

March 24, 2020

Ms. Carol Weiser
Benefits Tax Counsel
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220
Submitted via email

Re: Follow-up on Relief Requested due to Coronavirus Impact

Dear Ms. Weiser,

On March 16, 2020, the American Retirement Association ("ARA") wrote to request relief from certain provisions under the Internal Revenue Code and ERISA due to ongoing and future business impacts of the current COVID-19 ("Coronavirus") pandemic. The ARA is continuing to receive many questions from our members about concerns relating to retirement plans, especially retirement plans sponsored by small businesses. This letter summarizes additional issues that continue to arise, including a request for relief from funding requirements for defined contribution plans. We believe the issues listed below are within the scope of the agency's regulatory authority, under the IRC 7508A and the March 13, 2020, National Emergency declaration.

The ARA 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 American Society of Enrolled Actuaries ("ASEA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation which sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has nearly 28,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Relief Requested

1. Treas. Reg. §1.401(k)-3(e)(4) provides that an ADP safe harbor plan may be terminated during a plan year without losing safe harbor status provided certain conditions are met. One of those conditions is that the employer have incurred a substantial business hardship comparable to a substantial business hardship described in IRC §412(c). An additional requirement is that the cessation of accruals cannot be effective until the later of: (1) the date the amendment to cease accruals is adopted, or (2) 30 days after eligible employees are provided with a notice regarding the plan termination.

Treas. Reg. §1.401(k)-3(g) provides that an ADP safe harbor may be amended during a plan year to cease or reduce safe harbor contributions provided certain conditions are satisfied. One of those conditions is the same as a plan termination regarding the effective date of the cessation or reduction (i.e., it is tied to the adoption of the amendment and when notification is provided to eligible employees). Another condition, which differs from Treas. Reg. 1.401(k)-3(e)(4), is the plan must be amended to provide that the ADP test will apply to the plan for the plan year.

In both situations, the employer must fund safe harbor contributions up to the effective date of the cessation or reduction of the contributions.

These rules are applicable to IRC §401(k) plans using the provisions of IRC §§ 401(k)(12), 401(k)(13), 401(m)(11) and/or 401(m)(12) and IRC §403(b) arrangements using IRC §401(m)(11) or 401(m)(12).

IRC §416(g)(4)(H) provides that a top-heavy plan does not include a plan consisting solely of elective deferrals and employer contributions that satisfy the ADP and ACP test safe harbor provisions referenced above.

Proposed Modification

The relief we are requesting is due to the immediate concerns relating to the COVID-19 virus. Many employers are under significant financial burdens and the proposed relief is needed to alleviate these burdens as soon as possible.

Many offices are either closed or were forced to change to telecommuting in a very short period (this includes both employers and service providers who assist employers in preparing amendments and notices). This may limit the ability to adopt plan amendments and/or provide notices to employees, which means safe harbor contributions will continue to accrue.

Many plans also utilize the top-heavy exemption of IRC §416(g)(4)(H). While a plan termination due to a substantial business hardship would not trigger the top-heavy rules, a suspension or reduction of the safe harbor contributions without a plan termination would trigger the rules. The financial crisis facing employers might force them to terminate their plans rather than keeping them intact, but partially frozen, until the business recovers.

ARA recommends the following relief, until December 31, 2020 (regardless of the plan year). We note that an extension of this date might be warranted depending on future circumstances.

Modify Treas. Reg. §§ 1.401(k)-3(g) and 1.401(k)-3(e)(4) to provide that safe harbor contributions may immediately stop accruing upon an employer memorializing such intent (formal or informal). The employer would need to notify eligible employees within 90 days of the reduction or cessation. In addition, a formal plan amendment could be adopted no later than the last day of the plan year to which the cessation or reduction applies. Also, please consider modifying section 1.401(k)-3(c)(5)(ii) to provide temporary relief from the end of quarter deadline for safe harbor matching contributions if not otherwise included in relief described above.

In order to encourage employers affected by the top-heavy rules to keep plans in existence, modify Treas. Reg. §1.401(k)-3(g) to provide that a plan will not fail to satisfy safe harbor status provided: (1) the cessation or modification is due to a substantial business hardship comparable to a substantial business hardship described in IRC §412(c), and (2) no highly compensated employee within the meaning of IRC §414(q) may make elective deferrals or employee contributions for the remainder of the plan year in which safe harbor contributions are ceased or reduced.

2. Participants in retirement plans are being severely affected by the ongoing crisis. As employees particularly of small businesses are being laid off or furloughed, questions have arisen about whether the partial termination provisions of IRC 411(d)(3) are triggered. ARA believes relief is necessary from the partial termination trigger due to extraordinary circumstances of this crisis; if all non-vested or partially vested plan participants were to become fully vested under IRC 411(d)(3), plan sponsors

would only face further dramatic business hardship due to increased funding costs. **ARA recommends** that a temporary period for the 2020 plan year be established whereby partial terminations are deemed not to occur if the plan sponsor's business has been affected by the Coronavirus emergency and if those employees are rehired by December 31, 2020. Alternatively, ARA recommends that the Service provide guidance that, under the facts and circumstances, it will find that a partial termination did not occur if the number of active participants under the plan as of a date that is no more than six months after the national emergency is lifted is not fewer than 80% of the number of active participants on the day prior to March 13, 2020 (the date the national emergency was declared).

3. With employees of small business dramatically affected by Coronavirus shutdowns, there are greatly increased risk of participant loan defaults. **ARA recommends** that plan sponsors be able to change the date of default from the date of termination of an employee, to a later date that is not earlier than December 31, 2020, so that a participant is not penalized severely if they are rehired some months later when the business is reopened.
4. Participants in retirement plans are being severely affected by the ongoing crisis, particularly by a loss of income due to curtailed hours and the attendant income. As employees' hours are being reduced or employees are being furloughed, participants' need for hardship distributions has increased. Our members have reported that plan sponsors are uncertain whether the national emergency declaration qualified as a "heavy and immediate financial need" under the Service's safe harbor distribution reasons under 1.401(k)-3. Based on our reading of the regulations and Stafford Act, we believe the national emergency does currently entitle participants to hardship distributions under Treasury Regulation section 1.401(k)-1(d)(3)(iii)(B)(7), assuming all other requirements for a hardship distribution are satisfied. **ARA recommends** the Service issue formal or informal guidance clarifying that the current national emergency is "a disaster declared by the Federal Emergency Management Agency (FEMA) under the Robert T. Stafford Disaster Relief and Emergency Assistance Act" as described in Treasury Regulation section 1.401(k)-1(d)(3)(iii)(B)(7).
5. **ARA recommends** a temporary relaxation of administrative requirements for hardship withdrawals and loans, including self-certification by the participant if the employer, plan administrator, or other individual is not available. Documentation to substantiate the need for the hardship or withdrawal can be retained by the individual participant.
6. **ARA recommends** that IRS clarify that Form 5498 reporting has been delayed until at least August 31, 2020, based on the July 15, 2020 tax filing extension.
7. There may be reporting requirement changes for Form 1099-R and Form 5498 with respect to forthcoming distribution relief. **ARA recommends** that these reporting changes be optional for the 2020 tax reporting year, and that any changes not be mandatory until the 2021 tax reporting year.

ARA appreciates your consideration of issues related to retirement plan administration as plan sponsors, third-party administrators, recordkeepers, and other organizations struggle with the national impact of Coronavirus. Thank you for your consideration of these comments. Please contact Martin L. Pippins, MSEA, Executive Director of ASEA and Director of Regulatory Policy (mpippins@usaretirement.org; 703.516.9300, ext. 146), if you have any comments or questions regarding the matters discussed above.

Sincerely,

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

/s/
Martin L. Pippins, MSEA, EA
Director of Regulatory Policy
American Society of Enrolled Actuaries

Cc: Victoria Judson, Associate Chief Counsel, Internal Revenue Service CC:EEE
Stephen Tackney, Deputy Associate Chief Counsel, Internal Revenue Service CC:EEE