

April 30, 2015

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2015-27)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

**RE: Notice 2015-27, Public Comments Invited on Recommendations for 2015-2016
Priority Guidance Plan**

The American Society of Pension Professionals and Actuaries (“ASPPA”) is writing in response to Internal Revenue Service (“IRS”) Notice 2015-27, to provide input on the Retirement Benefits items (and relative priority of such items) to be included on the 2015-2016 Guidance Priority Plan. ASPPA thanks the IRS for the opportunity to provide input on these matters.

ASPPA is a national organization of retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines including consultants, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA is now part of the American Retirement Association whose total membership of more than 17,000 retirement plan professionals is diverse but united by a common dedication to the employer-based retirement plan system.

ASPPA believes that each and every item on the Guidance Priority Plan is important to provide clarity and guidance to sponsors of retirement plans and the professionals who assist them. We also recognize that the IRS and the Department of the Treasury have limited resources and that pending guidance projects must be prioritized as a practical matter. We have listed the items below in order of priority, beginning with the guidance projects that are most important to ASPPA members. We believe that guidance for each of the items listed below –

- Will resolve significant issues relevant to many retirement plan sponsors and practitioners (not just a small group);
- Will promote sound tax administration by helping plan sponsors and practitioners to maintain retirement plans in compliance with tax code qualification rules; and
- Can be drafted in a manner that can be easily understood and applied by plan sponsors and practitioners.

ASPPA recommends that the Retirement Benefit items listed below be included on the 2015-2016 Guidance Priority Plan, **in the following order of priority**:

I. Determination Letter Program for Individually Designed Plans (IDPs) - IRS officials have recently indicated that the IRS is considering significant changes to the IDP determination letter program. ASPPA understands that one of the changes contemplated includes scaling back the program beginning in 2017 so that determination letters will be available to IDPs only upon the initial adoption of a plan and the termination of a plan. **ASPPA recommends** soliciting suggestions from practitioners on what can be done to reduce IRS burdens associated with the IDP determination letter program as an alternative to the IRS proposal. ASPPA believes the current determination letter program provides great value to plan participants and promotes sound tax administration by encouraging plan sponsors to review and update plan documents. Further, elimination of determination letters for IDPs during the life of the plan may have the effect of increasing the IRS's burdens in situations such as plan terminations, examinations, plan corrections, and private letter rulings programs. This is particularly true for plans that require frequent and/or substantial revisions due to plan design changes, merger or acquisition of the plan sponsor, or significant legislative updates to maintain plan qualification. ASPPA understands and supports the IRS's need to revise and improve the program, but suggests that the IRS first solicit public comment on the myriad of issues involved with a substantial revision to the program and also ensure that any significant changes to the program are announced with sufficient lead time for plan sponsors to understand and implement a transition plan.

II. Mid-Year Changes for Safe Harbor Plans - **ASPPA notes that this item was included in the 2014-2015 Guidance Priority Plan (as item A. 10 under Retirement Benefits) and recommends** that the IRS retain this item on the 2015-2016 Guidance Priority Plan. In particular, ASPPA encourages the IRS to provide additional guidance on permissible mid-year changes to plans utilizing the safe harbors under Internal Revenue Code ("Code") section 401(k)(12) (ADP test safe harbor provisions), section 401(m)(12) (ACP test safe harbor provisions), section 401(k)(13) (qualified automatic contribution arrangement), or section 414(w) (eligible automatic contribution arrangement). As the popularity of safe harbor 401(k) plans continues to grow, the importance of ensuring plan sponsors understand what changes are permitted also grows. Providing a comprehensive list of permissible amendments or a set of criteria to be used in making such a determination would resolve significant issues relevant to many retirement plan sponsors and practitioners and would promote sound tax administration by helping plan sponsors and practitioners to maintain retirement plans in compliance with tax code qualification rules. ASPPA has previously provided the IRS with a list of mid-year amendments it believes should be permitted, and ASPPA continues to recommend that the IRS issue guidance clarifying that those amendments (and other categories of amendments) may be adopted by safe harbor plans mid-plan year.¹

III. QNECs and QMACs – **ASPPA notes that this item was included in the 2014-2015 Guidance Priority Plan (as item A. 9 under Retirement Benefits) and recommends** that the IRS retain this item on the 2015-2016 Guidance Priority Plan. Specifically, ASPPA requests that

¹ See ASPPA's comment letters to the IRS dated October 17, 2013 available at <http://www.asppa.org/Portals/2/ASPPA%20Safe%20Harbor%20Plans%20Comment%20Letter%20-%20final.pdf> and June 1, 2012, available at <http://www.asppa.net/document-vault/pdfs/GAC/2012/612012comment.aspx>.

the IRS issue guidance permitting the use of forfeitures to fund Qualified Non-Elective Contributions (QNECs), Qualified Matching Contributions (QMACs), and Safe Harbor Contributions under Code section 401(k)(12). ASPPA has previously submitted to the IRS comment letters detailing our recommendations and reasoning with respect to this topic.² In summary, the statutory requirements of Code section 401(k)(2)(C) do not in any way mandate that QNEC, QMAC, and section 401(k)(12) safe harbor contributions be fully vested at the time that the contributions are first deposited into the plan. Rather, the statute only requires that these contributions become nonforfeitable at the time they are allocated to participant accounts (which is the time at which such amounts become part of an employee's accrued benefit). The issuance of clarifying guidance sanctioning the use of forfeitures in this way would be consistent with the Code provisions and further encourage employer adoption and retention of 401(k) retirement plans. ASPPA believes the existing regulations could be interpreted to reach this result. If the IRS believes there are regulations inconsistent with this position, that portion of the regulations should be immediately withdrawn as being contrary to the clear wording of the statute.

IV. Substantiation of Hardship Distributions - ASPPA notes that this item was included in the 2014-2015 Guidance Priority Plan (as item A. 8 under Retirement Benefits) and recommends that the IRS retain this item on the 2015-2016 Guidance Priority Plan and provide official guidance on the recordkeeping requirements that plan sponsors must satisfy to properly document hardship distributions.³ The IRS has emphasized that even where a third party administrator handles participant transactions, the plan sponsor is still ultimately responsible for the proper administration of the retirement plan. Ensuring that plan sponsors have sufficient information regarding these requirements is critical to ensure compliance. Equally important is providing transitional relief with regard to application of any revised standards in light of anecdotal evidence suggesting there is much confusion with regard to the applicable requirements.

V. Governmental Plans - ASPPA notes that this item was included in the 2014-2015 Guidance Priority Plan (as item A. 22 under Retirement Benefits) and recommends that the IRS publish long-awaited guidance on the definition of a governmental plan under Code section 414(d).

VI. Interim Amendments - ASPPA notes that this item was included in the 2014-2015 Guidance Priority Plan (as item A.6 under Retirement Benefits) and recommends that the IRS retain this item on the 2015-2016 Guidance Priority Plan and update and improve Revenue Procedure 2007-44 and the interim amendment process.⁴ Although well intentioned, the current

² ASPPA's comment letters to the IRS dated July 8, 2013, available at <http://www.asppa.net/document-vault/pdfs/GAC/2013/07082013comm.aspx> and May 8, 2012, available at <http://www.asppa.net/document-vault/pdfs/GAC/2012/lifetimelong.aspx>.

³ See the April 1, 2015 edition of Employee Plan News, Issue No. 2015-4, "It's Up to Plan Sponsors to Track Loans, Hardship Distributions".

⁴ For additional information on interim amendments, see ASPPA comment letters submitted to the Department of the Treasury and the IRS on April 29, 2011, available at <http://www.asppa.net/document-vault/pdfs/GAC/2011/0429-comm.aspx>; March 4, 2010, available at <http://www.asppa.net/document-vault/pdfs/GAC/2010/2007-44.aspx>; and November 25, 2009, available at <http://www.asppa.net/document-vault/pdfs/gac/2009/final1125.aspx>. It should also be noted that this issue is likely to be impacted by the implementation of changes to the determination letter program for individually designed plans as noted in item I above.

interim amendment process is expensive, time consuming, and increases the burden of plan sponsorship, all of which are felt disproportionately by small plans. The burdens of the current process are exacerbated by the varying deadlines and accompanying uncertainty as to when interim amendments are required and the specific issues that must be addressed. **ASPPA recommends** that the IRS issue sample language for amendments that are required for legislative changes and modify the interim amendment process to require only periodic adoption of interim amendments. For example, the IRS might require that interim amendments be adopted only at the midpoint of the plan's cycle or by the end of the 5-year or 6-year remedial amendment period. ASPPA believes this would significantly reduce the burden of interim amendments while still promoting sound tax administration by requiring plan sponsors to periodically review and update plan documents. **Alternatively, ASPPA recommends** that the IRS require the interim adoption of certain amendments that impact IRC §411(d)(6) benefits while permitting the adoption of other interim amendments to be delayed until the mid-point or the end of the 5-year or 6-year remedial amendment period.

VII. Update and Expand EPCRS - ASPPA notes that this item was included in the 2014-2015 Guidance Priority Plan (as item A. 41 under Retirement Benefits) and recommends that the IRS retain this item on the 2015-2016 Guidance Priority Plan and update and expand Revenue Procedure 2013-12. One area of particular concern to plan sponsors and practitioners is guidance regarding the failure to timely distribute safe harbor notices required under Code sections 401(k)(12)(D) and 401(k)(13)(E). ASPPA thanks the IRS for its recent steps to improve the program in Revenue Procedures 2015-27 and 2015-28. **ASPPA recommends** that the IRS continue to improve and expand the program, particularly for plan loan failures, as outlined in a recent comment letter⁵, and for certain 403(b) plan issues.

VIII. Guidance regarding the aggregation rules for affiliated service groups under § 414(m) - ASPPA notes that this item was included in the 2014-2015 Guidance Priority Plan (as item A. 21 under Retirement Benefits) and recommends that the IRS retain this item on the 2015-2016 Guidance Priority Plan and provide guidance on the determination of affiliated service groups and management groups. This guidance is particularly important because these provisions impact the compliance of not only of retirement plans, but also of health plans under the Affordable Care Act. The proposed regulations, published in 1983, are extremely out of date and updated guidance is needed. Issuance of this guidance will significantly reduce issues relevant to many retirement plan sponsors and practitioners and will promote sound tax administration in both the retirement plan and health plan contexts.

IX. Lifetime Income Guidance - ASPPA notes that this item was included in the 2014-2015 Guidance Priority Plan (as item A. 39 under Retirement Benefits) and recommends that the IRS retain this item on the 2015-2016 Guidance Priority Plan to provide general guidance that helps address certain open tax issues such as nondiscrimination testing (benefits, rights and

⁵ For additional information on changes that should be considered in EPCRS, see ASPPA comment letters to the IRS dated March 19, 2015, available at <http://www.asppa.org/Portals/2/PDFs/GAC/Comment%20Letter/EPCRS%20Loan%20Comment%20Letterfinal3%2019%2015.pdf> and July 30, 2013 available at <http://www.asppa.net/document-vault/pdfs/GAC/2013/07302013comm.aspx>. It should also be noted that this issue is likely to be impacted by the implementation of changes to the determination letter program for individually designed plans as noted in item I above.

features) and the application of the QJSA/QPSA requirements to lifetime income products to put them on an equal footing with other types of investment products⁶.

X. Pre-Approved Plans for Cash Balance and Employee Stock Ownership Plans (ESOPs) –

In order to continue the reduction of the IRS work burden related to the number of plans that are submitted for determination letters, **ASPPA recommends** that the IRS officially expand the pre-approved plan document program as indicated in IRS Announcement 2014-41⁷ to permit pre-approved cash balance plan and ESOP documents.⁸ In addition, ASPPA Recommends the submission deadline for pre-approved defined benefit plans be extended to a date that is at least 5 months after the issuance of the Listing of Required Modifications (LRMs) or other IRS guidance regarding the parameters for pre-approved cash balance plans.⁹

XI. Flexibility in Internal Revenue Code Section 401(a)(26) – ASPPA notes that this item was included in the 2014-2015 Guidance Priority Plan (as item A. 5 under Retirement Benefits) and recommends that the IRS retain this item on the 2015-2016 Guidance Priority Plan and issue guidance on the application of Code section 401(a)(26) to soft frozen plans. When Code section 401(a)(26) was implemented, the concept of a pension plan that was “soft frozen” (no new participants) was uncommon.

XII. Merger and acquisition issues - ASPPA recommends that the IRS address issues that result from mergers and acquisitions impacting 401(k) plans (including the treatment of safe harbor plans), the determination of highly compensated employees and the determination of years of service credit.

XIII. Update Revenue Procedure 2000-40 - ASPPA recommends that the IRS give priority to guidance on approval of a change in valuation date, a change in method from fair market value to an asset averaging method, and a change from one set of segment rates to another or between segment rates and the full yield curve.¹⁰

XIV. Vesting of terminated participants - ASPPA recommends that the IRS address the issue of whether participants who are terminated and paid during the last 5 years before a plan termination occurs should be (or not) fully vested.

XV. Retirement Plan Deadlines - ASPPA recommends that the IRS provide guidance on which retirement plan deadlines are extended when a deadline falls on a weekend or holiday.

⁶ See ASPPA comment letter dated May 3, 2010, available at <http://www.asppa.net/document-vault/pdfs/GAC/2010/final503.aspx>, for additional information regarding lifetime income options.

⁷ Available at <http://www.irs.gov/pub/irs-drop/a-14-41.pdf>.

⁸ For additional information, see ASPPA comment letter to the IRS on June 19, 2014, available at <http://www.asppa.org/Portals/2/PDFs/GAC/Comment%20Letter/ASPPA%20ACOPA%20cash%20balance%20volume%20submitter%20June%2019%202014.pdf> and on April 29, 2013, available at <http://www.asppa.net/Document-Vault/PDFs/GAC/2013/4292013comm.aspx>.

⁹ See ASPPA comment letter dated March 3, 2015, available at <http://www.asppa.org/Portals/2/PDFs/GAC/Comment%20Letter/dbcashbalanceext3%203%2015final.pdf>

¹⁰ For additional information, see ASPPA comment letter to the IRS dated June 1, 2012 available at <http://www.asppa.net/document-vault/pdfs/GAC/2012/612012comment.aspx>.

XVI. Expenses Included in Target Normal Cost - ASPPA recommends that the IRS provide guidance on pension plan expenses that are and are not to be included in the Target Normal Cost.

XVII. “High 25 Rule” - ASPPA recommends that the IRS provide guidance under the High 25 rule¹¹, particularly where the plan covers only highly compensated employees, to coordinate the use of certain terms under the High 25 rule with terms used in Code Section 430 and to review the restrictions under the High 25 rule in light of the Code Section 436 benefit restrictions.

XVIII. Reduce Regulatory Burdens - ASPPA recommends that the IRS revise existing regulations in order to support innovation and reduce administrative burdens on the retirement plan system, with a focus on simplifying and creating uniform rules for electronic disclosure under the Employee Retirement Income Security Act of 1974, as amended, and the Code and permitting plan sponsors to choose electronic communications as the “default” method for required disclosures.¹²

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These comments are submitted on behalf of and were prepared by ASPPA’s IRS Subcommittee, Frank Porter, QKA, QPA, Chair. If you have any questions regarding the matters discussed herein, please contact Craig Hoffman, ASPPA General Counsel and Director of Regulatory Affairs at (703) 516-9300.

Thank you for your time and consideration.
Sincerely,

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¹¹ See Treas. Reg. §1.401(a)(4)-5(b)(3)(ii).

¹² For additional information, see ASPPA comment letter submitted to the Department of the Treasury on April 29, 2011, available at <http://www.asppa.org/Document-Vault/pdfs/GAC/2011/0429-comm.aspx>.

/s/

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