AMERICAN RETIREMENT ASSOCIATION
Working for America's Retirement

4245 North Fairfax Drive | Suite 750 | Arlington, VA 22203 • P. 703.516.9300 • F. 703.516.9308

June 8, 2017

Mr. Rob Choi
Director, Employee Plans
Internal Revenue Service
999 North Capitol Street, NE
Washington, DC 20002

RE: Mid-Year Amendments to Safe Harbor 401(k) and 403(b) Plans

Dear Mr. Choi:

The American Retirement Association ("ARA") is writing in response to Internal Revenue Service ("IRS") Notice 2016-16, to provide comments on mid-year safe harbor amendments. ARA thanks the IRS for the opportunity to provide input on this matter.

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 recommends the expansion of the guidance contained in IRS Notice 2016-16 (the "Notice") to include the following:

I. Clarify a plan sponsor involved in a IRC 410(b)(6)(c) transaction may amend a safe harbor 401(k) plan to cover other members of the newly formed group and retain all the protections and benefits of the safe harbor 401(k) plan.

II. Clarify the plan can be amended to increase non-safe harbor contributions, other than matching contributions, at any time during the year.

III. Provide the restrictions in Notice section III.D.4 apply only to the safe harbor matching contributions and not to other matching contributions subject to non-discrimination testing.

IV. Allow a plan to make eligibility less restrictive, via an amendment, at any time during the year.

V. Allow alternative notices to be given to participants under Notice section III.C.

VI. Add to Notice section III.D.3 "or changing a safe harbor non-elective plan into a safe harbor matching plan."

Discussion

ARA recognizes and appreciates the Service's commitment to safe harbor 401(k) and 403(b) plans. These types of plans provide valuable benefits for participants, particularly for non-highly compensated participants, and encourage participants to save for their retirement. ARA believes the Service's clarification of the ability to amend the plan during the year will result in more plan sponsors adopting this plan design. Although the discussion herein focuses on safe harbor 401(k) plans, in accordance with Notice section IV, the comments herein should be read to also apply on similar terms to 403(b) plans that apply the section 401(m) safe harbor rules pursuant to section 403(b)(12).

I. Clarify that a plan sponsor involved in a IRC 410(b)(6)(c) transaction may amend a safe harbor 401(k) plan to cover other members of the newly formed group and retain the all protections and benefits of the safe harbor 401(k) plan

Code section 410(b)(6)(c) essentially allows members of a group created through a merger or acquisition to recognize a grace period during which, with some limitations, they have relief from section 410(b) coverage testing as a group. Many plans, both preapproved and individually designed, include provisions that automatically exclude employees of controlled group members that are acquired in a Code section 410(b)(6)(c) transaction. These provisions are helpful to avoid unintended consequences following the transaction.

However, the plan sponsor may desire to have all employees covered under the same plan immediately following the transaction. In many cases this is done to allow all employees of the group members to share in the plan with the least restrictions and greatest benefits. Although it appears clear in the Notice that this amendment can be done mid-year, it is not clear whether the newly eligible group is treated as eligible for the safe harbor, whether inclusion of that group would cause the plan to cease to be solely a safe harbor plan, or whether the group must be tested as a separate plan.

Offering additional guidance which clarifies the newly eligible group would be covered by the safe harbor provisions could help to facilitate and encourage plan sponsors to provide safe harbor plan benefits to all participants at an earlier time than they otherwise would.

ARA recommends the Service clarify that if an employer amends a safe harbor plan mid-year to include employees acquired in a IRC 410(b)(6)(c) transaction, the newly eligible group will be treated as covered by the safe harbor provisions of the plan, even if the amendment were adopted

within the last three months of the plan year, and specifically that the relief from ADP and ACP test (as applicable) would apply to the plan and all participants, and the newly eligible group would not cause the plan to be treated as failing to qualify for the exemption from the top heavy rules under IRC section 416(g)(4)(H).

II. Clarify the plan can be amended to increase non-safe harbor contributions, other than matching contributions, at any time during the year

Section III.D.4 of the Notice prohibits increasing or adding a formula for "matching contributions" unless such change is made at least 3 months prior to the close of the plan year and such change is retroactive to the beginning of the plan year. ARA does not believe that the intention of this wording was to impact any other contribution sources. To avoid any confusion, however, it would be beneficial to have clarifying language confirming that other contribution sources can be increased, or added, at any time during the plan year.

ARA recommends the addition of an example similar to example 3 – which provides guidance with respect to the addition of a profit sharing contribution rather than a change to the safe harbor matching contribution. An example similar to the example below could be used:

The employer sponsors Plan O – a traditional matching safe harbor 401(k) calendar year plan. Plan O does not have a profit sharing contribution. The employer sponsoring Plan O makes a mid-year amendment, on December 1, 2017, to add a discretionary profit sharing contribution effective January 1, 2017. The mid-year change does not violate the provisions of §§ 1.401(k)–3 and 1.401(m)–3. However, the addition of the profit sharing contribution would eliminate the safe harbor plan's ability to be deemed exempt from the top heavy rules for the year.

III. Provide that Notice section III.D.4 applies only to safe harbor matching contributions and not to matching contributions subject to ACP testing

Section III.D.4 of the Notice restricts a safe harbor plan sponsor's ability to "(i) to modify (or add) a formula used to determine matching contributions (or the definition of compensation used to determine matching contributions) if the change increases the amount of matching contributions, or (ii) to permit discretionary matching contributions" mid-year.

This restriction is reasonable and appropriate for matching contributions that are intended to take advantage of the safe harbor provisions of section 401(m)(11) and (12). Matching contributions that are not intended to satisfy safe harbor rules, however, offer no relief from non-discrimination testing and should not be subject to the same restrictions. Because non-highly compensated participants are protected by non-discrimination testing for this contribution type, fewer, if any, restrictions on mid-year amendments are needed. Amendments to add a match that is subject to the ACP test, or to increase such a match, must be tested to make sure that it does not discriminate against non-highly compensated employees and therefore should not be restricted.

ARA recommends the Service modify Notice section III.D.4 to limit the application of those restrictions to only matching contributions that are intended to meet the safe harbor provisions of 401(m)(11) and (12).

IV. Allow a plan to make eligibility less restrictive at any time during the year

Notice section III.D.2 prohibits making eligibility more restrictive, unless the amendment is adopted prior to the date the participant actually becomes eligible. Example 7 illustrates this point clearly. ARA does not believe that the Service intends to prohibit the employer sponsoring the plan from amending the plan, at any time, to make eligibility more liberal. The language in Notice section III.D.2, however, restricts the ability to increase some benefits. This language has caused confusion, particularly when eligibility is being expanded in a plan with safe harbor matching contributions.

In addition, it is not clear whether participants who enter by virtue of the amendment are covered by the safe harbor, or whether they must be tested for the year in which the amendment is made.

ARA recommends that additional examples be added to clearly illustrate eligibility may be expanded. Examples with facts similar to the below would highlight this:

- *The employer sponsoring Plan S, a safe harbor match plan, makes a mid-year amendment to change the entry dates for commencement of participation of eligible employees who meet the plan's minimum age and service eligibility requirements, from semi-annual entry dates to monthly entry dates. The amendment is adopted on November 15 and effective November 15 for a calendar year plan. Because this expands eligibility, the mid-year change does not violate the provisions of §§ 1.401(k)–3 and 1.401(m)–3.*

- *The employer sponsoring Plan S, a safe harbor match plan, makes a mid-year amendment to change the entry dates for commencement of participation of eligible employees who meet the plan's minimum age and service eligibility requirements, from semi-annual entry dates to monthly entry dates. The amendment is adopted on November 15, 2017 and is effective January 1, 2017 for a calendar year plan for all sources other than the salary deferral source – the effective date for the salary deferral source is November 15, 2017. Since this expands eligibility, the mid-year change does not violate the provisions of §§ 1.401(k)–3 and 1.401(m)–3.*

ARA further recommends the Service clarify that if an employer amends a safe harbor plan mid-year to expand eligibility, then the newly eligible group will be treated as covered by the safe harbor provisions of the plan. Specifically, that the relief from the ADP and ACP test (as applicable) would apply to the plan and all participants, and the newly eligible group would not cause the plan to be treated as failing to qualify for the exemption from the top heavy rules under IRC section 416(g)(4)(H).

V. Allow alternative notices to be given to participants under Notice section III.C.

Notice section III.C.1 provides that when an amendment makes changes to required safe harbor content, then "[a]n updated safe harbor notice that describes the mid-year change and its effective date must be provided to each employee otherwise required to be provided a safe harbor notice." ARA agrees that notifying participants is reasonable and appropriate.

However, there are instances where issuance of a full updated safe harbor notice may not be the most effective way to alert participants to the change. This is particularly true when, in accordance with the regulations, a safe harbor notice refers to the SPD for certain required content. The sponsor is already required to notify participants of a change in the SPD by issuing a new SPD or SMM. However, under the Notice, the plan sponsor must also send the participant an entire safe harbor notice, even though the language in that notice has not changed. This inclusion of the notice, which does not contain relevant information about the change, is likely to distract and/or overwhelm the participant and prevent the participant from fully understanding the change. Participants would be more likely to read and understand changes outlined in a shorter document than those contained in a lengthy updated safe harbor notice. Allowing plan sponsors to provide a shorter notice would be more effective for communication, would conserve time and expense on the part of the plan and, in the case of paper notices, and would be beneficial for the environment.

ARA recommends that the Service amend Notice section III.C.1 to require:

1) An amended safe harbor notice; OR

2) If the provisions that have changed were incorporated by reference to the SPD, an updated SPD or SMM; OR

3) Any other notice that advises the participant:

    a. of the effect of the amendment;

    b. when the amendment is effective; and

    c. how the amendment changes the information communicated in the safe harbor notice.

VI. Add to Notice section III.D.3 "or changing a safe harbor non-elective plan into a safe harbor matching plan"

Notice section III.D.3 prohibits "[a] mid-year change to the type of safe harbor plan, for example, a change from a traditional § 401(k) safe harbor plan to a QACA § 401(k) safe harbor plan." While it is already well established that a safe harbor non-elective plan cannot be changed to a safe harbor match plan mid-year, for clarification it could be beneficial to add "or changing a safe harbor non-elective plan into a safe harbor matching plan".

ARA recommends the addition of the phrase "or changing a safe harbor non-elective plan into a safe harbor matching plan" to the wording in Notice section III.D.3.

These comments were prepared by ASPPA's IRS Subcommittee of the Government Affairs Committee, with primary authorship by Michael Haya. Please contact Craig Hoffman, ARA General Counsel, at CHoffman@USARetirement.org if you have any questions. Thank you for your time and consideration.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/
Craig P. Hoffman, Esq., APM
General Counsel
American Retirement Association

/s/
Robert Richter, Esq., APM
President
American Retirement Association

/s/
Scott Hayes
President-Elect
American Retirement Association

cc:

Ms. Victoria A. Judson
Division Counsel/ Associate Chief Counsel
Tax Exempt and Government Entities
Internal Revenue Service

Stephen B. Tackney
Deputy Associate Chief Counsel
Tax Exempt and Government Entities
Internal Revenue Service

Mr. Louis J. Leslie
Senior Technical Advisor
Employees Plans
Internal Revenue Service

Mr. Seth Tievsky
Senior Technical Advisor
Employee Plans Rulings & Agreements
Internal Revenue Service

Mr. William Evans
Attorney-Advisor
Office of Benefits Tax Counsel
U.S. Department of the Treasury