily authored by Kelly Marie Hurd; Vice Chair we welcome the opportunity to discuss these issues. If you have any questions

⁶ See IRS Notice 2010-84, Q&A 2.

⁷ See, Notice 2010-84 Q&A 14.

⁸ IRC section 402A(c)(4)(E)(ii).

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,

/s/

Brian H. Graff, Esq., APM
Executive Director/CEO

/s/

Judy A. Miller, MSPA
Chief of Actuarial Issues

/s/

Craig P. Hoffman, Esq., APM
General Counsel

/s/

John R. Markley, FSPA, Co-Chair
Gov't Affairs Committee

/s/

Ilene H. Ferenczy, Esq., APM, Co-Chair
Gov't Affairs Committee

/s/

Robert M. Kaplan, CPC, QPA, Co-Chair
Gov't Affairs Committee

cc:

Mr. Robert Choi
Director, Employee Plans
Internal Revenue Service
1750 Pennsylvania Avenue, NW
Washington, DC 20006

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

Ms. Victoria A. Judson
Division Counsel/ Associate Chief Counsel
Tax Exempt & Governmental Entities
Internal Revenue Service
1111 Constitution Avenue, NW
4306 IR
Washington, DC 20224

Mr. George H. Bostick
Benefits Tax Counsel
Office of Tax Policy
U.S. Department of Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220-0001