

October 8, 2019

Mr. Robert Choi, Director
Employee Plans Division
Internal Revenue Service
999 N. Capitol Street, NE
Washington, DC 20002

RE: Request for Meeting Relating to Section 401(k) Hardship Regulations (RIN-1545-BO82)

Dear Mr. Choi:

The American Retirement Association (“ARA”), as well as the signatory mass submitters and plan providers in their own capacity, are writing to call to your attention to an urgent matter relating to the final hardship distribution regulations published in the Federal Register on September 23, 2019¹ (the “Final Regulations”). As ARA had also raised in its comment letter submitted on January 14, 2019,² the current rules concerning the timing of interim amendments for pre-approved plans present major challenges to the retirement plan community.

- The ARA requests a meeting with you, appropriate personnel from IRS and the Department of the Treasury, and the plan document provider community as soon as possible because of the time-sensitivity of this concern.

The preamble to the Final Regulations explains that the discretionary provisions of the Final Regulations are integrally related to the changes required under the Final Regulation. The preamble then summarizes the interim amendment deadlines set forth in section 15 of Rev. Proc. 2016-37. Applied in the context of these Final Regulations, these interim amendment rules result in deadlines that, for some adopting employers may only be months away.

Sponsors of individually designed plans have two years from the publication of the Required Amendments List to adopt a conforming amendment. Imposing a substantially shorter deadline for adopters of pre-approved plans may undercut IRS’ goal of fostering compliance within the retirement industry.

For pre-approved plans, the interim amendment deadline is generally the due date of the tax return for the year in which the amendment is required to be effective. Three examples will highlight the issues associated with the Final Regulations:

- 1) Assume a plan sponsor delays implementation of the mandatory changes³ of the Final Regulations to the latest possible date, which is for distributions made on or after January 1,

¹ <https://www.govinfo.gov/content/pkg/FR-2019-09-23/pdf/2019-20511.pdf>

² https://www.asppa.org/sites/asppa.org/files/PDFs/GAC/Comment%20Letter/19.1.14Final_ARA_Comment_letter_on_Hardship_Proposed_Regulations.pdf

³ The two mandatory changes in the Final Regulations are the elimination of the six-month suspension period and the new general standard for determining whether a distribution is necessary.

2020. This date is not tied to the plan year. If the plan sponsor has a tax year that begins on February 1, then the change to the plan would be effective for the fiscal year beginning February 1, 2019 and ending January 31, 2020. The amendment would be due by the due date of the tax return, or May 15, 2020 (or later if the tax return is on extension).

- 2) Assume a plan sponsor with a calendar fiscal year implemented the mandatory changes of the Final Regulations in 2019. It appears the interim amendment deadline would be the due date of the 2019 tax return, or April 15, 2020 (or later if the tax return is on extension). The preamble to the Final Regulations only includes an example where a plan sponsor with a calendar fiscal year delays implementation of one of the mandatory changes to January 1, 2020.
- 3) Assume a plan sponsor maintains a calendar year plan and has a tax year that begins on July 1. If the plan sponsor had implemented both mandatory changes in January 1, 2019, then it appears the interim amendment deadline would be December 31, 2019 (the later of the due date of the tax return for the fiscal year ending June 30, 2019 or the end of the plan year).

These are just three examples of situations where the interim amendment deadline will expire in a matter of months. This is extremely problematic for plan document providers who must implement the underlying systems, delivery, and communications of the amendments. This interim amendment cannot simply be adopted by the volume submitter practitioner or prototype sponsoring organization because adopting employers have many options available to them. Thus, in many cases, the adopting employer must formally adopt the amendment.

We would like to meet with the appropriate Treasury and/or IRS representatives as soon as practical. A meeting will allow us to further explain our concerns, resolve outstanding issues and ensure that all parties – the IRS, document providers, mass submitters, and adopting employers have an accurate and consistent understanding of the timing requirements for pre-approved plan interim amendments. We would be happy to meet in-person or by conference call.

Respectfully,

American Retirement Association
ASC Institute
Ascensus
AXA Equitable Life Insurance Company
DATAIR Employee Benefits Systems, Inc.
FIS Business Systems LLC
ftwilliam.com
Groom Law Group
Document Agility
PenServ Plan Services, Inc.
E.R.I.S.A., Inc.