

Comments on Additional Alternatives for Satisfying Nondiscrimination Testing on a Benefits Basis for a DB/DC Plan

February 28, 2014

Department of Treasury
Internal Revenue Service

Notice 2014-5

The American Society of Pension Professionals & Actuaries (ASPPA) and the ASPPA College of Pension Actuaries (ACOPA) are writing in response to the request for comments included in Notice 2014-5 as issued by the Internal Revenue Service (“IRS”) and Department of Treasury (“Treasury”) on December 13, 2013.

ASPPA is a national organization of more than 16,000 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, 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. All credentialed actuarial members of ASPPA are members of the ASPPA College of Pension Actuaries (ACOPA), which has primary responsibility for the content of comment letters that involve actuarial issues.

Summary

In situations where the “primarily DB” or “broadly available” criteria of §1.401(a)(4)-9(b)(2)(v)(B) or (C) are not met, the current gateway structure of §1.401(a)(4)-9(b)(2)(v)(D) has allowed for flexibility in design, while providing meaningful benefits for non-highly compensated employees (NHCEs). The gateway regulations have served the purpose they were intended to serve, and the gateway structure should be preserved. However, permitting more flexibility in meeting the gateways could be helpful in improving plan design and retirement security for NHCEs through incenting employers to maintain defined benefit plans. ASPPA and ACOPA are pleased to comment on several of the alternatives outlined in Notice 2014-5. In the discussion below, the alternatives are numbered to correspond with the items in the Notice.

Discussion

A. **Comments Regarding the Ability of a DB/DC Plan to Satisfy Nondiscrimination Requirements on a Benefits Basis**

2. Alternative for DC plans with combination of non-elective and matching contributions – This proposed alternative would allow a portion of the minimum aggregate allocation gateway to be satisfied based on the average matching contribution rate for all NHCE's under the plan. *ASPPA and ACOPA recommend* permitting the average matching contribution rate for non-highly compensated employees to be applied toward a portion of the gateway as a meaningful improvement to the current rules. The gateway contribution alone will not provide for adequate retirement income, and matching contributions have been shown to encourage participants to contribute on their own behalf. Thus, permitting the average NHCE matching contribution rate to count toward the gateway will allow for more effective plan design, without reducing the plan sponsor's commitment to NHCEs. To assure some gateway protections are maintained for all participants, *ASPPA and ACOPA recommend* that the portion of the gateway that can be provided through matching contributions be limited to 50%. We further recommend that the average match be determined solely on the basis of the NHCEs eligible for both the gateway and the match, and that any NHCEs not eligible for the match receive the full gateway contribution.

3. Alternative for DC plans that could satisfy nondiscrimination using a lower interest rate – Alternatives to the gateway approach would eliminate the protection the gateway provides for *all* NHCEs in a benefits-tested arrangement. The gateway approach should be maintained, and any amendment to the rules should be modifications to application of the gateways. However, although the current gateway amounts are suitable for the current interest rate range, they arguably are high for a plan that could satisfy the nondiscrimination rules on a benefits basis using a lower interest rate.

ASPPA and ACOPA recommend that consideration be given to a reduced gateway for plans testing with a lower interest rate. For example, the current gateway would apply for testing at 8.5%. The gateway would be reduced by seven and one-half percentage points for every full 0.50% reduction in the testing rate, but never below 50% of the current gateway.

4. Safety valve alternative under which plans can request permission to disregard outliers- ASPPA and ACOPA support modifications to the gateway rules to minimize the disproportionate impact outlier HCEs may have on the required gateway contribution. However, the safety valve is not the appropriate method to address this issue. For smaller employers, the IRS user and professional fees make applying for an IRS ruling impractical. For employers of all sizes, it lacks the necessary predictability for business planning and compensation budgeting.

ASPPA and ACOPA recommend the development of safe harbor alternatives to deal with HCE outliers. Possible safe harbors may include allowing the DB Equivalent EBAR to be determined using an accrued to date method, or allowing 5% of DB Equivalent EBARS to be disregard if the defined benefit formula has not been increased for HCEs in the last five years and the HCE does not receive a non-elective contribution in the DC plan that exceeds 3% of compensation.

B. Other Possible Related Modifications to Other Nondiscrimination Requirements

2. Treatment of Matching Contributions – Under this proposed modification, matching contributions could be used to satisfy the nondiscrimination in amount test as well as the minimum allocation gateway discussed in A.2. *ASPPA and ACOPA recommend* that if this modification is made available, it should be an option, not a requirement.

In addition, *ASPPA and ACOPA recommend* that consideration be given to the following modifications:

1. Phase-in of the gateway for closed plans- Under the current rules, a plan that has been “primarily DB” for many years, then fails to meet the “primarily DB” rule, is immediately subject to the same gateway requirements as a plan that has no history of being primarily DB. *ASPPA and ACOPA recommend* providing a phase in of the gateway requirements for plans that were but no longer are primarily DB such as shown in the chart below. For example, if an arrangement is 45% DB, the gateway would be only 25% of the full gateway amount; 35% DB would be 50% of the full gateway. Allowing some benefit from continued maintenance of the DB plan would reward and encourage maintenance of the DB program.

| % of NHCEs with Higher DB accruals | Applicable portion of Maximum Gateway | DB/DC Gateway |
|------------------------------------|---------------------------------------|---------------|
| at least 50% | 0% | 0.000% |
| 45% to 49.99% | 25.00% | 1.875% |
| 35% to 44.99% | 50.00% | 3.750% |
| 25% to 34.99% | 75.00% | 5.625% |
| Less than 25% | 100.00% | 7.500% |

2. 401(a)(26) – Notice 2014-5 mentions consideration of possible changes to the regulations under §401(a)(26), but none of the proposals included in the notice would affect its application. *ASPPA and ACOPA recommend* that consideration be given to amending the §401(a)(26) regulations to allow closed DB plans to continue accruing benefits. Permitting closed plans that are tested on the basis of benefits to include NHCE’s receiving gateway contributions as benefitting under the defined benefit plan for purposes of §401(a)(26) would be a reasonable approach. Plans with no further benefit accruals should also be deemed to pass §401(a)(26) provided the plan complied in the last year benefits were accrued. In addition, *ASPPA and ACOPA recommend* that you take this opportunity to revisit the rule for underfunded plans to eliminate the requirement of a Schedule SB attachment to certify to values on a plan termination basis as the reason for not closing out the plan. The plan administrator should be permitted to demonstrate that a shortfall exists based on lump sum values and annuity purchase rates in the open market rather than having a qualification issue depend on a Schedule SB attachment.

In summary, ASPPA and ACOPA appreciate the opportunity to comment on possible additional alternatives for satisfying nondiscrimination testing on a benefits basis for a combination DB/DC plan. However, the existing gateway rules have served their purpose, and there should be no consideration of any substantive changes to the existing rules.



These comments were prepared by ASPPA's Defined Benefit Subcommittee of the Government Affairs Committee and the ASPPA College of Pension Actuaries. Please contact Judy A. Miller, MSPA, Executive Director of ACOPA, at (703) 516-9300 if you have any comments or questions on the matters discussed above.

Thank you for your time and consideration.

Sincerely,

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

/s/
Judy A. Miller, MSPA
ACOPA Executive Director

/s/
Craig P. Hoffman, Esq., APM
General Counsel

/s/
John R. Markley, FSPA, Co-Chair
Gov't Affairs Committee

/s/
Ilene H. Ferenczy, Esq., APM, Co-Chair
Gov't Affairs Committee

/s/
Robert M. Kaplan, CPC, QPA, Co-Chair
Gov't Affairs Committee