

January 14, 2019

CC:PA:LPD:PR (REG– 107813-18)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Hardship Distributions of Elective Contributions, Qualified Matching Contributions, Qualified Nonelective Contributions and Earnings [REG– 107813-18] RIN 1545-BO82

Dear Sir or Madam:

The American Retirement Association (“ARA”) appreciates this opportunity to comment on the proposed amendments to the regulations under Internal Revenue Code (“Code”) Section 401(k) regarding hardship distributions to reflect statutory changes, including those made by the Tax Cuts and Jobs Act (“TCJA”) and Sections 41113 and 41114 of the Bipartisan Budget Act of 2018 (BBA 2018) (“Proposed Regulations”).

The American Retirement Association is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America’s private retirement system, the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors (“NAPA”), the National Tax-deferred Savings Association (“NTSA”), the ASPPA College of Pension Actuaries (“ACOPA”), and the Plan Sponsor Council of America (“PSCA”). ARA’s members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer sponsored plans. In addition, ARA has more than 25,000 individual members who provide consulting and administrative services to American workers, savers, and the sponsors of retirement plans. ARA’s members are diverse but united in their common dedication to the success of America’s private retirement system.

Summary

ARA thanks the Department of the Treasury and the Internal Revenue Service (“Treasury”) for quickly issuing the Proposed Regulations. The guidance assisted plan sponsors, administrators, and document providers in making necessary decisions relating to hardship distributions in late 2018. ARA also appreciates the flexibility Treasury has afforded plan sponsors regarding the implementation of the law changes. This flexibility permits plan sponsors to address the needs of their participants and reduces the burdens of maintaining retirement plans.

Treasury requested comments on all aspects of the Proposed Regulations, which among other provisions, included provisions that do the following:

- Add “primary beneficiary under the plan” as an individual for whom qualifying medical, educational, and funeral expenses may be incurred;
- Provide that the modification to Code Section 165(h)(5) made by TCJA does not apply to limit when damages to a principal residence qualify for a hardship distribution under the safe harbor rules;
- Add expenses related to certain disasters as a seventh type of safe harbor hardship expense;
- Remove the six-month suspension and loan requirements from the safe harbor related to determining if a distribution is necessary to satisfy an immediate and heavy financial need;
- Expand the sources from which a 401(k) plan may make hardship distributions;
- Effective for hardship distributions made on or after January 1, 2020, require for all hardship distributions (i.e., safe harbor or facts and circumstances) that the participant represent that he or she has insufficient cash or other liquid assets to satisfy the financial need; and
- Effective for hardship distributions made on or after January 1, 2020, prohibit a plan from providing for a suspension of elective contributions or employee contributions as a condition of obtaining a hardship distribution but permit certain additional conditions to apply (e.g., obtaining all nontaxable loans).

While the Proposed Regulations provide useful guidance on a number of our member’s concerns, ARA recommends Treasury provide the following additional guidance prior to or in issuing the final regulations:

1. Immediately issue guidance confirming taxpayers may rely on the Proposed Regulations effective January 1, 2019;
2. Clarify that plan sponsors who choose to allow hardship distributions may elect, on an individual basis, which of the safe harbor expenses specified in the final regulation will apply under the plan without losing reliance on the hardship safe harbor;
3. Specify that suspensions of contributions under other plans of the employer are permitted but not required after a hardship distribution and provide relief under Code Section 409A for mid-year amendments;
4. Clarify the “additional conditions” that a plan may or may not impose, as provided for under Proposed Regulation Section 1.401(k)-1(d)(3)(iii)(C);

5. Extend the amendment deadline for pre-approved 401(a) plans to the later of December 31, 2020 or the last day of the year following the year in which regulations are finalized;
6. Set an amendment deadline for pre-approved 403(b) plans and 403(b) plan investment arrangements that is consistent with the plan amendment deadline for pre-approved 401(a) plans;
7. Clarify that mass submitters of 403(b) pre-approved plans may amend plans for the statutory changes, the Proposed Regulations, and the final regulations on behalf of plan sponsors in a manner consistent with the rules for pre-approved 401(a) plans; and
8. Provide that governmental plan sponsors have an additional two years to amend governmental plans, consistent with plan amendment deadlines for other new laws.

ARA also recommends that the Treasury update the Operational Compliance List on its website to include changes under the Proposed Regulations.

Discussion

- I. **Immediately provide reliance on the Proposed Regulations.** *ARA recommends* that Treasury immediately provide guidance clarifying that plan sponsors may rely on the Proposed Regulations. Plan sponsors may be reluctant to immediately implement the changes permitted in the Proposed Regulations prior to issuance of the final regulations unless they are assured that issuance of the final regulations will not create retroactive operational failures. This may prevent participants from accessing funds critical to satisfying legitimate hardships. Clarifying that plan sponsors may rely on the guidance in the Proposed Regulations would give plan sponsors and providers the confidence to implement these changes immediately and allow participants critical access to their retirement funds for hardships.

ARA recommends Treasury provide immediate guidance (prior to issuance of final regulations) clarifying that taxpayers may rely on the Proposed Regulations immediately and any guidance in the final regulations that is more restrictive than the Proposed Regulations will be effective only prospectively.

- II. **Limiting hardship distributions to only certain expenses.** *ARA recommends* Treasury clarify that plan sponsors who do not permit hardships related to all expenses listed in the regulation, particularly those incurred by primary beneficiaries, may still fall within the safe harbor hardship provisions. The Proposed Regulations do not specifically state that plan sponsors are permitted to limit hardship distributions to some, but not all, of the expenses listed in the regulation. Practitioners have generally regarded the list of expenses under 1.401(k)-1(d)(3)(iii)(B), and later the addition of primary beneficiary expenses by the Pension Protection Act of 2006, as a maximum limitation on the expenses that may permit a hardship distribution and allow the plan to remain within the safe harbor, concluding plans were permitted, but not required to, use the most expansive definition of the hardship provision to remain within the safe harbor hardship provisions. ARA members have reported that plan sponsors do not want to use the most expansive

list of permitted hardship expenses, particularly the provisions related to primary beneficiaries, for a variety of reasons, including concerns that participants will change beneficiaries just to access plan funds, avoiding additional complexity, and maintaining distribution provisions that are consistent with the plan sponsor's retirement plan philosophy. If plan sponsors are required to provide for all of the safe harbor hardship expenses for all of the permissible individuals (i.e., participants, spouses, dependents and primary beneficiaries), some plan sponsors may cease to permit hardship distributions, which may decrease plan participation. ARA believes the list of safe harbor hardship expenses in Section 1.401(k)-1(d)(3)(iii)(B) is not meant to be a list that a plan sponsor must adopt in its entirety to remain within the safe harbor. *ARA recommends* that Treasury include a specific provision in the final regulations that a plan remains within the safe harbor hardship rules even if it does not allow a hardship distribution on account of all possible expenses listed in 1.401(k)-1(d)(3)(iii)(B), noting particularly that sponsors are not required to allow hardship distributions on account of primary beneficiary expenses. *ARA also recommends* Treasury confirm that this provision is optional for Code Section 401(k)(12) and (13) safe harbor plans. Providing this clarification will promote sound administration of the retirement plans and reduce the burden of sponsoring the plan.

- III. **Suspensions under other plans maintained by the employer.** The current regulations require employers to apply the six-month contribution suspension not only to qualified and 403(b) plans but to “all other plans maintained by the employer.” The current regulations defined this to include all nonqualified plans of deferred compensation and stock option, stock purchase, or similar plans. As a result, many nonqualified deferred compensation plans subject to Code Section 409A and employee stock purchase plans provide for the suspension of employee contributions following receipt of a hardship distribution from the employer's retirement plan. The Proposed Regulations removed the provision related to other plans (i.e., Section 1.401(k)-1(d)(3)(iv)(D) and (E)). It is not clear whether plan sponsors are permitted to continue suspending deferrals in these other plans. Plan sponsors, particularly those using online hardship applications or outsourcing hardship processing, may no longer receive notice that a hardship distribution was processed, and therefore will not know to begin suspending contributions to other plans. *ARA recommends* that Treasury clarify in the final regulations that plan sponsors are permitted, but not required, to continue suspending contributions under other employer plans. *ARA also recommends* that Treasury permit plan sponsors to amend those other plans to eliminate the suspension of employee contributions. In particular, Code Section 409A generally requires that elections to defer compensation be irrevocable as to all terms by the end of the year preceding the year services are provided. *ARA recommends* that Treasury issue guidance permitting amendments to nonqualified deferred compensation plans in response to BBA 2018, the Proposed Regulations or the final regulations, and specifically providing such amendments will not violate Code Section 409A even if such an amendment is made with respect to services already provided or to be provided in the year of the amendment.
- IV. **Additional conditions.** Proposed Regulation Section 1.401(k)-1(d)(3)(iii)(C) states that a plan may provide for additional conditions on hardship distributions and cite Treasury Regulation Section 1.401(k)-1(d)(3)(iv)(B) and (C) (revised as of April 1, 2018) as a

possible additional condition. The cited paragraphs of the regulation (which will be replaced when the Proposed Regulations become final) refer to the requirement that no alternative means for paying for the hardship expenses be available and allow for employer reliance on an employee representation. The Proposed Regulations provide only one other example of an additional condition, stating a plan may still condition a hardship distribution on an employee first obtaining all loans available under any employer-provided plan after January 1, 2020. As a result, plan sponsors may be uncertain what conditions they may place on hardships without violating the Proposed Regulations hardship provisions or falling outside the hardship safe harbor.

ARA recommends Treasury clarify that the only condition not permitted is the suspension of elective contributions or employee contributions under the plan. *Alternatively, ARA recommends* Treasury provide more examples of what additional conditions are permitted or not permitted. Specifically, *ARA recommends* Treasury clarify whether it will permit sponsors to condition hardship distributions on completing the administrator's application process, providing required documentation, suspending participant's contributions under other employer-provided plans, and whether other additional conditions are permitted or prohibited. Providing this additional certainty will promote sound administration and reduce the burden of sponsoring, maintaining, and administering the plan.

- V. **Deadline for amendment to pre-approved and governmental plans.** The Proposed Regulations state that the deadline for amending plans shall be as provided in Rev. Proc. 2016-37 and every amendment under BBA, the Proposed Regulations, and the final regulations will be a disqualifying defect for purposes of determining the amendment deadline. ARA appreciates Treasury providing a uniform date for all amendments related to the law change. However, under Revenue Procedure 2016-37, pre-approved plan sponsors are required to adopt interim amendments no later than the due date (including extensions) for filing the plan sponsor's tax return for the tax year in which the qualification change first became applicable. As a result, the due date for amendments to pre-approved plans will be variable based on the plan sponsor's tax year. Governmental plan sponsors will have a different timeline based on the timing of the beginning of their legislative session. These plan-specific and sponsor-specific amendment deadlines are difficult to administer and increase the cost and burden of amending retirement plans.

ARA recommends a single amendment deadline for pre-approved plan documents of the later of December 31, 2020 or the last day of the year following the year in which regulations are finalized. *ARA recommends* for governmental plans that the deadline be two years later than the date for pre-approved plans. Permitting this uniform amendment deadline will reduce the costs and burdens to plan sponsors of updating their plans to comply with the regulation.

- VI. **403(b) plan documents.** Treasury identified in its 2018-2019 Priority Guidance Plan that it intends to issue guidance on amendments to 403(b) plans. Many 403(b) plans are in a remedial amendment period to conform their existing plan document to the final Code Section 403(b) regulations by adopting a pre-approved plan document. The remedial amendment period ends March 31, 2020. ARA appreciates the Treasury's and the Service's attention to this important issue. However, the changes brought about by BBA 2018 to hardship distributions make guidance on this issue urgent. Some 403(b)

plan sponsors already have restated their plans using a pre-approved plan document. Further, many ARA members are finding that most 403(b) plan sponsors want to remove the suspension and loan requirements as soon as possible. In addition, 403(b) plan sponsors using individually designed plans need confirmation on whether they are to use the deadline for tax-exempt and governmental employers in Revenue Procedure 2016-37. Understandably there are numerous issues related to 403(b) plan amendments that will need to be resolved in separate guidance. However, until that guidance can be issued, providing a single amendment deadline now for all 403(b) plan sponsors may be the best solution.

ARA recommends that Treasury specify an amendment deadline for the hardship regulations for all 403(b) plan sponsors that is consistent with the amendment deadline for pre-approved 401(a) plans (i.e. the later of December 31, 2020 or the last day of the year following the year in which regulations are finalized). *ARA recommends*, for governmental plans, that the deadline be two years later than the date for non-governmental 403(b) plans. Further, *ARA recommends* that Treasury clarify 403(b) mass submitters of pre-approved 403(b) plans may amend plans on behalf of plan sponsors as they can for pre-approved 401(a) plans. Permitting this uniform amendment deadline and allowing mass submitters to amend on behalf of plan sponsors will reduce the costs and burdens to plan sponsors of updating their plans to comply with the regulation.

- VII. **403(b) contracts and custodial agreements.** In the days before written plan document requirements for non-ERISA 403(b) plans (and for those plans continuing with a paper-clip approach), much of the required language was contained within the associated individual participant contract(s) and/or custodial agreement (s)

To avoid conflict between the plan document and these investment arrangements, subsequent regulations and LRMs for pre-approved 403(b) plans clarified that the deadline to update these investment arrangements should be the same as the end of the remedial amendment period to adopt a pre-approved 403(b) plan document of March 31, 2020. The terms of the investment arrangements may not be identical among investment providers. The differences among these agreements are problematic to plan sponsors, particularly in multiple-provider situations. Providing a consistent deadline to update the investment arrangements for the final hardship regulations to permit plans to avoid being in conflict with the underlying investment arrangements is in the best interest of 403(b) plans and their participants. With a reasonable and known amendment deadline, 403(b) investment providers can prepare State regulatory filings and/or amend their existing filings to incorporate these changes.

ARA recommends that Treasury provide an amendment deadline for 403(b) contracts and custodial arrangements for the hardship regulations that is consistent with the deadline for 403(b) plans (i.e., the later of December 31, 2020 or the last day of the year following the year in which the regulations are finalized). Providing this uniform deadline will promote compliance with the law and reduce the costs and burdens of maintaining the contracts.

VIII. **Operational Compliance List.** *ARA recommends* that the Service update the Operational Compliance List on its website to include 2018-2019 items, including the TCJA, the BBA 2018, and the final regulations.

These comments were prepared by ASPPA's IRS Subcommittee and Plan Document Subcommittee of the Government Affairs Committee, Kelsey Mayo (Chair) and John P. Griffin (Chair) respectively, and primarily authored by Michelle Ueding and Elizabeth T. Hallam. Please contact Marty Pippins, Executive Director of ACOPA and Director of Regulatory Policy (mpippins@usaretirement.org; 703.516.9300), if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

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

/s/
Steve Dimitriou
President
American Retirement Association

/s/
Kyla Keck
President-Elect
American Retirement Association

/s/
Marty L. Pippins, MSPA
Director of Regulator Policy
American Retirement Association

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