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RETIREMENT
ASSOCIATION
Working for America's Retirement

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May 16, 2016

Internal Revenue Service
CC:PA:LPD:PR (Notice 2016-16), Room 5203
P.O. Box 7604,
Ben Franklin Station,
Washington, DC 20044

RE: Comments on Notice 2016-16 regarding Mid-Year Changes to Safe Harbor Plans

The American Retirement Association ("ARA") is submitting this letter in response to the request in IRS Notice 2016-16 ("Notice") for comments on additional guidance needed for mid-year changes to safe harbor plans under Code Section 401(k)(12) and (13) and safe harbor 403(b) plans pursuant to 403(b)(12)(A)(i). ARA appreciates the guidance provided by Notice 2016-16 and the opportunity to provide input on additional guidance that may be needed.

The ARA is a national organization of more than 20,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines, including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-deferred Savings Association ("NTSA") and the ASPPA College of Pension Actuaries ("ACOPA"). ARA members are diverse but united in a common dedication to America's private retirement system.

SUMMARY

ARA believes the guidance provided in the Notice will greatly assist plan sponsors maintaining safe harbor plans and encourage adoption of additional safe harbor plans. In response to the request for comments on additional matters requiring guidance, the ARA (i) requests clarification on several matters related to Notice 2016-16; (ii) identifies additional guidance needed to address mid-year changes relating to plan sponsors involved in mergers and acquisitions; and (iii) identifies additional guidance needed for plans that include an eligible automatic contribution arrangement ("EACA") under Code Section 414(w).

Specifically **ARA recommends:**

1. Providing flexibility to plan sponsors in meeting the employee mid-year change notice requirements of Notice 2016-16 by allowing a Summary of Material Modifications ("SMM"), change notice or updated safe harbor notice;

2. Allowing prospective mid-year changes to eligibility in addition to entry date changes;
3. Clarifying what is meant by "type" of safe-harbor plan in the context of classifying a mid-year change in the type of safe-harbor plan as a prohibited mid-year change;
4. Allowing mid-year amendments adopted or effective prior to January 29, 2016 without jeopardizing safe harbor status, provided the amendment was not a prohibited change under Notice 2016-16;
5. Allowing mid-year amendment of the safe harbor contribution in accordance with the exception for a final plan year under Treasury Regulation Section 1.401(k)-3(e)(4) for plans merging into an acquirer's plan;
6. Allowing conditional notices of reduction or suspension of safe harbor contributions for mergers and acquisition situations;
7. Allowing a safe harbor plan sponsor acquired by another safe harbor plan sponsor to adopt the plan of its acquirer mid-year;
8. Allowing a mid-year amendment to a safe harbor plan to exclude classifications of employees employed after the acquisition but not prior to the acquisition; and
9. Extending application of Notice 2016-16 to EACAs and allowing mid-year establishment of such arrangements.

DISCUSSION

CLARIFICATION OF NOTICE 2016-16 GUIDANCE

1. Allowing Provision for Change Notices To Inform Participants of Mid-Year Changes

Notice 2016-16 Section III.C.1. requires that employees be provided an updated safe harbor notice describing the mid-year change. ERISA requires plan sponsors to provide employees a SMM to the Summary Plan Description ("SPD") or a new SPD when a plan is amended. We believe it is not clear whether Notice 2016-16 requires employees to receive a full safe harbor notice, even though only one aspect of the notice may have changed. Further, because of the SMM requirement, employees would likely receive an explanation of what has changed in the safe harbor notice as well as an SMM explaining the change. Duplicate notices can be costly for the plan or plan sponsor that pays for these communications. Further, lengthy notices and duplicate information may cause confusion among participants.

ARA recommends allowing a notice describing only the change (a "change notice") instead of requiring the plan sponsor to resend the full safe harbor notice, and providing flexibility as to the format of the updated safe harbor notice because describing the change and the effective date of the change within a single document may prove difficult. For example, the mid-year change notice requirement could be met by providing a restated full safe harbor notice and explanation, providing an SMM with the original or revised safe harbor notice or providing just a change notice or SMM. If the requirement is met using just a change notice or an SMM, the document would explain the mid-year change, state the effective date of the change, and reference the previously provided safe harbor notice and provide information

on how the employee may obtain a duplicate copy of such safe harbor notice. Further, the notice of the change need only be sent to impacted employees (if the plan amendment impacted less than the full eligible population). ARA believes this approach allows plan fiduciaries to determine the most effective way to communicate a particular change to employees, manage plan costs. Furthermore, this is consistent with other change notice requirements applicable to retirement plans (e.g., participant fee disclosure).

2. Allowing Prospective Mid-Year Changes to Eligibility

Notice 2016-16 Section III.D.2 includes in the list of prohibited mid-year changes:

> A mid-year change to reduce the number or otherwise narrow the group of employees eligible to receive safe harbor contributions. This prohibition does not apply to an otherwise permissible change under eligibility service crediting rules or entry date rules made with respect to employees who are not already eligible (as of the date the change is either made effective or is adopted) to receive safe harbor contributions under the plan.

With regard to employees who have not yet met the plan's eligibility requirements, this language would permit a plan sponsor to change from monthly to semiannual entry dates. This language could also be read to restrict the ability of the plan sponsor to amend mid-year to **prospectively exclude** a classification of employees that only applies to employees who have not yet become eligible to participate. Amendments such as these can often arise in conjunction with a corporate restructuring. A prohibition of mid-year changes of this type would require a plan sponsor to reserve business decisions on restructuring until the beginning of the next plan year. There does not appear to be any potential for abuse if the amendment only impacts employees who are not already eligible.

ARA recommends that the IRS clarify that the second sentence of the prohibition in Section III.D.2 is meant only as an example of a permissible mid-year eligibility change and that any prospective eligibility change permissible (i.e., applicable only to employees who are not yet eligible) under current law (including the general nondiscrimination and coverage rules) would be permissible mid-year.

3. Clarifying What is Meant by "Type" of Safe Harbor Plan

Notice 2016-16 Section III.D.3 states that a mid-year change to the type of safe harbor plan is a prohibited change. The Section provides an example that a change from a "traditional" Code Section 401(k)(12) safe harbor to a Qualified Automatic Contribution Arrangement ("QACA") i.e., a Code Section 401(k)(13) safe harbor, would be prohibited. No other definition of "type" of plan is provided (e.g., whether a change from a safe harbor nonelective contribution to a safe harbor matching contribution is a change to the "type" of harbor plan).

ARA recommends that the IRS clarify that only changes between traditional and QACA safe harbor plans and changes between safe harbor nonelective contributions and safe harbor matching contributions that do not meet the requirements of Code Section 401(k)(12)(B) or

401(k)(13)(D)(i) and (ii) are considered a change to the type of safe harbor plan. For instance, a change from a safe harbor matching contribution to a safe harbor nonelective contribution is permissible provided the match (for the portion of the plan year prior to the replacement of the match with a safe harbor nonelective contribution) is calculated on a payroll period basis. If the plan changes from safe harbor nonelective to safe harbor match, the safe harbor matching contribution would either have to be calculated on a payroll period basis or retroactive to the beginning of the plan year (if calculated on a plan year basis). No other changes would be considered a change in type of safe harbor plan.

4. Providing Guidance on Amendments Adopted or Effective Prior to January 29, 2016

Notice 2016-16 Section VI. states that the Notice applies to mid-year changes made on and after January 29, 2016. Based on the incomplete and informal guidance available prior to Notice 2016-16, many plan sponsors were confused as to what qualified as an allowable mid-year amendment. Plan sponsors had to operate on a good-faith basis. For instance, many restated their plans for determination letter cycles. Others may have experienced mid-year corporate changes.

ARA requests that the IRS announce that mid-year plan amendments adopted or effective prior to January 29, 2016 will not jeopardize a plan's safe harbor status, provided the amendment was not a prohibited change under Notice 2016-16, and regardless of whether an additional notice and election period was provided for a change that affected required content in the safe harbor notice.

MID-YEAR CHANGES RELATING TO MERGERS AND ACQUISITIONS

5. Allowing Conditional Notice of Reduction or Suspension of Safe Harbor Contribution Where Plan Sponsor Has a Transaction Pending

Treasury Regulation Section 1.401(k)-3(g)(1) requires plan sponsors to send a 30-day notice prior to reducing or suspending safe harbor contributions. Mergers and acquisitions of companies often have conditional or proposed acquisition dates, negotiations may require non-disclosure, and closings can happen on a very short time-frame for a variety of business reasons. As a result, a plan sponsor often does not have 30 days in advance of the closing to notify participants. Further, a plan sponsor may reasonably believe that a transaction will close on a particular date and then have circumstances change.

ARA recommends allowing a safe harbor plan sponsor participating in a merger or acquisition to satisfy the 30-day notice requirement of Treasury Regulation Section 1.401(k)-3(g)(1) by sending a conditional notice (i.e., only if the transaction closes) or a notice that provides for a delay in ceasing contributions under the plan if the transaction is delayed. The plan sponsor would be required to provide employees with a notice of the change in effective date within an administratively reasonable period following a final determination that the transaction date will change.

6. **Allowing Mid-Year Amendment of Safe Harbor Contribution Where Plan Not Terminating for Mergers and Acquisitions**

Treasury Regulation Section 1.401(k)-3(e) requires a plan sponsor to maintain a safe harbor plan for the full plan year. Notice 2016-16 Section III. D. prohibits certain mid-year changes to plan design, including a change in type of safe harbor plan. Acquirers of plan sponsors with safe harbor plans often want to offer their benefit programs to the new employees on the day after the transaction to maintain a uniform benefits package for all employees. In some cases both the acquirer and the acquired company may maintain safe harbor plans, but with different plan designs or features. The acquired company may want to freeze or terminate its prior plan and adopt the plan of its new parent. In cases where the acquiring company is willing to take over the plan of the acquired company, the acquiring company may prefer to merge the plans, rather than having to maintain the acquired plan as a separate plan.

Treasury Regulation Section 1.401(k)-3(e)(4)(ii) provides that a plan that terminates during a plan year will not fail to satisfy the requirements of paragraph (e)(1) (which requires the safe harbor provisions to be in effect for a 12-month plan year) if the plan termination is in connection with a transaction described in Code Section 410(b)(6)(C).

ARA recommends allowing a plan sponsor to rely on Treasury Regulation Section 1.401(k)-3(e)(ii) with respect to a plan maintained by a company involved in an Code Section 410(b)(6)(C) transaction if the company takes any of the following actions: (1) freezes its participation in a prior plan that contained a safe harbor 401(k) arrangement, (2) terminates a safe harbor 401(k) arrangement within the prior plan, or (3) merges a prior plan containing a safe harbor 401(k) arrangement into another plan maintained by any company involved in the Code Section 410(b)(6)(C) transaction. Under any of these scenarios, the plan sponsor would treat the prior plan's safe harbor 401(k) arrangement through the date of the freeze, termination of the 401(k) arrangement, or merger as a safe harbor plan, provided that all other safe harbor requirements under Code Section 401(k)(12) or (13) are satisfied for such short period. This treatment will apply regardless of whether the surviving plan in the merger, or the plan which is adopted by the company freezing or terminating its safe harbor 401(k) plan as a result of the Code Section 410(b)(6)(C) transaction, is a non-safe harbor plan, a safe harbor plan or a safe harbor plan of the same design as the prior plan. Further, ARA recommends the IRS confirm that affected participants may receive notice up until the date of eligibility in the plan in which they become eligible as a result of a merger of the plans or as a result of adoption of the other plan following such freeze or termination, as specified in Treasury Regulation Section 1.401(k)-3(d)(ii).

7. **Allowing Prospective Mid-Year Changes to Eligibility for Mergers and Acquisitions**

As described above with regard to clarification of guidance provided in Notice 2016-16, there are several business reasons for amending a plan to exclude classifications of employees mid-year. For instance, in a merger and acquisition context, an acquiring company may find

itself with classifications of employees it did not have prior to the transaction (e.g., union employees). Under Notice 2016-16 Section III.D.2, this is arguably a prohibited mid-year change.

ARA recommends clarifying that a prohibited mid-year change under D.2. of Notice 2016-16 does not occur when a safe harbor plan is amended to prospectively exclude classifications of employees employed after the acquisition but not prior to the acquisition (e.g., the acquired employees include union employees and the acquirer has no union employees) even if such classification of employees would otherwise have become eligible for the safe harbor 401(k) plan as a result of the acquisition.

MID-YEAR CHANGES FOR EACAs UNDER CODE SECTION 414(w)

8. **Extending application of Notice 2016-16 to EACAs and allowing mid-year establishment of such arrangements.**

EACAs under Code Section 414(w) are subject to many of the same requirements as QACAs. Treasury Regulation Section 1.414(w)-1(b)(3)(iii) requires that notice be provided at the beginning of each plan year. This requirement arguably requires an EACA to be in place for the entire plan year if it applies to any existing employees. EACAs, unlike QACAs, do not have required employer contributions. As a result, participants are unlikely to make deferral decisions based on the content of the annual or initial notice.

ARA recommends clarifying or expanding Notice 2016-16 to apply to EACAs as well as plans under Code Section 401(k)(12) and (13) and allowing a new EACA to be established mid-year. In such case, the employer would satisfy the notice requirement under Treasury Regulation Section 1.414(w)-1(b)(3)(iii) for all employees to which the arrangement is applicable as described in subsection (B) of that section for newly eligible employees (i.e., by providing notice at least 30 days and not more than 90 days prior to the date on which automatic enrollment arrangement is effective). The ARA further recommends that plans that add an EACA as a mid-year amendment pursuant to this guidance may allow for permissible withdrawals, as described in Code Section 414(w), for the period during the plan year that the EACA is in effect, and that the 6-month correction rule applies to the EACA for such plan year.

CONCLUSION

ARA appreciates the guidance provided in Notice 2016-16 and the opportunity to provide input with respect to additional guidance that may be needed. ARA believes encouraging the establishment of safe harbor plans is an important aspect of increasing employee retirement savings. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at ARA, at (703) 516-9300 ext. 128, if you have any comments or questions regarding the matters discussed above.

Thank you for your time and consideration.

Sincerely,

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