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June 08, 2010

Ms. Monika Templeman
Acting Director, Employee Plans
Internal Revenue Service
1750 Pennsylvania Ave., NW
Washington, DC 20006

Re: Comments on Notice 2009-68 – Safe Harbor Explanation – Eligible Rollover Distributions

Dear Monika:

The American Society of Pension Professionals & Actuaries (ASPPA) is writing to recommend further modifications to the safe harbor 402(f) notice set forth in Notice 2009-68 (the "Notice"). We greatly appreciate the issuance of the updated Notice, and ASPPA strongly believes that additional modifications should be considered to more fully explain the information to participants.

ASPPA is a national organization of more than 7,000 retirement plan professionals who provide consulting and administrative service for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

Summary of Recommendations

ASPPA recommends that the guidance and model notices be revised to:

- Clarify that a single notice may be used for plans that offer both Roth and non-Roth accounts.
- Clarify that pre-tax amounts in a partial or split rollover can be rolled first to a traditional IRA or qualified plan in accordance with Internal Revenue Code (the "Code") Section 402(c)(2).

- Provide a minimum 1-year grace period for plan sponsors to update their notices for newly adopted laws, and post information on the IRS website regarding changes under the new law that are required to be reflected in the notice.
- Clarify that it is permissible to add the 30-day waiver and notice to defer provisions.
- Clarify that a plan that lowers its mandatory cash out provision to \$1,000 or that excludes amounts in excess of \$5,000 that are attributable to prior rollovers does not result in a loss of safe harbor status.
- Explain the IRS position on applicable withholding rules for beneficiaries.
- Clarify that state and local taxation and withholding rules may apply.
- Clarify the proper approach for governmental 457(b) plans to retain safe harbor status.
- Issue a model notice in Spanish as quickly as possible and clarify that it is optional.
- Correct duplicate references to the Code Section 414(w) exclusion.

ASPPA will be happy to prepare a revised model notice incorporating these changes upon request.

Discussion of Issues

A. Combination of Roth and non-Roth Notices

The Notice, for the first time, provides for separate model notices for Roth and non-Roth accounts. Historically, these provisions have been contained in a single notice, but the Notice expressly states that separate notices should be provided (and, in public informal comments, IRS and Treasury staff have informally recommended providing notices separately). It also states that the notice should be distributed only for eligible rollover distributions. It is unclear if a single notice containing both pieces continues to satisfy the IRS safe harbor when distributed to participants. Requiring specific separate notices based on whether a participant's account contains Roth or non-Roth balances creates an additional administrative burden for plan sponsors and service providers. A plan should be able to provide one combined notice for administrative ease and consistency.

ASPPA recommends that the Service clarify that a plan including designated Roth accounts may provide a single notice, which clearly sets out the separate portions for Roth and non-Roth amounts, and still conform to the IRS safe harbor notice. This single notice could be provided for all distributions (i.e., regardless of whether a distribution is made from a Roth account or a non-Roth account).



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ASPPA also recommends that the Service clarify that the safe harbor notice can continue to be distributed for all distributions, even if some or all of the payment is not eligible for rollover (e.g., annuity, hardship, MRD payments), for ease of administration.

B. Partial and Split Direct Rollover

The Notice provides that if the distributee elects to roll over only a portion of a distribution in a direct rollover, an allocable portion of any after-tax contributions are considered rolled over. Similarly, with a partial direct rollover of Roth accounts, an allocable portion of the earnings are considered rolled over. The rules for rollover to a Roth IRA are further described in the Spring 2010 Employee Plans Newsletter, which appears to take the same pro rata allocation approach (defining "amount distributed" as amounts rolled directly or indirectly to a Roth IRA and including the ordering rule for partial rollovers, which appears limited to indirect rollovers with the reference to "receive").

It appears that each rollover/cashout is being treated as a separate distribution (which is prior to the annuity starting date) and therefore subject to Code Section 72(e)(8), which requires this pro rata allocation approach. Presumably, thereafter, the Code Section 402(c)(2) flush language -- that states rollover of taxable amounts first -- can be applied. However, this language does not appear to have any impact for a payment that is directly rolled over.

The IRS approach appears to mirror the approach taken for Roth contributions under Treas. Reg. § 1.402A-1, Q&A-5, where (1) the regulations expressly limit the special ordering rule to indirect rollovers -- the part that is rolled over is deemed to consist first of the portion of the distribution that is attributable to income under Code Section 72(e)(8), and (2) following the Preamble to TD 9324, treat the portion of the distribution that is rolled over as a separate distribution for purposes of applying Code Section 402(c)(2). However, Roth accounts are different from after-tax amounts because Roth accounts are treated as a separate account under Code Section 72, which prohibits commingling earnings on Roth contributions with other taxable amounts and may justify a different analysis.

The clear language of Code Section 402(c)(2), which expressly applies to direct rollovers, appears to override the pro rata allocation rules, and the fact that a separate 1099-R may need to be filed for the rollover and the cashout (or for split distributions between IRAs), due to the box 7 coding provisions, should not alter this result. The legislative history also does not make this pro rata allocation point clear. The EGTRRA bluebook states that "... the provision also clarifies that, if a distribution includes both pretax and after-tax amounts, the portion of the distribution that is rolled over is treated as consisting first of pretax amounts." There is no policy reason for providing for a different result depending solely on whether the amount is directly or indirectly rolled over, or whether the distribution is split between multiple IRAs.

Historically, many plan sponsors and third party administrators have interpreted the flush language of Code Section 402(c)(2) to permit rollover of the pre-tax amounts first, regardless of a direct or indirect rollover, and have designed plans and recordkeeping systems accordingly. For example, a participant with a \$10,000 account balance, with \$2,000 of after-tax contributions and \$8,000 of the pre-tax contributions, could elect to roll over the \$8,000 pre-tax contributions to a traditional IRA and have the remaining \$2,000 paid in cash. Following the same approach, these same plans/systems would permit the same participant to direct all \$8,000 pre-tax amounts to a traditional IRA (rolled first to traditional IRA) and after-tax amounts rolled to a Roth IRA. To alter this long-standing result based on a single reference in the Notice (or a brief summary of the rollover rules for Roth IRA conversions, without examples, in an IRS newsletter) is inconsistent with prior guidance and intent.

ASPPA recommends that the Service clarify that either following the IRS pro rata approach or the historic interpretation of the statute is permissible and does not result in loss of safe harbor status.

C. Employer Grace Period

The Notice expressly provides that if any relevant law is amended after September 28, 2009, the plan administrator must update the model notice to comply with eligible rollover distribution notice requirements. There has historically been a tension between reliance on the model and going ahead and making statutory changes. Unfortunately, this new guidance does not provide any relief from the need to adopt ongoing updates to the notices. As such, plan administrators will continue to face such questions as legislative and regulatory changes are adopted.

ASPPA recommends a minimum 1-year grace period be granted to update the notice for newly adopted laws.

ASPPA further recommends that the IRS provide information on the need to update the notice for new law through the IRS website (or other informal guidance).

D. 30-Day Waiver Provision and Notice to Defer.

The predecessor notice (Notice 2002-3) explained that distributees have 30 days to consider whether or not to directly roll over their distributions from a plan. The Notice removed this language; however, this regulatory requirement of Q&A-2 of Treas. Reg. § 1.402(f)-1 has not changed. Accordingly, if this provision is not within the notice, it must be addressed in a separate notice or distribution request form.

Moreover, many plans combine the Code Section 402(f) notice with the notice of the consequences of failing to defer a distribution, and there appears to be no legal requirement to keep these notices separate. See Prop. Treas. Reg. § 1.411(a)-11.

ASPPA recommends that the language regarding the 30-day review period be added back to the model notice to ease administration, or that the Service clarify that the prior language can be added to the model notice without loss of safe harbor status.

ASPPA further recommends that the Service clarify that the notice of the consequences of failing to defer a distribution can be included in the model notice for administrative ease and that inclusion of such language does not result in loss of the notice's safe harbor status.

E. Beneficiaries.

The model notice explains that surviving spouse beneficiaries may treat a rollover IRA as their own or as an inherited IRA (and the related tax consequences), and explains that non-spouse designated beneficiaries may make a direct rollover to an inherited IRA only. However, effective for plan years on or after January 1, 2010, a non-spouse beneficiary is subject to mandatory 20% withholding (following WRERA) if amounts are not directly rolled to an inherited IRA. An estate (and trusts not meeting the minimum required distribution rules) remains subject to 10% voluntary withholding.

The model notice does not address these changes in the law. Moreover, the new model notice removed all discussion of the voluntary withholding rules.

ASPPA recommends that the Service modify the model notice to include an explanation of the applicable withholding rules for beneficiaries, as well as an explanation of the voluntary withholding rules.

F. State Income Taxes.

The model notice adds a Q&A on state tax, but the limited statement can mislead participants to believe that no state income taxes may be imposed.

ASPPA recommends that the Service add a statement that state tax and withholding may apply. For example, "while some state or local governments may treat the distribution as taxable (and perhaps subject to withholding), this notice does not describe these rules."

G. Governmental Plans.

The model notice language explains that certain public safety officers may exclude from their income amounts paid directly to an accident or health plan as premiums, and a single paragraph replaces the prior, separate model notice for governmental 457 plans. Therefore, it appears that a separate governmental 457(b) plan notice may fall outside the safe harbor beginning January 1, 2010.

ASPPA recommends that the Service clarify the proper approach that sponsors of 457 plans must take to retain safe harbor status.



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H. Spanish Version.

The Notice indicates that a Spanish version will be issued shortly. Many plan sponsors are asking for this version.

ASPPA recommends that the Spanish version be issued as soon as possible, and that the Service clarify (as in the past) that use of the Spanish version is optional.

* * *

These comments were prepared by ASPPA's IRS Subcommittee of the Government Affairs Committee, and were primarily authored by Elizabeth Thomas Dold, Esq., chair and Donal K. Ford, CPC.

Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs, if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Sincerely,

/s/

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/s/

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