
The purpose of the meeting and calls was to provide the IRS officials with questions which were submitted by members of ASPPA. It is intended that the responses or deferrals to the questions provide the basis for discussion at the 2005 Pension Actuaries and Consultants Conference during the IRS Question and Answer session. The answers reflected in this presentation are the ASPPA representatives’ interpretation of the IRS officials’ responses, and not direct quotes. They are intended to reflect as accurately as possible the statements made by the government representatives. This material does not represent the official position of the Internal Revenue Service, the Treasury Department, or any other government agency; nor has it been reviewed or approved by the Service or Treasury.

It is intended that this written material will meet the requirements necessary to qualify for Continuing Education Credits.

ASPPA wishes to thank Mr. Steven Miller, Ms. Carol Gold, Mr. Joseph Grant, Mr. James Holland, and Mr. Marty Pippins for agreeing to this meeting, and for their cooperation and assistance in making this portion of the program a success.
1. A plan is intended to be a Safe Harbor 401(k) plan for 2005, and has followed all requirements to be Safe Harbor using a match. In July, the Plan Sponsor changes payroll providers. As an administrative consequence of this change, deferrals are not taken from employees paychecks for 2 payroll periods. Does this invalidate the Safe Harbor for the plan for 2005? If so, does that mean the plan is subject to testing for 2005, or are there other consequences? Would the answer be different if the payroll periods were more or fewer? Does it make a difference whether the plan makes its matching contributions each payroll, or annually? How should this be dealt with?

   A. This is an operational plan disqualification issue. Possibly can correct under EPCRS.

2. Facts: A participant earns $8,000 and defers 100% of her compensation in a 401(k) plan. First, assume participant is under age 50. Is it true that no additional annual addition can be made (ignore FICA tax issue that would actually give us approximately $612 of room due to the tax coming off the $8,000 first; assume gross compensation paid and deferred was $8,000)?

   A. Yes.

   Now, assume participant is age 60. Can her employer allocate a $1000 matching contribution without needing to do a $1000 415 refund (again ignore FICA tax issue and assume gross compensation paid and deferred was $8,000)? The $1000 match causes the annual additions to exceed the 415 limit of 100% of compensation. However, the $1000 excess is within the annual catch-up limit. Is a refund necessary?

   A. Assuming that the plan has the necessary catch up provision, $1,000 of the elective deferrals can be considered catch up deferrals and no 415 violation would occur.

   And lastly, going back to our first example, if the employee defers 100% of pay, what is the plan required to do about safe harbor contributions, top heavy contributions, or threshold cross-testing contribution that are necessary to be made (again, ignoring the room that might be left for some part of these by the FICA tax reduction) as well as a discretionary match?

   A. To be discussed from the podium.

3. Is it possible for a defined benefit plan to require that fees (such as distribution fees, etc) be charged directly to the participant?
A. We do not see how you can mandate that the participant pay any fees for routine plan operation. There is no account that can be debited for any participant related fees, and the retirement benefit cannot be reduced by any fees.

4. A person terminates employment and is paid the vested portion of the employer's account. Upon re-employment, the plan provides that the employee must repay such distribution in order to recapture the previously non-vested portion of the employer's account. It is possible that such repayment can come from either after-tax personal dollars or a prior rollover account via direct transfer to our plan (or some combination of both).

What requirements are imposed on the plan with regard to having to determine whether this was before or after tax money being repaid, and tracking cost basis issues for ultimate distribution?

A. The plan needs to determine the tax status of the incoming funds and track it accordingly. This can be avoided by simply providing a restoration upon re-employment WITHOUT any payment being required.

5. If accruals are frozen in the db portion of a floor-offset plan, may the frozen accrued benefits be reduced as the dc account balances continue to increase? Would that approach violate 411(d)(6)?

A. This would be a volition of 411d(6). When you freeze an offset plan you also freeze the offset (expressed as an accrued benefit). This will be discussed from the Podium.

6. If a participant loan is considered a deemed distribution (without an offset), is the participant still required to repay the loan?

A. The loan must be repaid at some point after a deemed distribution. It will be repaid when the loan IS offset at some future date, if not paid earlier by the participant.

7. A plan defines the "annuity starting date" to be the first day of the month following the participant's separation from service. A participant terminates employment on November 15, 2005. According to the "hard-coded" plan document definition, this participant's "annuity starting date" is December 1, 2005. The QJSA election is provided to the participant on December 15, 2005 and reflects a December 1, 2005 "annuity starting date."

Please confirm that this situation is not subject to the Retroactive Annuity Starting Date (RASD) rules as per Treas. Reg. §1.417(e)-1(b)(3)(iii) because the participant under this scenario is unable to affirmatively elect an annuity starting date other than the "annuity starting date" explicitly written in the plan. The scenario assumes that, in conformance with §1.417(e)-1(b)(3)(iii), the actual distribution will commence no more than 90 days after the date the QJSA explanation is provided to the participant and ignoring any
administrative delay issues. (i.e., ignoring any administrative delaying issues, distribution will begin or be made on or before March 15, 2006)

Basically, we’re looking to clarify the difference between Treas. Reg.1.417(e)-1(b)(3)(iii) and Treas. Reg. 1.417(e)-1(b)(3)(iv). The first is not subject to the RASD regulations but the second is. There is much confusion in the field. Please clarify.

A. Since a RASD under 1.417(e)-1(b)(3)(ii) is an optional rule and this plan has not adopted it, the RASD rules do not apply. However, the failure to distribute the election documents is a qualification issue. DB plan SHOULD consider adopting RASD provisions.

8. Based on Revenue Procedure 2005-66, is it the Service’s position that any amendment to change a plan’s testing method or HCE definition for a particular plan year must be adopted by the last day of the plan year?

A. Yes. Under Section 5.05 of the Revenue Procedure, this would constitute a discretionary amendment and must be adopted no later than the end of the plan year for which the amendment is effective, and perhaps earlier to avoid 411(d)(6) cut back in accrued benefits. Particularly, the HCE modifications must be carefully analyzed for 411(d)(6) anti-cutback issues.

9. Rev. Rul. 2004-11 leaves open how the 410(b)(6)(C) transition rule would apply to a cross tested (or otherwise generally tested) plan. Assume two professional corporations form a joint venture and become an affiliated service group. Each has a cross-tested plan, but the plan years do not match. During the 410(b)(6)(C) transition period, may the two corporations cross-test the plans based only on the employees of the respective corporation, i.e., without taking into account the employees of the other corporation?

A. Yes, so long as the requirements on 412(b)(6)(c) regarding coverage and change of benefits are met, you test each entity separately during the transition years.

10. A general information letter from the IRS dated April 27, 2004 regarding 412(i) safe harbor plan designs comes to the conclusion that a 412(i) plan funded with life insurance and annuities cannot qualify as a safe harbor under 1.401(a)(4)-3(b)(5)(vii) because life insurance and annuity contracts are inherently not of the same series. Is this still the Service’s position?

A. We believe it may be possible for an insurance company to design a series of contracts that includes both life and annuity contracts which would satisfy the “same series” requirement.

11. I recently had occasion to review a defined benefit adoption agreement that was completed to establish a 412(i) plan. For a 412(i) plan, the section on actuarial
equivalence, which includes the GATT provisions for lump sums, that is required to be checked, reads as follows:

N/A. Plan is fully insured (i.e., a Code Section 412(i) plan) (Go to next question).

When we asked the prototype drafter about this we got the following response: “As far as the application of GATT, there is an n/a and that's how the plan was approved. However, now no one here or at the IRS seems to be sure whether it applies. In any event, it was approved by the IRS that way so there is reliance on the terms of the plan as approved.”

Section 412(h) only exempts plans described in 412(i) from section 412, not the rest of the Code. Could you confirm with the IRS that 417 does apply to a plan that complies with 412(i)?

A. Yes. If the 412(i) plan defines the accrued benefit as equal to the contract values, then 417 may be satisfied by the contract values.

12. The regulations indicate you can terminate a safe harbor 401(k) plan during the year by treating the termination of the plan as a reduction or suspension of safe harbor matching contributions. But what if the plan provided for safe harbor nonelective contributions? Do you follow the guidelines for the permissible suspension of matching contributions as best as you can (e.g. provide 30 day notice), or simply stop the safe harbor nonelective contributions immediately, or some other process?

A. We believe the same provisions applicable to matching contributions would apply to non-elective contributions. For example, this would include the 30 day notice under 1.402(k)-3(e)(4).

13. Revenue Ruling 2004-13 indicates the term “top-heavy plan” does not include a plan which consists solely of:

1. a cash or deferred arrangement that meets the requirements of section 401(k)(12)

2. matching contributions with respect to which the requirements of section 401(m)(11) are met.

We have a safe harbor 401(k) plan provides for a 3% safe harbor nonelective contribution. No match is provided. Does this plan satisfy the condition required or must a match also be provided?

A. Yes, it satisfies the provisions and no match is required.

In this case there are a number of participants who enter the plan mid year, so the 3% safe harbor would not be based on total compensation.
A. That’s ok.

Would the answer change if the Plan provides the 3% safe harbor contribution only to NHCE’s? This Plan has several HCE’s who are not Key Employees

A. Yes

14. Plan documents often require rehired participants with a break in service to complete 1 year and reenter the plan retroactively. In a profit sharing plan, if a retroactive contribution is allocated to a rehired participant in year 2 for year 1, in what plan year is that contribution tested for 401(a)(4)? Is it the year allocated or is the prior year testing rerun?

A. We believe there is flexibility in the decision. We believe you must be consistent in your 401(a)(4) and 410(b) treatment. This is separate form 415 and 404 issues.

15. For the new casualty loss provision for hardship withdrawals in 401(k) plans, can a plan go ahead and authorize a hardship for those reasons before 1/1/06 without putting the qualification of the plan in jeopardy? We have several plans where participants were affected by hurricane damage last year and just want to be prepared if some of our plan participants were affected by hurricane damage this year.

A. Provided your participants are affected by Hurricane Katrina as determined by IRS regulations, the answer is yes. If affected by other than Hurricane Katrina, these would be non-safe harbor provisions at this time. Adopting a hardship distribution reason that may otherwise be a safe harbor in 2006 may not be considered a safe harbor for 2005 (but can still be permissible under facts and circumstances determinations) and may bring you out of prototype or word for word adopter status but would not require early compliance with the other 401(k) guidance.

16. We were told by an IRS agent that we could add two additional amendments designed to further clarify the actual operation of the plan to an existing VCP submission that has a case number assigned to it. The plan operated in compliance with these amendments but they were never actually executed. This appears to me to fly in the face of the acceptable amendments under 2003-44. Please comment.

A. To be discussed from the podium.

17. If it is discovered after more than a year that a distribution check remains uncashed, but has been reported via 1099R as taxable to the participant, what steps should be taken? The participant cannot now be located. Can we proceed with lost participant procedures, re-credit the amount back to the plan (if lost, under $1,000 and the plan permits)? If the funds are returned to the plan, should a corrected 1099R be issued in the later year? We
are having trouble with an investment provider reluctant to do anything about the 1099R in this situation.

A. To be discussed from the podium.

18. Paul Shultz issued a memorandum in 2002 instructing field personnel to question whether a defined benefit plan is providing “meaningful benefits” for purposes of IRC 401(a)(26) where it provides benefit accrual rates of less than 0.5% of pay. For this purpose, Paul stated that the accrued benefits under a cash balance plan should be tested on a benefits basis by crediting the hypothetical accounts with the hypothetical interest to the participant's normal retirement age and converting the resulting hypothetical account balance to an actuarial equivalent annuity benefit commencing at the same age.

The use of the term "normal retirement age" in Paul's memorandum can have consequences that must be considered.

It seems a more reasonable requirement would be to deem a plan to be providing meaningful benefits if it provides a benefit at normal retirement age that is actuarily equivalent to a benefit of 0.5% of pay beginning at age 65. The earlier a benefit begins, the more valuable it is. If a benefit of 0.5% of pay beginning at age 65 is considered to be "meaningful", then any other benefit which is actuarily equivalent should also be considered "meaningful". For purposes of making this determination, the actuarial equivalence assumptions set out in the plan document could be used to determine whether or not benefits are actuarily equivalent.

Will IRS accept this demonstration of meaningful benefits as long as the equivalent benefit commencing at age 65 exceed 0.5%, even if the benefit beginning at normal retirement age is less than 0.5%?

A. No. You must use the Normal Retirement Age. This is consistent with the application of the top heavy rules at a given NRA other than 65.

19. A professional corporation maintains the following retirement plans: a Defined Benefit plan, a Profit Sharing/401k plan, and a 401k deferral only plan. The nonexcludible employees of the corporation are either in "Group A" or "Group B".

Group A is covered by both the Profit Sharing/401(k) and Defined Benefit plans. Group B is covered only by the separate 401(k) [deferral only] plan. No individuals are members of both Group A and Group B.

The 25% deduction limit of IRC 404(a)(7) applies because members of Group A benefit under both a defined contribution plan and a defined benefit plan. (Assume that the minimum required contribution under the defined benefit plan is less than the 25% of pay limit.)
Only the profit sharing and defined benefit contributions count against the 25% deduction limit. 401(k) contributions no longer count against this limit.

Question: What is the deduction limit for the corporation's contributions to the DB and Profit Sharing plans? Is it 25% of the compensation of members of both Group A and Group B or is it just 25% of the compensation of members of Group A? Or, is it something else?

If the compensation of Group B members is to be ignored, what is the statutory authority for that? It is my understanding that participants in a 401k plan are considered to be "benefitting" from the plan as long as they are eligible to defer.

A. It is in fact limited to 25% of the compensation of members of Group A. See 404(a)(7)(A)(i).

20. IRC 404(a)(7) limits the maximum deduction in the case of a defined benefit and defined contribution plan to 25% of pay or what it takes to fund the defined benefit plan. Section 404(a)(7)(C)(i) says this does not apply if no employee is a beneficiary under more than one trust or annuity plan. I asked the IRS at the fall 2003 convention in DC if this meant that if at least one person who was a participant in the DB plan also had an account balance in the DC plan, even if this person did not receive an allocation of employer contributions in the DC plan, that the limitation under 404(a)(7) would apply and the IRS said that it would.

Now 404(a)(7)(C)(ii) says that If, in connection with 1 or more defined contribution plans and 1 or more defined benefit plans, no amounts (other than elective deferrals (as defined in section 402(g)(3))) are contributed to any of the defined contribution plans for the taxable year, then subparagraph (A) shall not apply with respect to any of such defined contribution plans and defined benefit plans. This seems to indicate just the opposite of the conclusion reached by the IRS at the 2003 ASPA meeting. I (and I’m sure many others) would like to put this issue to rest, once and for all.

If one person is a participant under both a DB and DC plan sponsored by the same employer, and this person has an account balance in the DC plan and may receive allocations of forfeited employer contributed amounts, and may defer but now is not eligible to receive any employer contributions and does not receive any employer contributions, does the limitation of 404(a)(7) apply to both the DB and DC plans or is this limitation exempted under 404(a)(7)(C)(ii) regardless of what 404(a)(7)(C)(i) says regarding someone being a beneficiary under more than one trust?

A. Will be discussed from the podium.

21. An employer sponsors a defined benefit plan and a 401k plan. There is only 1 employee common to both plans, and he is eligible to participate in the 401(k) plan for deferrals only. The other participants in the 401k plan are eligible to make deferrals and to receive nonelective employer contributions. In a year in which the employer does make a
nonelective contribution on behalf of those eligible, does this trigger the combined plan
deduction limit of IRC 404(a)(7)?

A. No, as long as the one common employee only has elective employee contributions,
404(a)(7) won’t apply.

22. I need to aggregate a db plan with a ps plan of the same employer. NRA = 65 in the ps
plan and 62 in the db, which means that my latest uniform RA is 65, which equals the
testing age. My testing benefits will now have to be normalized to 65, but what if the db
plan opts to recognize the 415 limit for testing? Is my maximum accrued benefit the same
at 65 as it was at 62? Or would the maximum at 62 still be subject to normalization to age
65?

A. To be discussed from the podium

23. Verify that in service withdrawals for a profit sharing plan can occur at age 59 1/2 or
NRA without the aged 2 year/5 year rule. Please confirm that the aged 2 year/5 year rule
only applies when there are no other age or event requirements.

A. Only if the NRA has been reached can the 2 year/5 year rule be ignored. Age 59 ½
has no application for this purpose.

24. A defined benefit plan is terminating effective 12-31-2004. There is a participant who
terminated employment in 2002, was 20% vested and has never returned their benefit
election form that would have allowed benefits to commence. Does this participant have
to be made 100% vested as of the date of termination (12-31-2004) or do they remain
20% vested? (Some IRS reviewers under a 5310 are requiring 100% vesting).

A. We agree that 100% should apply (as long as the assets are adequate).

25. Assume a calendar year plan defined benefit plan with a valuation date of 1/1. If benefit
accruals are frozen of 12/31/2005 by an amendment adopted on 12/31/2005, I cannot
recognize the amendment in my funding for 2005 under Rev. Rul 77-2. But if the
amendment is adopted after 12/31/2005 but no later than 3/15/2006, I can recognize it in
my 2005 funding under IRC 412(c)(8). Is this correct?

A. No. You can make a 412(c)(8) election for any amendment adopted during the year
and up to 2 ½ months after the plan year end. Of course, we are assuming 204(h) and
4980F were complied with.

26. The answer to question 36 in the 1992 Enrolled Actuary's meeting Gray Book indicates
that a change in assignment within a firm needs to be reported on Schedule C, however
the instruction for Schedule C are not clear about this. Could you confirm that this is
correct? If so, should the EIN be reported as the firm's EIN, or should the enrollment
number be reported on Schedule C. Also, could the instructions be revised to make this
clear as we get push back from some of the 5500 preparers in our office because several privately prepared publications apparently say that an assignment change within a firm is not required to be reported.

A. The instructions will be reviewed to see if they need clarification.

27. Is there any consideration being given that would allow adopters of Solo Plans to adopt this type of plan up to the tax filing deadline, plus extensions? This would be extremely beneficial to these individuals and partnerships as many of them do not know they can adopt this type of plan until they meet with their CPA after a plan year end.

A. This would require a statutory change, which must be enacted by Congress.

28. Under the proposed 1.415(c)-2 regs, may a plan's definition of definition of compensation include post severance payments for services actually rendered but exclude payments for leave or other reasons? Having to characterize post severance payments will inevitably beget litigation as to what often times is a compromise payment to avoid litigation.

A. The Service has received and is reviewing comments on post severance payments.

29. Employee is hired 1/1/91 and commences participation in defined benefit plan on 1/1/92. Plan is frozen 12/31/98 after employee has participated in plan for 7 years. Employee terminates employment 12/31/02 and is to receive a distribution during 2005.

In calculating 415 dollar limit, is the benefit based on 7 years of participation or 10+ years of participation?

In calculating 415 dollar limit is benefit determined based on 1998 maximum benefit, 2002 maximum benefit or 2005 maximum benefit

A. The plan is frozen 12/31/98; thus the accrued benefit is determined at that time and limited to 7/10 of the 415 limit. Additional years of service with the employer do not change the frozen accrued benefit, which remains at 7/10.

30. What is the IRS position concerning amending a plan via corporate minutes, without a separate amendment? Smith v National Credit Union 36 F 3rd 1077 (no) and Horn v Berdon 938 F 2d 325 (Yes). My problem is what to do about a plan that was amended by directors' resolution.

A. We believe an action by the Board of Directors can be a valid amendment provided the plan allows for such action or doesn’t prohibit such action. Like any amendment, the language actually adopted must be complete and appropriate regardless of form.

31. If a participant in a 403(b) plan separates from service from a 501(c)(3) organization after the age of 55 but prior to age 59 1/2 and transfers his existing 403(b) account to another
403(b) account (transferee plan) after separating from service, may the participant then take distributions from the transferee 403(b) account at any time prior to age 59 1/2 and avoid the 10% early distribution tax due to the age 55 exception under IRC 72(t)(2)(A)(v)?

A. We will check with the appropriate parties to see if we can get some guidance. To be discussed from the podium if we get such guidance.

32. What does it mean for an employee to be employed on the last day of a plan year, for example, in determining eligibility for a top heavy minimum contribution? EXAMPLE # 1: 7/31/2005 falls on a Sunday. If an employee's last day of work was on 7/29/2005 and the plan sponsor is closed on Saturday & Sunday, would the employee be considered to be employed on the last day of the plan year ending 7/31/2005? EXAMPLE # 2: Employee terminates employment on 2/23/2005 and is paid two weeks unused vacation pay on his last day of work. Would this employee be considered to be employed on the last day of the plan year ending 2/28/2005? EXAMPLE # 3: Following a hectic tax season, a CPA firm closes from April 16th through May 5th. An employee works on 4/15 but does not return to work when the company re-opens in May. Would this employee be considered to be employed on the last day of the plan year ending 4/30/2005? EXAMPLE # 4: 12/31/2004 was New Years Eve and many businesses were closed that day since January 1st was a Saturday. If an employee's last day of work was on 12/30/2004, would the employee be considered to be employed on the last day of the plan year ending 12/31/2004? This also affects plans which require employment on the last day of the plan year as a condition for sharing in the allocation of the employer contribution or forfeitures. I have never seen any guidance from the IRS or DOL addressing this issue even though the top heavy rules are twenty years old. Thanks!!!

A. Being "employed" on the last day of the year is NOT the same as WORKING ON the last day of the year. Employment is a "relationship" with the employer. If you are on vacation and someone asks you where you work, if you are still "employed", you have an answer, even though you are not actually working during the vacation period.

So, if 12/31 is a Sunday and it is a business that is only open mon-fri, unless someone has been TERMINATED from employment as of that day, they are still employed even though it is not a work day.

So, your example 1: as long as the person wasn't terminated, he is still employed on 7/31 even though it's a Sunday and not a work day.

Example 2: Employee is TERMINATED prior to the last day; he is not employed on the last day regardless of how much money he is being paid upon termination. He is NO LONGER EMPLOYED by the firm as of 2/23.

Example 3: The question is always "is he employed" during that period, not "is he working". (BTW, seasonal employee rules were never issued, so let's not deal with "seasonal employees" here - besides, I don't think a three week shut down qualifies as
Let's just assume that everyone is on vacation. Are they FIRED (terminated) on 4/16? Unlikely. They are basically on a company wide vacation; they are still employees; they are supposed to come back on 5/5. Therefore, they are still employed as of 4/30.

Example 4: Basically the same as opening comment about 12/31. Here, the company is closed 12/31 and last day of work was 12/30. None of that matters; what matters is "was he still employed on 12/31", and the answer is yes (UNLESS he was actually terminated on 12/30).

33. Why is it no longer possible to order Form 8109-B online for mail delivery? I was told that the only way I could now get these forms was to drive to my local IRS office and pick up a few at the walk-in desk.

A. We have confirmed that the above is NOT correct. You can order 8 at a time from this IRS Office: 1-800-829-4933. Tell them you are a tax preparer and you need them for your clients. Copies of the forms are available in quantities of 25 at a time by writing, on your business stationary, to the IRS Forms Distribution Center, P.O. Box 8901, Bloomington, IL, 61702-8901 and including a statement that you are a tax preparer and require these forms for your clients.

34. We had thought the compensation threshold for determining HCE status was settled a long time ago but noted some recent IRS publications seemed to throw open the issue once again. For purposes of defining who is an HCE in 2005, without regards to the ownership portion of the definition, is it still the case that you examine the lookback year (2004) compensation and use the threshold in effect IN THE LOOKBACK YEAR? For example, anyone who earned at least $90,000 in 2004 is HCE in 2005 (assume no top paid group election). In other words, does the IRS still agree that the $95,000 comp threshold for determining HCE would only be effective for the 2005 lookback year and therefore would only be used when testing HCE status for the 2006 year?

A. Yes.

35. When can we expect to receive determination letters on cash balance plans that were converted from traditional db plans. we have some at IRS for 3 Plus years?

A. Secretary of Treasury Snow has made the determination that this is dependent on Congressional action.

36. Assume a defined benefit plan was frozen on 12/31/01 with a timely 204(h) notice that said top heavy minimums would continue to accrue. An EGTRRA model amendment effective 1/1/02 was adopted 8/15/03 and it states that top heavy minimums will not accrue if no key employee accrues benefits during the plan year. May the plan stop
accruing the TH minimums at 12/31/01, 12/31/02, 12/31/03 or not until another 204(h) notice is provided?

A. *It would be 12/31/03, assuming a timely 204(h) notice was given.*

37. Suppose an employer sponsors a SIMPLE IRA and until mid-year it is the only plan of the employer. Then during this plan year the employer decides to establish another qualified plan (say a safe harbor 401(k) plan). According to 408(p)(2)(D)(i) the SIMPLE will then not be treated as a qualified salary reduction agreement for that plan year.

Is the employer still required to contribute to the SIMPLE during this plan year?

A. *No.*

Assuming that contributions to the SIMPLE are required for this plan year, and because such contributions are not qualified, then what are the consequences to the SIMPLE participants who now receive such non-qualified contributions?

A. *From the IRS standpoint, there is no mandatory requirement on the employer since the SIMPLE does not satisfy Code Section 408(p). There may be contract law issues with regard to employee rights that might apply.*

Alternatively, is the employer prohibited from contributing to the SIMPLE for the year?

A. *Yes.*

What should happen to contributions already made by both the employees and employer? Can they be removed from the IRA as an excess contribution to an IRA (if they exceed the annual IRA limits)? Can employer contributions be re-characterized as compensation to the employee and a contribution by the employee to the IRA, which then can be treated as an excess contribution if it exceeds the IRA limit? This is an area that needs IRS attention and a simple method of correction.

A. *Since contributions made by the employer are no longer appropriate, the contributions should be re-classified through payroll as compensation to the employees with appropriate payroll taxes due, and the contributions to the IRAs treated as participant contributions to an IRA. If they then exceed the IRA limits, they should be treated as excess contributions to an IRA and corrected accordingly.*

38. An eligible employee in a 401(k) plan elects to contribute $500 per payroll. Due to a payroll processing error, the employer fails to deduct the contribution from his paycheck for the entire year. Though seemingly unusual (to say the least), this omission is not noticed by the employee but is noticed during the plan's annual CPA audit. Rev Proc 2003-44 suggests that the employer is required to fund all missed contributions as well as earnings. However, this method of plan correction seems to be unfair and results in an
unnecessary "windfall" to the employee. Is this still the current guidance for this type of operational error? Is the length of time or the amount of money involved a factor in any way?

A. This is still the current guidance for correction of this type of error, and the length of time or amount involved is not a factor.

39. Company X has both a 401(k) plan (invested in an insurance company's group annuity product with mutual fund-like pooled separate accounts) and an ESOP. A terminated employee with a substantially large (>5,000) balance in each plan wishes to cash out the shares in the ESOP and roll the proceeds into the 401(k) plan in order to utilize those investments. Assuming it was not prohibited by the 401(k) plan, is this acceptable? If the employee were still active, he would not be eligible to take a distribution from the plan.

A. It is acceptable.

40. Some professional service employers with cash balance plans have side agreements with certain participants that pay from the employer to the participant the difference between actual earnings in the plan and the plan's crediting rate. Does this side agreement cause the cash balance plan to violate any requirement under IRC 401(a)(26)?

A. This agreement may in fact run afoul of 1.401(a)(26)-2(d)(1)(ii)(A).

41. I am unable to find any guidance regarding the electronic signing of adoption agreements. What is required to prove that a sponsor signed an AA electronically?

A. The proposed e-sign regulations do not specifically address this issue. The Service would appreciate comments for our consideration on this topic.

42. If a Plan surrenders a former participant's life insurance policy that is owned by the Plan, deposits the cash surrender value into the participant's investment fund and immediately distributes the value of the fund to the former participant in the form of a lump sum distribution, are the accumulated P.S. 58 costs recoverable?

A. Yes

If they are recoverable, and the participant wants to roll the distribution to an IRA, can the participant receive a cash distribution equal to the accumulated P.S. 58 costs and roll the balance into the IRA so that no part of his distribution is taxable in the year of distribution?

A. Yes; in fact, no part of the accumulated P.S. 58 cost equivalents may be rolled into the regular IRA account since they are after-tax dollars.
43. If a profit sharing plan is adopted but no contributions ever made, is a 5500 required?

   A. Yes. It is our holding that a plan exists, even if the corpus of the trust is not funded.

44. For form 5500 purposes, must the participant count at the beginning of the year equal the ending participant count at the end of the prior year? In other words, does the plan year begin, THEN participants enter; OR, does the plan year and plan entry happen simultaneously?

   A. New entrants on the first day of the plan year are counted in the opening participant count. Therefore, it is quite likely that the participant count at the beginning of the plan year will be different than the participant count at the end of the prior plan year.

45. F owns 100% of his law firm. G owns 100% of his firm. Both are LLCs, and both employ individuals making over the HCE threshold. Neither firm currently sponsors a retirement plan of any kind.

The two firms merge on 7/1/05, creating F/G, LLC. The new firm is owned 50/50 by F and G. They wish to establish some kind of retirement plan for 2006. Can or must I aggregate compensation from the prior entities with compensation received from F/G, LLC in determining my HCEs for 2006?

   A. This issue is not settled, but is on our business plan for this year.

46. Currently a multiple ER plan files one 5500 with a Schedule T for each adopting employer. How will the new 2005 5500 form changes impact annual filing for this type plan?

   A. The answer is that you never file more than one Schedule R, including for 2005 plan years. So you just check both boxes at line 9 if different portions of the plan use different methods to satisfy coverage. If you would complete line 3 on the old Schedule T, then you leave line 9 blank. If you would have completed line 4, then you just indicate whether the ratio test, the average benefit test, or both were used by the plan for which the filing is being made.

47. Assume a DC plan which is subject to the J&S rules. The plan has one active participant, with a $500,000 account and a terminated participant with a $10,000 account. The plan sponsor (who is the participant with the $500,000 account in the plan) is terminating the plan. The terminated participant with the $10,000 account has never returned the applicable benefit payment forms to the plan administrator. The participant refuses to complete the benefit payment forms and/or the participant is a “lost participant”. What must the plan sponsor do in closing down the plan and dealing with this errant participant that will not adversely affect the plan’s qualified status?

   A. This is a DOL question, but we suggest you review the DOL regs on lost participants and terminating plans.
48. A new business was established 1/1/05. At that time there was only one employee - the owner who is an HCE. The business hires other employees who are NHCEs during the year. Plan year and fiscal year are the calendar year. Is it permissible for the business to adopt a plan effective 1/1/05 which provides that all employees on 1/1/05 are immediately eligible and, thereafter, employees must complete a year of service and enter on the next entry date (1/1 and 7/1 of each plan year)? If that's okay, what about a requirement for two years of service (with 100% vesting, of course)?

A standardized prototype precludes discrimination in operation. If such a plan permits immediate participation for those employed on a certain date, e.g. the plan's effective date, and requires 1 year/age 21 for those hired later, could such a provision ever be discriminatory or does the fact that it is permitted in a standardized prototype document assure that the provision can not be deemed to be discriminatory?

A. To be discussed from the podium.

49. Assume a QDRO includes a distribution of Roth 401(k) monies. If the alternate payee is a participant in the plan and rolls the money into his/her own account, does s/he have separate 5-year periods for his/her own Roth contributions vs. the QDRO rollover?

A. We are working on guidance on this issue.

50. A participant does not receive any compensation for a plan year. Can this year be EXCLUDED when computing the high 3 year average for 415 purposes?

A. No.

51. A question regarding Roth 401(k) and safe harbor 401(k) plan designs. A safe harbor 401(k) plan implements a Roth 401(k) feature on a date other than the first day of the plan year. In such case, is it sufficient to notify employees of the new option without jeopardizing the plan's safe harbor status (since the safe harbor notice given before the beginning of the year might not have explained the Roth choice)? I would suggest that there shouldn't be any effect on the plan's safe harbor status if it has otherwise met the 401(k)(12) requirements for the year, but it wouldn't hurt for the regulations to clarify that (or at least discuss the issue in the preamble). Do you agree with this interpretation and will the final regulations (or preamble) deal with this?

A. This may be addressed in upcoming guidance.

52. We have a few restaurant clients and are hoping for solutions/ideas about tipped employees contributing to the plan. Specifically, we are wondering if the new Roth 401(k) will provide a solution to this problem.
The tipped employees don't receive a paycheck so there is no salary deferral available and these employees can't contribute to the plan currently. We do have some tipped employees who would like to contribute to the plan. Will they be able to contribute after-tax dollars to the plan without it being "payroll withheld"? I have had no luck finding information about tipped employees contributing to 401(k) Plans.

A. This is unlikely to be addressed in guidance, but probably would be acceptable.

53. A corrective amendment under 1.401(a)(4)-11(g) must have substance, which means at least partial vesting on the corrective accrual. Does the substance requirement apply to corrective accruals granted by a plan's 410(b) "fail-safe" language?

A. The operation of a 410(b) “fail safe” provision automatically passes 410(b) without a correction, and therefore, the substance requirement of -11(g) is not applicable.

54. The current structure of 414(s) regulations would provide that a safe harbor modification of 415 compensation would be to exclude all elective deferrals that are included in the 415 definition but are not includible in gross income. So, if an employer has a Roth contribution feature in the 401(k), and elects this safe harbor modification, does that mean employees who designate Roth have their elective deferrals included in compensation for plan purposes and those who designate pre-tax do not? If yes, would this still be considered a safe harbor definition under 414(s)? The reason why this is important is that you might have a disproportionate # of HCEs electing the Roth designation.

A. This may (or may not) be dealt with in upcoming guidance.

55. I’m hoping you can address the following coverage testing question or can at the very least point me in the direction where I can find the answer. The question and plan specs are as follows:

Plan Type: 401(k) Safe Harbor Plan (Nonstandardized Prototype Document)
Employer: LLC that owns numerous hotels Eligibility: Enter on Jan 1 or July 1 after completing 1 yr of service and age 21. However, if the employee is NOT a department head or manager, the document excludes you from participating even if you’ve meet the statutory eligibility to enter the plan.
Contribution types: 401(k) Deferral and Safe Harbor Match

As you can probably guess, the problem is getting 410(b) to pass. For 2004, we failed the ratio test, but were able to pass using the NHCE concentration test and average benefits percentage test. However, I don’t think 2005 will pass either part of 410(b). Therefore, I’m recommending to the client to “open” the plan back up as soon as possible to all employees regardless of employment classification.

My question to you is: Can they amend the plan effective 10/1/05 to remove the language
excluding employees from participating or do they need to wait until 1/1/06? If the plan is opened up to them on 10/1/05, we were going to give the 10/1/05 participants who elect to defer a matching contribution based on their compensation for all of 2005. I’m having trouble locating any IRS guidance on this issue.

Suggested answer: I believe adding these folks in middle of the year would not work although I must admit, I'm not sure. I guess my concern is a violation of the safe harbor notice rules in that you are changing features of the plan that were supposed to be disclosed a reasonable period before the plan year begins. The 401k regs don’t address what the consequences might be of a change in plan terms mid year but informally irs folks have questioned whether adding new contribution features would violate the same rule.

As an alternative, it would seem you could use the 401a4-11g corrective amendment approach to add the minimum number of NHCEs in after the yr is over. It would appear the plan sponsor would have to make qne contributions for each person added back in equal to the adp and acp for the year. The -11g regs were written before k12 came into being, but i don’t know why the result should be any different in a k12 plan vs a regular k plan. Safest course of action is to get a determination letter on the -11g amendment.

A. To be discussed from the podium

56. Most plans conduct coverage and nondiscrimination testing after the plan year. In using prior year testing, can you redo a prior year ADP test to exclude the statutory group assuming that you pass coverage testing?

A. Yes.

Let's say the prior recordkeeper did not run the prior year test to disaggregate the non-statutory group. Now it is well after the plan year end, but still within the 12 month period for making corrections. Must you file an amended Form 5500 to change the Schedule T to show the coverage test results? ( The revised Schedule T would simply show another way to pass coverage by disaggregating the nonstatutory group. The revised Schedule T would then properly reflect how the ADP test was conducted/revised.

A. Yes.

Is this considered a self-correction before anything is broken since it is well within the 12 month period after the end of the current plan year?

A. This is not considered a self-correction under our rules.
57. What is the procedure to request an authoritative answer regarding whether a particular insurance product would be consistent with the ILP method as required under Section 412i? To whom is such a question addressed?

A. You may request a private letter ruling, which IRS may or may not rule upon.

58. Is there to be any additional guidance regarding the deductibility of premium allocable to Waiver of Premium insurance provisions for policies held inside pension plans?

A. Nothing is planned beyond Revenue Ruling 2004-20 at this time.

59. The accountants are auditing a plan that was terminated in April 2004. The plan has not distributed all of the assets because they can not find several participants with account balances. Checks have been cut, but they have not cleared with the probability that the addresses that the client has are probably incorrect. Does the Plan have to wait until all of the funds are gone (ie turned over to the state) to file the final 5500?

A. Yes.

60. Someone has suggested that if leased employees are collectively bargained employees of the leasing company (and legitimately so), then one doesn’t even need to worry about whether or not the leased employees are covered by a qualified retirement plan maintained by the leasing company since they are excluded from any non-bargained plan that the leasing organization may sponsor. In other words, the argument is that if the leasing company employees are collectively bargained, then the employer who is leasing them can ignore them completely for nondiscrimination and coverage purposes regardless if they are covered by any qualified plan sponsored by the leasing company?

Here is my take on the issue. IRC 414(n)(1)(A) says that the leased employee shall be treated as an employee of the recipient. The question is then if these collectively bargained "employees" are excludable from the recipient's non-bargained plan under 1.410(b)-6(d).

I suspect that they are not excludable because of the definition of the collectively bargained employee found in 1.410(b)-6(d)(2)(i). It says that there must be "evidence that retirement benefits were the subject of good faith bargaining between employee representatives and the employer or employers."

Now there may be evidence of good faith bargaining between the leasing organization and employee representatives, but I seriously doubt that there will be any bargaining between the recipient and employee representatives. If this is the case then even though 414(n) treats the leased employees as employees of the recipient, I don't think that they would be treated as collectively bargained employees under 410(b) with respect to plans maintained by the recipient. Any thoughts?
A. We agree with your conclusion.

61. Company A, LLC and Company B, LLC are owned 100% by the same person. This person performs management functions for both entities. Company A has rank and file employees; Company B has no rank and file employees. A defined contribution plan is set up that covers only Company A. The owner receives $100,000 in earned income from Company A (after the contribution for the employees of Company A). However, he incurs a loss of $100,000 from Company B. For purposes of allocating contributions in the Company A plan, is his compensation considered to be $100,000 or $0?

   A. $100,000.

62. Other than deductibility, what is the penalty for a plan sponsor not depositing 401(k) safe harbor contributions within 12 months following the plan year?

   A. Will be discussed from the podium.
1. What is the proper way to allocate a defined benefit plan deduction to the individual partners in a partnership entity?

Treasury Reg. 1.404(e)-1A(f)(2) indicates that a contribution to a defined benefit plan must be allocated to the individual partners in the same manner as their distributive share of partnership income. The regulation goes on to reference Code Section 704, for purposes of the determination of the distributive share. Although this regulation was issued under a code subsection that was repealed, Field Service Advice Memorandum 1992-0626-4 references it to support the same position. However, one of the key provisions of this memorandum was that the partnership agreement made no provision for specially allocated plan deductions.

Code Section 704 seems to indicate that a partnership agreement can be drafted to specify the manner in which a defined benefit plan’s deduction is allocated to each partner, and that if it does not, then the default methodology is based on each partner’s interest in the partnership.

Instructions for Line 11 of the Schedule K-1 to Form 1065 indicate that payments made on behalf of the partner to a qualified plan is the amount of the deduction. In addition, instructions for Line 18 of Form 1065 indicate that only contributions made by the partnership for its common-law employees should be entered on Line 18. It goes on to state that contributions for the partners should be reported on Schedule K-1, Line 11, and deducted on their own returns.

a) Does the IRS require, without exception, that the deduction of a defined benefit plan’s contribution be allocated among the partners in the same proportion as the partners' interests in the partnership, regardless of whether the contributions are made to fund benefits for the common-law employees or the partners?

b) Or, is it permissible for the partnership agreement to be drafted to specify an alternative allocation?

c) If it is permissible for the partnership agreement to specify an alternative allocation methodology, which of the following would be acceptable for a plan with on-going accruals?

   (i) Each partner’s normal cost is allocated to him/her and used as the Form 1040 deduction, and the remaining portion of the defined benefit contribution (cost of common-law employees and any amortizations) is allocated to each partner in the same proportion as his/her interest in the partnership (an approach similar to how contributions to a defined contribution plan would be handled).

   (ii) The percentage of the plan’s current liability attributable to all the active partners is first determined. This same percentage of the plan’s contribution is then allocated to each partner (and deducted on Form 1040) based on criteria
specified in the partnership agreement. The remaining contribution is allocated to each partner in the same proportion as his/her interest in the partnership.

d) For a plan with frozen accrued benefits, is the only acceptable method based on allocating the entire contribution to each partner in the same proportion as his/her interest in the partnership, with no amount being claimed as a deduction on Form 1040 (i.e., the contribution simply serves to adjust each partner’s self employment income from the partnership)?

2. Let's say we have a plan that is top heavy and cross-tested. There is immediate entry for the 401(k) and twice-a-year entry after a year of service for the profit sharing contributions

A participant is hired in March 2004, and so is immediately eligible for the 401(k) but not eligible for the profit sharing. However, they must receive a top heavy minimum, equal to 3% of full-year pay. For gateway purposes, they must receive 5% of 415 compensation, but this can be limited to their post-participation date. However, for purposes of the profit sharing, they don't have an entry date yet, and so could I argue that they must receive at least 5% of zero?

Assuming that it's not feasible to run a separate tests for otherwise excludable employees, what's the gateway minimum for a person in this situation for 2004?

3. When using the 3% non-elective safe harbor contribution and the plan definition of compensation is from date of participation, there appears to be some confusion that you could not use date of participation compensation and still rely on the safe harbor plan to satisfy top heavy. If the plan is using no other contributions but the safe harbor 3% nonelective, I was under the impression that the plan was considered not top heavy even if the top heavy ratio was over 60%. Please clarify.

4. Following the 401(a)(4) regulation safe harbor guidelines for 412(i) plans, is it okay to use a formula in excess of 100% of pay? Assume we have a 55-year-old owner of a small business who establishes a DB plan with normal retirement at age 65. To get maximum benefits, the formula is set at 250% of pay with reduction for less than 25 years of participation. (10/25 X 250% = 100%) Further assume that the employer has one eligible employee who is 25 years old. Under a traditional DB plan, the employee's accrued retirement benefit would be 62.5% of pay after 10 years of participation. (10/40 X 250% = 62.5%) The owner has a 100% accrued benefit after 10 years. The same formula applied to a 412(i) plan produces the same accrued benefit for the owner, but dramatically different results for the employee. By definition, the 412(i) plan must level fund retirement benefits over a participant's future participation in the plan and the participant's accrued benefit at any given time is the value of the insurance/annuity contract(s). However, we can't fund toward a benefit in excess of the 415 limit so we have to level fund a 100% benefit over 40 years for the 25-year-old participant. After 10 years of participation, the insurance/annuity contracts have only received 10 of the 40 years of
level funding needed to fund a 100% of pay benefit. At the end of 10 years, the value of the contracts would only purchase a retirement benefit equal to only about 25% of pay - a far cry from the 62.5% of pay provided by a traditional DB plan. Is this okay? The 401(a)(4) regs seem to say it's okay, but the actual accrual patterns don't seem to pass the "smell test". I'm interested in the IRS position on this. What is the correct way to handle a situation such as this?

5. Would the following situations meet the requirements of IRC Section 416(g)(4)(H) so that they are not subject to the top-heavy rules in Section 416?

Situation 1: A non-governmental 401(k) Plan utilizes a 3% non-elective safe harbor to satisfy the ADP and ACP tests. The Plan permits a discretionary non-elective contribution. The Plan also permits a discretionary matching contribution that satisfies the ACP safe harbor matching contribution limitations, including a limitation that the discretionary match shall not exceed 4% of compensation. For the Plan year, there are no Employer contributions made other than the 3% safe harbor contribution. No forfeitures are allocated for the year.

Situation 2: The same Plan as in Situation 1, except that the Employer makes a discretionary matching contribution.

6. Does the extension to the remedial amendment period as outlined in Rev. Proc. 2004-25 apply to a plan amended for GUST and EGTRRA but not for the final 401(a)(9) regulations or the new mortality table as outline in Rev. Proc. 2001-62?

7. Under the ADP/ACP Safe Harbor rules, a plan is considered to have met top heavy requirements if the only employer contribution is the safe harbor matching dollars. The question has to do with the time period during which a discretionary contribution is made and the plan year that must be tested for Top Heavy purposes.

For example. Plan year runs 1/1/03 to 12/31/03. As of the determination date (12/31/03), the only contributions made for the plan year were deferrals and employer matching contributions. Plan sponsor makes a discretionary profit sharing contribution in March 2004 for the 2003 plan year.

Do you deem the 1/1/03 to 12/31/03 plan as consisting "solely" of safe harbor money since the profit sharing contribution was made after the determination date and under Top Heavy rules contributions made after the determination date are not considered in determining top heaviness?

If not, it would seem that you would need to test the 2003 plan year for top heavy purposes and the determination date is 12/31/02.

Or, do you perform the top heavy test for the year in which the contribution is actually made, in this case the 2004 plan year, and the determination date is 12/31/03?
8. The use of specific private delivery services is listed in the Form 5500 instructions for 2003. To be timely filed, could a service such as UPS Groundtrack be utilized where the 5500 form is not sent at the end of the filing period but significantly in advance. In other words, why pay the expense for next day, etc. when time is not a factor?

9. A company sponsors a SIMPLE IRA and mid-year decides that a Safe Harbor 401(k) is really the right choice.

   1) Is it correct that all SIMPLE IRA deferrals and earnings must be returned to the employees who contributed?

   2) If the employer has not as yet matched his/her employees, is the match still payable to the employees who deferred even though it too would need to be refunded? If yes, is it deductible?

   3) Deferrals made to a SIMPLE IRA count as a part of 402(g). If a refund was necessary as a result of the employer starting a new plan, are the deferrals made to the SIMPLE still counted toward the 402(g) limit? If no, then it would follow that each eligible participant can defer the maximum under 402(g) in the new Safe Harbor 401(k). This could also affect a participant who works two jobs and has a 401(k) or 403(b) somewhere else.

   4) Does the employer have any fiduciary responsibility in "blowing up" his employees SIMPLE IRA plan? I think not since IRAs do not come under Title I but there must certainly be some civil implications.

   5) May an employer, separate situation, decide in June that it no longer wants to sponsor a SIMPLE IRA. We have guidance as to how to limit matching contributions in a Safe Harbor 401(k) but I know of nothing to guide us regarding terminating a SIMPLE IRA after the plan year begins.

10. There seems to be a fair amount of confusion about trust EIN's and the Schedule P of form 5500. The instructions indicate that it's acceptable to use the payor number as reported on form 1099. Is this still acceptable when that number is for an omnibus withholding submitter and is used for multiple, unrelated plans? Should each trust EIN be specific to a single plan and be portable regardless of the service provider handling the withholding submissions? DOL has said this is an IRS EIN issue and IRS has referred me back to DOL as a form 5500 issue.

11. As the IRS workforce resumes the normal audit staffing following the GUST & EGTRRA restatements, what plan administration deficiencies, if any, will be targeted first?

12. Fact pattern: Joe makes an elective deferral out of his 12/31/03 bonus. These deferrals are not deposited until 3 months later. When does his deferral get classified as late? Is it
late for the 2003 plan year and therefore requires a 2003 5330? or does it become late in 2004 and only require a 2004 5330?

13. If a plan freezes benefit accruals and merges into another plan (without terminating) how do I answer question 5a on Schedule I? Does it matter that this will be the final filing and we have not marked the box that says the plan is terminated?

14. The new Incentive Stock Option regulations say that a condition for qualification as an ISO is that the shareholders of the company must approve a stock plan that states the maximum number of ISO's that may be granted. Suppose a plan that has already been approved by the stockholders sets a maximum # of shares that are available for all stock grants (ISO's, nonqualified, and restricted stock) and gives the directors the authority to designate which of these shares will be granted as ISO's. In my experience this is the way most of these stock plans have been designed. Doesn't this sort of provision already meet the stockholder approval requirement for ISO's? (The question is asked because several accounting firms have issued alerts stating that all stock plans must be amended and re-approved by stockholders to reflect the new rules, implying that current plans that set a maximum on all stock do not comply.)

15. In a 401(k) Safe Harbor design, is it permissible to eliminate an optional form of benefit (annuity) mid year? These plans are required to send an annual notice which discusses various provisions in the plan - including distributions options. If this is OK, what is the prescribed notice period?

16. If a plan allows for an administrative cap on deferrals, but does not expressly state the capped percentage, how should a participant's deferrals in excess of this cap be treated? Does the answer change if the participant is an HCE?

Issues - should the deferrals be left in the plan or returned to the participant? Should the attributable match be forfeited or paid to the participant? Should the deferrals be included in the ADP test?

17. At a recent Corbel seminar, the instructor opined that no election was even necessary for a catch up contribution - rather that the catch up contribution was simply an addition to the 402(g) limit. However, if a plan has a 50% cap on the deferral rate, although unlikely, those making less than $26,000 would not reach the 402(g) limit, but may still be catch up eligible. Would you think the catch up election would need to be made available for this lower paid group?

18. In utilizing Revenue Ruling 74-307 (the so-called 2/3 to insurance test for DB plans), is the individual level premium computation in the ruling based upon the plans normal form of benefit (i.e, if 100% J&S, use the ILP for that benefit vs. a straight life benefit)?

19. Under EPCRS, a plan sponsor is allowed to correct a situation where the exclusive plan rule has been violated by refunding contributions to employees under the SIMPLE IRA
plan. We have the following questions. First, please confirm that refunding contributions to employees includes both elective deferrals and any employer contributions. Secondly, can an employer follow this correction method even if they intentionally violated the exclusive plan rule (that is, they intentionally set up a new plan)?

20. What guidance can the Service give us for handling missing participants under a DB plan once they reach their required beginning date and age 70 1/2? Since the participant cannot be located, you cannot confirm they are still living. Assuming the plan sponsor has followed due diligence process to locate them, should the plan calculate a minimum distribution by making the assumption the participant is living? Would the plan continue to make required distributions until such time that the participant is located or the life expectancy runs out?

QUESTION FROM LARRY RE ABOVE: WHERE ARE THEY MAKING THIS DISTRIBUTION TO?

21. If all available forms of benefit are the actuarial equivalent of a straight life annuity using the applicable interest rate and applicable mortality table, is a relative value determination still required? If so, must the payment under every optional form of benefit be disclosed? The disclosure requirements are running up the cost of administering small plans -- another nail in the defined benefit coffin! What is the least expensive way to meet the disclosure requirements under the above facts?

22. DOL issued FAB 2004-2, re distributions to missing participants when a plan is terminating. One of the required steps is to use IRS or SSA letter forwarding to attempt to contact the participant. Can IRS representatives give us some indication as to how quickly they forward such letters, so we can determine an appropriate waiting period before proceeding with plan distribution? We want to be sure to allow enough time for IRS to forward the letter, then assuming it gets to the participant, give them 30 days to respond.

23. Suppose a 412(i) plan is funded through a combination of annuity contracts and life insurance contracts. Does this funding arrangement satisfy the safe harbor requirements of 1.401(a)(4)-3(b)(5)(vii) of the regulations? I am looking at a general information letter from the IRS that contends that this arrangement is not a safe harbor design because life insurance and annuity contracts are inherently not of the same series. If this is not an acceptable safe harbor design then many existing 412(i) plans do not qualify as safe harbor plans and will need to be tested under the general test in the 401(a)(4) regulations. If these plans do need to be general tested, please provide information about how to determine the most valuable and normal accrual rates in a 412(i) plan.

24. Is it acceptable to use a variable annuity in a 412(i) plan if payments necessary to fund the 412(i) plan are calculated using the interest and annuitization rates specified in the annuity contract and to the extent that actual interest rates are greater than the guaranteed rates, that these "gains" are applied against future premiums? The use of a variable
annuity allows the contribution to be adjusted each year based on the projected benefit of the participant. Using the guaranteed interest and annuitization rates in effect removes all flexibility in amount and timing of annuity payments.

25. Will the plan sponsor of a daily valuation plan be in violation of the "automatic IRA rollover" rules if a cash-out (no IRA rollover) is initiated when the participant's vested interest is $999, but when the check is actually issued the amount is over $1,000? If yes, to avoid this problem, could the sponsor adopt a policy that would specify automatic IRA rollovers for vested interests between $950 and $5,000 based on the participant's vested interest in the plan as of the date of termination and any subsequent last day of the calendar (or plan year) quarter? Since most daily valuation plans don't keep records of daily balances, but they do keep records of quarterly balances, such a policy would allow the plan administrator to process a terminee's cash-out or automatic IRA rollover without having to worry if the vested balance goes above or below the $1,000 threshold on the date the check or rollover is actually processed. Note that a similar policy could be used! for the $5,000 limit on cashouts by adopting a $4,500 cash-out limit based on the vested balance as of termination or any subsequent last day of the quarter.

26. Please confirm whether the following is true or false: The requirement to provide automatic IRA rollover on a cash-out in excess of $1,000 applies to ALL cash-outs over $1,000, even if the benefit attributable to employer contributions is less than $1,000 but the plan ignores amounts attributable to prior rollovers in making cash-outs and the total amount of the cash-out, when including the prior rollover, is greater than $1,000 (or even greater than $5,000).

27. Elimination of optional forms of benefits question:

(1) May all life and period certain benefits be eliminated if they are not subsidized?

(2) May benefits be eliminated for new participants before they enter the plan and grandfathered only as to current participants?

(3) Many of my defined benefit plans currently provide that a participant may elect at his normal retirement age to convert the present value of his accrued benefit to a 414(k) account, to be paid out in installments with allocable earnings, without regard to 415 limits applicable to defined benefit pension plans. Does the Service recognize this? If not, can such a benefit be eliminated from the plan without violating the cutback rules? If not, is disclosure required, and if so, wouldn't it simply be the lump sum value?

28. If a plan elects to use the account balance method for determining a participant's required minimum distribution, is the account balance based on the plan's actuarial equivalence rates or, if it produces a larger value, the GATT rates?

29. Medical premium for spouses of Participants in a union-negotiated pension plan are paid under the terms of a defined benefit pension plan. Should this benefit be included in
vested liability for valuing variable rate premiums? Under what circumstances would it be guaranteed by PBGC?

30. A calendar year defined benefit plan has a valuation date of January 1. For the January 1, 2004 valuation, projected future compensation amounts are determined by increasing 2003 compensation amounts with a salary scale. If the plan sponsor instead wishes to determine future compensation amounts by increasing 2004 compensation amounts with a salary scale, is that a change in funding method or a change in actuarial assumptions?

31. What period of compensation should be used in the ADP test for a calendar plan year in which the 401(k) plan is terminated as of 9/30? Should the comp be for the period of 1/1 - 12/31 or 1/1 - 9/30?

32. A defined benefit plan using the projected unit credit funding method has a $0 credit balance at 12/31/2003. The plan is frozen at 1/1/2004. As a result of the freeze and the ensuing amendment gain base, the FFL is $0, and the credits exceed the charges in the FSA as of 12/31/2004. No contribution is made for the 2004 plan year. Is the credit balance $0 at 12/31/2004 because no 2004 contribution was made, or is the credit balance equal to the FSA credits minus the charges?

33. Match on Excess Contrib that is Recharacterized as Catch-up: Assume you have a 401(k) plan that does not match the catch-up contributions but does match regular deferrals at a rate of 50% of all deferrals. The ADP test fails and a HCE over the age of 50 deferred $10,000, yet the maximum that would be allowed and still pass the test is $7,000. He was matched on the whole $10,000, since the $10,000 was considered regular deferrals during the year. Now we recharacterize the excess contribution of $3,000 as a catch-up. What happens to the match on this $3,000? Since we are now calling the $3,000 a "catch-up", is the person entitled to the match on the $3,000 since the plan says there is NO match on catch-up contributions? Can he keep the match? Should it be forfeited?

34. An individual died on 3/27/94 naming our taxpayer as the non-spouse beneficiary of an IRA. The taxpayer became aware of being named as beneficiary of the IRA in December, 1998 and filed a claim for the proceeds on 12/4/1998. The claim was denied by the custodian of the IRA because, according to the custodian, "the claim should have been made within one year of the date of death." The taxpayer objected and spent until 9/2004 attempting to have the funds transferred to his name. The custodian of the IRA finally agreed in 9/2004 to pay the proceeds to the taxpayer, with interest.

Questions:(1) What year are the proceeds taxable to the beneficiary? 1994, 1998 or 2004? (2)Is the taxpayer eligible to elect to have the proceeds paid out over his life expectancy thus deferring income tax? If so, by what date must the election be made?

35. A 401(k) plan allows participant to direct investments from the funds selected by the Trustees. An HCE wants to invest in a fund that the Trustees have not included in the list of funds available. The HCE wants to add this fund but limit the availability to only that
HCE as an investment option. Is it permissible for the plan to exclude all other participants from investing in this "new" investment?

36. Assume an employer amends its SEP plan each year to lengthen the service requirements for eligibility from one to two to three years. If present employees who are highly-compensated employees (and SEP participants) met the earlier eligibility requirements but would not meet the more restrictive eligibility requirements that new employees must now meet, would the successive amendments result in prohibited discrimination? [IRC Secs 408(k)(3), 414(o); see, too, Rev Ruls 73-382, 70-75] Alternatively, could an employer terminate its SEP each year and establish a new SEP to achieve the same effect?

37. May a provision that says that future employees will be required to satisfy an age or service requirement greater than applicable to current employees be allowed in a SEP? Would an individually designed SEP be required? Would the IRS approve a prototype SEP with such a provision? It should be noted that SEP (or SIMPLE IRA) rules do not expressly prohibit such a provision.

Same Question, but regarding the service and compensation requirements of a SIMPLE-IRA(?)

38. Why does the Service prohibit employers/plan sponsors from adopting the 3% non-elective safe harbor amendment/language beyond the normal "30 day" notice prior to the start of the plan year? I can understand why the safe harbor notice should be distributed 30-90 days in advance of plan year for plans that utilize the matching contribution requirement as participation in the 401(k) will have a direct impact on their employer contribution allocation. However, an employee's participation in 401(k) under the non-elective safe harbor would have absolutely no impact on amount of employer contribution allocation.

39. Suppose a MP plan terminates, a missing participant has an $8,000 account balance. This is more than the $5,000 cashout limit. The plan sponsor tries all the methods of DOL FAB 2004-2 to locate the participant without success. The plan attempts to purchase an annuity for this participant, but no insurer will issue one since the participant is not available and the amount is too small. Can this $8,000 account balance be distributed without participant consent to an IRA rollover per FAB 2004-2? Consider 1.411(a)-11(e) which provides special non-consent cashout rules for terminating plans. One of the criteria is the "plan does not offer an annuity option (purchased from a commercial provider)" Since the plan tried and cannot purchase an annuity, it would seem to meet the criteria for this reg for a cashout without consent.

40. Has there been any movement to allow sponsors to terminate 403(b) plans and allow the assets to transfer into another retirement plan simply as a result of the termination?

41. An employer writes the check for his DB contribution prior to September 15. The broker
erroneously deposits the check to the Profit Sharing Plan. The error is not discovered until after September 15 at which point the broker reverses the entry and corrects the entry with appropriate earnings. Does a funding deficiency exist? What options does the employer have to correct a mistake like this?

42. Would the IRS consider allowing an eligible organization to file a group VCP submission on behalf of fewer than 20 plans? Assuming the fee remains the same, it shouldn't be a burden to review a filing for less than 20 plans and I believe the need is there - especially where an error and/or correction is not specified in the appendices to Rev Proc 2003-44.

43. When the assets of a terminating plan are less than the present value of accrued benefits, does the ruling apply to plans that are not subject to section 4044 of ERISA? If a participant rolls his balance to an IRA as part of an in-service distribution (at age 59½, for instance), and then rolls it back into the plan, is this now considered an unrelated rollover, because it has passed through an outside custodian? Would the five-year lookback period be in effect, or is the distribution "re-set to zero" by its subsequent re-rollover back into the plan (as EGTRRA permits IRA-to-plan rollovers).

44. Rather than exposing benefits to anticipated inferior investment results in small IRA accounts, some plan sponsors are thinking about an alternative to default IRA rollover distributions. Some have said they would like to lower the automatic cashout threshold to $1,000 (this would be okay under the exceptions in the anticutback reg), and then offer cashouts at the participant's option from $1,000 to the cashout limit ($5,000 + rollover account). In the absence of an affirmative election, the benefit would stay in the plan. That is, the default is a deferred benefit.

For these voluntary elections, do you agree that a plan subject to the QJSA rules would not need to offer an immediate QJSA, get spousal consent or provide relative value information?

In light of the approach to EGTRRA of having to actually adopt amendments rather than relying on operational compliance, will the Service soon issue sample amendments?

45. 1.401(a)(4)-4(e)(3)(iii)(G): Regulation states: The right to each rate of allocation of matching contributions described in 1.401(m)-1(f)(12)….but also treating different rates as existing if they are based on definitions of compensation or other requirements or formulas that are not substantially the same.

If the plan does not use a definition of compensation that meets 414(s) in computing the allocation of the matching contribution, does the allocation of match represent different benefits, rights and features that require 401(a)(4) testing?

For example, if a plan has one HCE who has $80,000 salary, and total compensation of $100,000, due to a bonus, of which $80,000 is considered in the allocation of the match,
and has one NHCE who has $6,000 wages, and total compensation of $10,000, due to overtime, of which $6,000 is considered in the allocation of the match. Does this require BRF testing?

Would this change if no bonus was paid during the year and the HCE had 100% of total compensation counted but the NHCE only had 60% counted?

46. We understand that this question has been posed in prior ASPPA conferences, but for clarity, please confirm the IRS' stand on disaggregation of otherwise excludable employees in the following example:

401(k) Plan, calendar year; Eligibility for deferrals and matching is: 12 months, monthly entry, age 21

Can this plan can impose disaggregation in ADP/ACP testing because the entry dates are more liberal than the dual entry method? Do entry dates have any impact on the ability to disaggregate otherwise excludables?

What if the same example BUT age 18 to enter?

How closely is the TPA expected to review a client's salary deferral deposit history to determine if there were late deposits? Does the TPA risk incurring liability for unreported late deposits if he/she relies on the client's statement that there were no late deposits?

47. A cash balance pension plan is tested in conjunction with a profit sharing plan under 401(a)(4). The sponsor does not make a profit sharing contribution, therefore the cash balance plan fails 401(a)(4). Can this failure be resolved by not accruing a benefit for HCEs? Could a plan properly be drafted with language specifying accruals to HCEs shall not to exceed the amount allowed to pass 401(a)(4)?

48. We have a cash balance/DC combo that doesn't pass 401(a)(4). It doesn't because the sponsor didn't fund the profit sharing plan, primarily because they don't have the funds. Therefore the cash balance plan fails 401(a)(4). We'd like the HCE's not to accrue any benefits, or limit benefits to where the DB accruals for the NHCE's are sufficient to pass any 401(a)(4) test. I'm sure without specific language, the IRS will say 411(d)(6) precludes you from doing this. However, it seems that if we condition the HCE's accrual on the passing of 401(a)(4), you never arrive at a cutback issue. I don't think we want to construct a safe harbor test, but we want to limit the HCE accrual a priori to a benefit which we can demonstrate does pass. Could a plan properly be drafted with language specifying accruals to HCEs shall not to exceed the amount allowed to pass 401(a)(4)? The ultimate objective is not to have to put more money into the plans in this situation.

49. The proposed 415 regulations had several provisions that received a negative reaction by the private sector. At the public hearing, which took place on August 17, practioneers, as well as several organizations (including ASPPA) expressed their concerns regarding these
provisions. Can you tell us what the IRS reactions are to these comments and what changes (from the proposed regs) might we see in the final regulations?

50. At the Midway Meeting in July, Mr. Holland confirmed that the general information letter from the IRS which states that a 412(i) Plan funded with life insurance and annuity contracts does not constitute a safe harbor plan, as having two types of insurance products are inherently not the same series, is correct and the IRS’ current position.

Q: Some insurance companies have designed products for 412(i) Plans that have the same conversion factors and feel that this constitutes the “same policy series”. Does the service agree with this position?

Q: What guidance has the service provided on how to general test a 412(i) Plan?

Q: What makes a DB Plan a 412(i) Plan? Is a plan funded entirely by life insurance and annuities that satisfies a non-412(i) safe harbor design, and files a Sch. B no longer a 412(i) plan?

51. Assume that a defined benefit pension plan has a straight life annuity form of payment at a uniform retirement age without any subsidized early retirement provisions, and without any pre-retirement lump sum distribution options. Also assume that the plan’s interest and mortality assumptions for actuarial equivalence are identical to one of the sets of statutory interest rates and mortality tables set forth in Regulation 1.401(a)(4)-12 and that such identical set of statutory interest rates and mortality tables are used in the general test. Is it not reasonable and logical that the normal benefit and the most valuable benefit would produce the same EBAR?

52. Assuming the answer to the above is yes. Would your answer change if the plan allows for a lump sum form of benefit payment which is the actuarial equivalent of the Accrued Benefit?

53. In the case of a defined benefit pension plan with a non-uniform normal retirement age, benefit accrual rates must be tested at a uniform retirement age of 65. We cannot see how this can be done properly and reasonably without the normalization of the plan’s normal accrual rates. Does the Service agree with this position?

54. When preparing an actuarial valuation of a non-412(i) defined benefit plan with life insurance must the assets for the valuation reflect the “market value” of the insurance policies or may it reflect the cash value?

55. What is the proper way to allocate a defined benefit plan deduction to the individual partners in a partnership entity?

56. Question 8 on Schedule R of Form 5500 asks, “If this is a defined benefit pension plan, were any amendments adopted during this plan year that increased the value of benefits?”
Since almost all defined benefit pension plans have automatic 415 and 401(a)(17) cost-of-living adjustments (cola), and one of these two adjustments is likely almost every year, does that mean that all plans in which these cola increased benefits (and hence the value of benefits) should answer yes to the Schedule R question or does the IRS/EBSA only want to know about the increased value of benefits due to other non-automatic amendments?

57. A plan provides for a benefit at retirement based on participation with the benefit accrued on service (i.e. 2% of pay per year of participation, with benefits accrued prorated over service). When performing the 401(a) (4) discrimination test, is it acceptable to determine participants EBAR based on service?

58. Assuming a benefit of 2% of pay per year of service, but the accruals are now based on participation (i.e. 2% of pay per year of service, accrued prorated over participation). When performing the 401(a)(4) discrimination test, is it acceptable to determine participants EBAR based on service? There appears to be nothing in 401(a)(4) that would require that the EBAR be based on years of participation in this example.

59. A. Assuming a plan has a benefit, which is the greater of .5% of average compensation per year of service or 4% of average compensation per year of participation, with the accrued benefit equal to the benefit accrued to date. If a participant has 4 years of service and 1 year of participation is it acceptable to have an EBAR of 1% (4%/4)?

60. If the participant has 10 years of service and 1 year of participation is it acceptable to have an EBAR of .5% (.5% x 10/10)?

61. It would seem that the answer to both of questions would be yes. To require that in the first question that the EBAR be 4%, would not be logical in that an increase in the service benefit to 1% of average compensation would then, I assume reduce the participants EBAR from 4% to 1%.

62. A client has a DB & PS plan floor-offset arrangement, which contains a DB plan with a benefit of 1% of pay per year of service. Please confirm that it is not a 401(a)(26) violation for a participant after the offset to have a DB benefit that is less than the .5% per year of service required in the “soft guidance” in order to be benefiting for 401(a)(26) purposes.

63. Consider a frozen defined benefit plan (accrual of benefits have ceased). However, a HCE participant is past NRD and therefore receives an actuarial increase in accordance with the plan document. Please confirm that providing the actuarial increase is not considered benefiting and therefore, minimum top-heavy benefits would not be required.

64. An individual, prior to leaving for military duty in Iraq, gives his/her spouse power-of-attorney. May the spouse, who is a participant in a QP the plan and is entitled to a distribution, sign the spouses’ waiver on behalf of his/her spouse?
Would it be okay for a 412(i) plan to state that the accrued benefit will never be less than that which is produced under the fractional method based on participation? If yes, could this be funded in a manner similar to Top Heavy Minimum Accruals wherein any shortfall is funded through an auxiliary fund? I am concerned that the 401(a)(4) 25-year reduction requirement is in conflict with the way benefits accrue under a 412(i) Plan. Benefits must be level funded over future participation and participant accrued benefits are always equal to actual contract values. This forces 412(i) accruals to accumulate over total future participation and never any earlier thereby defeating the intention of the mandatory 25-year reduction. For example, if a traditional DB has a 250% formula with reduction for less than 25 years of participation, a participant entering at age 25 would accrue a 100% benefit after 16 years (16/40 X 250% = 100%). Under a 412(i) plan with the same formula it would take the same 25-year-old participant the full 40 years to accrue the 100% benefit. Setting a minimum accrual to that which is produced using fractional/participation would solve the problem.

What I am proposing is to define the accrued benefit according to the 412(i) requirements, but, similar to Top Heavy minimum benefits, to say that the accrued benefit will not be less than fractional/participation should the contract values fall short of that amount. I realize that this arrangement will require the services of an Enrolled Actuary and a Schedule B.

We want to do something along these lines because we noticed that the 25-year-reduction requirement for the safe harbor benefit formula has no effect on 412(i) plans. The accrual patterns are the same as they were before the 25-year reduction requirement was introduced - we don't think this was intended and that 412(i) was deliberately given a free pass. The example I gave after my question is real - a 25-year-old participant under a 250% formula in a traditional DB would accrue a 100% benefit in 16 years whereas in the 412(i) it would take 40 years. Thus, the participant receives no accrued benefit acceleration from the 250% formula whereas the HC participant with only 10 years of participation receives the full benefit from the 250% formula.

Because of this apparent conflict between the 412(i) funding/accrual requirements and the 401(a)(4) safe harbor benefit formula for 412(i), we have been applying the general test to our 412(i) plans and we have found that when the benefit formula exceeds 120% of pay there is difficulty in passing when the plan includes younger employees. We want to take advantage of the safe harbor rules and use benefit formulas in excess of 120%, but want to do so in a manner that will accelerate accruals for younger participants as this is the intention of the 25-year reduction rule. We are thinking that if we set the accrual to be the greater of the 412(i) accrual or fractional/participation this will accomplish the objective. So yes, stating my question another way, if we added the minimum accrued benefit provisions to a 412(i) plan would the plan still qualify as 412(i)?

A.
The following 3 questions relate to plan amendments and the new staggered remedial amendment period program set forth in Rev. Proc. 2005-66

66. There is much confusion over the need for interim plan amendments -- that is amendments regardless of a plan's remedial amendment period cycle. For each of the items below, please indicate whether an interim amendment is required, and if so, when such amendment must be adopted.

A. Automatic Rollover

A. Roth 401(k) provisions.

1. A calendar year plan sponsor elects to permit Roth 401(k) contributions on January 1, 2006.

Proposed answer: An amendment must be adopted by the end of the plan year – December 31, 2006.

2. A fiscal year (July 1 – June 30th) plan sponsor elects to permit Roth 401(k) contributions on January 1, 2006.


B. Final 401(k)/401(m) regulations.

1. An employer elects to apply the final regulations for the 2005 plan year.

Proposed answer: However, because the regulations would apply for the entire plan year, if the 2005 plan year began prior to the date the Rev. Proc. was issued (August 26, 2005), it is possible the Rev. Proc. does not apply. Similarly, it is possible the Rev. Proc. does not apply because the final regulations were released prior to Rev. Proc. 2005-66. If Rev. Proc. 2005-66 does apply, then the general deadline would be the end of the 2005 plan year. However, IRC § 411(d)(6) may require an earlier deadline – e.g., if the plan is satisfying the ACP safe harbor and has a 1,000 hour of service requirement to share in a discretionary matching contribution, then in order to satisfy the ACP safe harbor the 1,000 hour requirement must be eliminated prior to any participant accruing 1,000 hours.

2. The proposed regulations apply to the plan as of the first day of the 2006 plan year.

Proposed answer: Based on the above, it is possible Rev. Proc. 2005-66 does not apply because the regulations were issued prior to the release of...
the Rev. Proc. If Rev. Proc. 2005-66 applies, then it is not clear whether an amendment would be needed by the end of the 2006 plan year or by the end of the general remedial amendment period (generally the due date of the employer's tax return for the year). The issue is that some of the provisions in the regulations are mandatory and others (e.g., safe harbor hardship provisions) are voluntary.

C. Proposed 415 regulations.

An employer elects to rely on the post-severance compensation provisions of the proposed regulations for a plan year (that may be as early as 2005 or 2006).

Proposed answer: For the same reasons as above, it is not clear whether the principles of Rev. Proc. 2005-66 apply. This would be a voluntary amendment, and to the extent allocations are made among eligible participants, modifying the definition of compensation may need to be made prior to anyone accruing the right to share in an allocation.

D. Pension Funding Equity Act of 2004

An employer must apply the changes to the interest rates for purposes of IRC § 415 for plan years beginning after December 31, 2003.

Proposed answer: The law provides that amendments are required by the last day of the first plan year beginning on or after January 1, 2006.

E. Retroactive Annuity Starting Dates (RASD)

1. A plan elects to utilize the RASD provisions in 2006.

   Proposed answer: An amendment is needed by the end of the plan year in which the provision is applied.

2. A plan in existence prior to 2005 elected to apply the provisions in 2004 and has language in the plan document that conflicts with the RASD provisions (e.g., does not authorize a RASD).

   Proposed answer: A plan amendment will not be required until 12/31/06. Note that this proposed answer is for relief. The IRS position is that the amendment must have generally been adopted by the due date of the employer's 2004 tax return (Notice 2004-84).

F. IRC § 401(a)(9) regulations for defined benefit plans

An employer has elected to apply the regulations in 2004, 2005 and/or 2006.
Proposed answer: Pursuant to Rev. Proc. 2003-20, an amendment is not needed until the plan is updated for EGTRRA.

Elimination of the reduction of 402(g) limit in year following a safe-harbor hardship withdrawal - Notice 2002-4 extends to the end of the EGTRRA RAP for most plans (i.e., plans that reduced the suspension period to 6 months and are applying the elimination of the 402(g) reduction as of the same date).

G. Katrina relief

In 2005, an employer wishes to take advantage of the relief provided in the legislation and in Announcement 2005-70.

Proposed answer: The law permits conforming amendments to be adopted by the end of the 2007 plan year. Announcement 2005-70 provides that an amendment must be adopted by the end of the 2006 plan year. For consistency, we hope the IRS would permit an amendment under 2005-70 to be made by the end of the 2007 plan year.

H. EGTRRA technical corrections and elimination of reduction in IRC § 402(g) limit for hardship distributions

An employer is using the EGTRRA technical provisions (such as excluding rollovers in determining the $5,000 threshold in a plan subject to the joint and survivor annuity requirements) and has eliminated the reduction in the IRC § 402(g) in the year following the year of a hardship distribution.

Proposed answer: No amendment is needed until the end of the EGTRRA remedial amendment period. The EGTRRA good-faith amendment previously adopted is all that was required (even though it did include these provisions).

67. In those cases where an interim amendment is required, does the Service intend to issue a model or good-faith amendment?

68. If the Service does not issue a model or good-faith amendment, what impact would the adoption of a practitioner drafted good-faith amendment have on reliance?