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Mr. Andrew E. Zuckerman
Director, EP Rulings & Agreements
Internal Revenue Service
1111 Constitution Ave NW
Washington, DC 20224-0002

**Re: Further Comments on Applicability of the 5-Year Rule to Roth Conversions
within Qualified Retirement Plans under Internal Revenue Code §402A**

Dear Mr. Zuckerman,

The American Society of Pension Professionals and Actuaries (“ASPPA”) appreciates this opportunity to further comment on the guidance that the Internal Revenue Service (“IRS”) has provided in the area of Roth 401(k) plans. Provisions of the American Taxpayer Relief Act of 2012 (ATRA 2012)¹, which expanded the availability of in-plan Roth conversions, increased the need for additional regulatory guidance regarding the treatment of such in-plan conversions. In particular, we respectfully request that the IRS issue guidance confirming that the 5-year period of participation required for a tax-free distribution from a Roth account that was created by an internal Roth conversion begins on the first day of the calendar year that contains the date of the conversion, or if earlier, the date of the first designated Roth contribution to the plan. This letter is a supplement to ASPPA’s prior comment letter submitted on May 30, 2012.

ASPPA is a national organization of more than 11,000 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.

Discussion

Internal Revenue Code (the “IRC” or “Code”) section 402A specifies that a distribution from a designated Roth account is “qualified” and not subject to income tax only if it is made following

¹ The American Taxpayer Relief Act of 2012, H.R. 8, 112th Congress (2013).

a five-taxable-year aging period (the “Nonexclusion Period”)². As discussed in further detail below, a fair reading of the statute and Congressional intent would indicate that the Nonexclusion Period for amounts internally rolled-over to a Roth account begins on the January 1st of the year that the In-Plan Roth Rollover (“IRR”) contribution was made. However, an informal IRS response to a question at the 2011 ASPPA Annual Conference reached a contrary result on the basis that a rollover is not a contribution for purposes of starting the Nonexclusion Period.

IRC section 402A provides that:

“Distributions within nonexclusion period. A payment or distribution from a designated Roth account shall not be treated as a qualified distribution if such payment or distribution is made within the 5-taxable-year period beginning with the earlier of—

- (i) the first taxable year for which the individual made a designated Roth contribution to any designated Roth account established for such individual under the same applicable retirement plan, or
- (ii) if a rollover contribution was made to such designated Roth account from a designated Roth account previously established for such individual under another applicable retirement plan, the first taxable year for which the individual made a designated Roth contribution to such previously established account.”³

IRC section 402A also specifically provides that a Roth “contribution” created by an in-plan Roth conversion is disregarded for purposes of deferral contribution limits.⁴ It would have been unnecessary to include statutory language specifying that the Roth conversion would not be treated as a contribution for purposes of the deferral limitations if the conversion was not being treated as a contribution for other purposes. IRC Section 408A(e) also includes an IRR under the definition of a Qualified Rollover Contribution (“QRC”), so that the statute does in fact categorize this transaction as a type of contribution. ASPPA believes that the language of IRC section 402A, taken as a whole, clearly indicates intent on the part of Congress to treat the conversion as a contribution for purposes of starting the five-year Nonexclusion Period.

Moreover, the regulations associated with internal IRA Roth conversions specifically include language treating the internal conversion as starting the 5-year aging period.⁵ It is clear that the

² In addition to the requirement to complete the five-year Nonexclusion Period, IRC §402A(d)(2)(A), by reference to IRC §408A(d)(2)(A), provides that the term “qualified distribution” means any payment or distribution: (i) made on or after the date on which the individual attains age 59 1/2, (ii) made to a beneficiary (or to the estate of the individual) on or after the death of the individual, (iii) attributable to the individual’s being disabled (within the meaning of section 72 (m)(7)), or (iv) which is a qualified special purpose distribution.

³ IRC § 402A(d)(2)(B).

⁴ See, IRC §§ 402A(a)(1) (stating that “any designated Roth contribution made by an employee pursuant to the program shall be treated as an elective deferral for purposes of this chapter, except that such contribution shall not be excludable from gross income”); 402A(c)(4)(C) (stating that “Any distribution to which this paragraph applies shall not be taken into account for purposes of paragraph (1)”).

⁵ See, Treas. Reg. § 1.408A-6, Q&A-2 (stating “The 5-taxable-year period described in A-1 of this section begins on the first day of the individual’s taxable year for which the first regular contribution is made to any Roth IRA of the

purpose of the statutory language in IRC section 402A was to allow Roth conversions to occur without the need to take a distribution and roll the funds into an IRA and to create parity between internal and external Roth conversions. The statutory language of IRC sections 402A(d)(2) and 408A(d)(2), which provide descriptions of the 5-year aging periods for contributions to qualified retirement plans and IRAs, respectively, is substantially similar.⁶ Additionally, it should be noted that IRC section 402A describes two separate and distinct 5-year rules applicable to designated Roth accounts. The previous discussion only related to the 5-year ‘aging’ rule used in determining whether a distribution is a qualified distribution and applies to the entire Designated Roth Account. The second 5-year rule relates only to conversions or IRRs, and is referred to as the 5-year recapture of the 10% premature tax rule. The 5-year period for the recapture tax is also measured from the January 1st of the year that *each* IRR occurs. We believe that this is consistent with the model explanations contained in Notice 2010-84 for both 5-year periods.⁷

Most tellingly, Congress’ recent passage of the American Taxpayer Relief Act of 2012 effectively expanded the availability of in-plan Roth conversions by allowing for such conversions with respect to non-Roth funds that are not currently distributable (e.g., pre-tax elective deferrals held for an active employee who has not reached age 59½). This provides further support that the intent of Congress is to freely permit and encourage conversions. Guidance affirming that the 5-year aging period for a qualified distribution begins on the first day of the calendar year in which the IRR was contributed or “converted” within the Plan would be consistent with this and further Congressional intent.⁸

ASPPA recommends that the IRS issue guidance clarifying that the five-taxable-year aging period for in-plan Roth conversions begins as of the first day of the calendar year in which the conversion takes place, or if earlier, the date of the first designated Roth contribution to the plan. This is consistent with the treatment of Roth accounts created by the other conversion methods and would be in furtherance of Congressional intent.



individual or, if earlier, the first day of the individual’s taxable year in which the first conversion contribution is made to any Roth IRA of the individual ...”).

⁶ IRC §402A(d)(2)(B) states that “A payment or distribution from a designated Roth account shall not be treated as a qualified distribution if such payment or distribution is made within the 5-taxable-year period beginning with the earlier of—(i) the first taxable year for which the individual made a designated Roth contribution to any designated Roth account established for such individual under the same applicable retirement plan, or (ii) if a rollover contribution was made to such designated Roth account from a designated Roth account previously established for such individual under another applicable retirement plan, the first taxable year for which the individual made a designated Roth contribution to such previously established account.” IRC §408A(d)(2)(B) states that “A payment or distribution from a Roth IRA shall not be treated as a qualified distribution under subparagraph (A) if such payment or distribution is made within the 5-taxable year period beginning with the first taxable year for which the individual made a contribution to a Roth IRA (or such individual’s spouse made a contribution to a Roth IRA) established for such individual.”

⁷ 2010-51 I.R.B. 872

⁸ IRC §402A(c)(4), as added by the Small Jobs and Credit Act of 2010, allows for in-plan Roth conversions for non-Roth funds, as long as: (1) the amounts are currently distributable, and (2) the plan includes a designated Roth program. Section 1002 of the American Taxpayer Relief Act of 2012 (ATRA 2012), adds IRC §402A(c)(4)(E) to allow the in-plan Roth conversion option to be made available for non-Roth funds that are not currently distributable (e.g. pre-tax elective deferrals for a participant who has not reached age 59½ and does not satisfy any other distribution event under IRC §§401(k), 403(b) or 457(b)).

ASPPA's Administration Relations Committee, David Schultz, Co-chair, and ASPPA's 401(k) Subcommittee, Frank Porter, Chair, prepared these comments. We welcome the opportunity to discuss these issues. 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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