June 9, 2014

Mr. Rob Choi
Director, Employee Plans
Internal Revenue Service
999 North Capitol Street, NE
Washington, DC 20002

Re: Internal Revenue Code Section 412(d)(2) Amendments

Dear Mr. Choi,

The American Society of Pension Professionals & Actuaries ("ASPPA") and the ASPPA College of Pension Actuaries ("ACOPA") appreciate the opportunity to provide supplemental comments to our July 19, 2011, letter (attached) to Mark Iwry, Senior Advisor to the Secretary and Deputy Assistant Secretary (Retirement and Health Policy) of the Department of the Treasury regarding Internal Revenue Code ("IRC") Section 412(d)(2) amendments. ASPPA and ACOPA are supplementing their prior letter to: (1) provide additional support for their position; and (2) reiterate our request that the Internal Revenue Service ("IRS" or "Service") engage in a discussion of this issue before any change in ruling policy is implemented.

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, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-based retirement plan system. All credentialed actuarial members of ASPPA are members of ACOPA, which has primary responsibility for the content of comment letters that involve actuarial issues.

Summary

The following is a summary of ASPPA's and ACOPA's recommendations, which are described in greater detail in the Discussion section that follows.

I. **IRS Ruling Policy Should Affirm the Statutory Language of IRC Section 412(d)(2)** - IRS ruling policy and, to the extent necessary, guidance (sub-regulatory or otherwise) should affirm the clear statutory language of IRC Section 412(d)(2) and Congressional authority to permit defined benefit plan sponsors to adopt retroactive "discretionary" amendments.

II. **Dialogue with Interested Parties** - The IRS should rebuild trust with the employee benefits plan community by engaging in dialogue, rather than using the threat of disqualification, as the vehicle to communicate a change in the Service's ruling policy.

Discussion

I. IRS Ruling Policy Should Affirm the Statutory Language of IRC Section 412(d)(2).

ASPPA and ACOPA's July 19, 2011, letter to Deputy Assistant Secretary Iwry succinctly states the issue of concern. The plain statutory language of IRC section 412(d)(2) states:

> [A]ny amendment applying to a plan year which—
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> (A) is adopted after the close of such plan year but no later than 2 ½ months after the close of the plan year (or, in the case of a multiemployer plan, no later than 2 years after the close of such plan year),
>
> (B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and
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> (C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances,
>
> shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year.

The concern outlined in our July 19, 2011, letter over the proper interpretation of this straightforward statutory language arose because of an answer given in conjunction with a question submitted for the 2011 Enrolled Actuaries Conference. The answer was included in a conference publication referred to as the "Gray Book." Gray Book questions and answers are informal responses from IRS and Treasury staff that are reduced to writing by the conference program committee. There is cautionary language included in each Gray Book that states:

> The following pages set forth the questions posed to certain staff of the Treasury Department and the Internal Revenue Service at a meeting on February 3, 2011 with representatives of the Enrolled Actuaries Program Committee. Included also are summaries, prepared by the representatives of the Program Committee, of the oral responses to those questions, which represent only personal views of the individuals who responded. Because those oral responses do not result from the systematic legal and policy analysis, review and clearance involved in producing regulations and other administrative guidance on which taxpayers can rely, different responses may be given at other times or by other staff, and administrative guidance may be issued that is inconsistent with the oral responses. Accordingly, the responses do not necessarily represent the positions of the Treasury or the IRS and cannot be relied upon by any taxpayer for any purpose.[1]

Notwithstanding these cautionary words, the answer given to a 2011 question has caused a great deal of concern to ASPPA, ACOPA and other interested parties in the actuarial, legal and employee benefits community. This concern has grown more acute because our members have reported that IRS personnel

[1] Introductory Statement, 2011 Gray Book.

processing determination letter applications in the Cincinnati office (and elsewhere) have been applying this answer as legal precedent.[2]

Specifically, Question and Answer 4, a copy of which is attached to this letter as Appendix "A," indicated that an amendment that fits within the parameters of IRC Section 412(d)(2) would no longer be deemed to be adopted as of the beginning of the prior plan year, in contradiction to the statute and long standing ruling policy.[3] The underlying theory for the answer was that Revenue Procedure 2007-44[4] superseded the statute by characterizing such an amendment as "discretionary."

Under the procedural rules of Revenue Procedure 2007-44, "discretionary" amendments are required to be adopted by the end of the plan year during which they are effective. Notwithstanding the fact that Section 412(d)(2) – codified nearly 40 years ago -- represents the law, rather than interpretation, certain government officials are inappropriately deeming it to be overridden by agency guidance. This is not consistent with legal administrative law precedent. For an indication of the weight of Revenue Rulings and Procedures under the IRS's own procedures manual, *see* (taken together): Internal Revenue Manual (IRM) §§4.10.7.2.1 ("The Internal Revenue Code of 1986 is the primary source of Federal tax law."), 4.10.7.2.1.1. ("The courts give great importance to the literal language of the Internal Revenue Code, but not every tax controversy can be resolved by the language in the Code. In cases where the literal language of the Code is ambiguous, the courts will consider the history of a particular code section, including committee reports and other legislative history, Treasury regulations and other IRS published guidance interpreting the code section, and the relationship of the particular code section to other code sections.", 4,10.7.2.3.4.1 ("The Service is bound by the regulations. The courts are not.") and 4.10.7.2.6.1 ("Rulings do not have the force and effect of Treasury Department Regulations, but they may be used as precedents."). The summary of this guidance is that the law is the Code and that regulations and rulings are less authoritative and binding than the law. *See, also,* IRM 32.2.2.2 ("[The purpose of Revenue Procedures] is to help Service personnel *apply the tax laws correctly and uniformly …"* (emphasis added.)

The language in IRC Section 412(d)(2), which was previously located at IRC Section 412(c)(8) and was retained but moved as part of the changes made by the Pension Protection Act of 2006,[5] was originally enacted as part of the Employee Retirement Income Security Act of 1974 ("ERISA").[6] Under ERISA, minimum funding standards were established for pension plans, including defined benefit pension plans. Those standards were codified in the Internal Revenue Code at Section 412 and under Title I of ERISA at Section 302.

The legislative history that accompanied ERISA indicated that IRC Section 412(c)(8) and ERISA Section 302 were the result of Congressional concern with retroactive amendments that reduced plan benefits.[7] IRS regulations[8] recognized the protective role IRC Section 412(c)(8) played in this regard and focused on the need for approval from the Secretary of Labor if a retroactive amendment resulted in a reduction in benefits.[9] In contrast, a retroactive amendment increasing benefits was not restricted under the statute or the regulation. As the preamble to the regulation specifically states:

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[2] See redacted review sheet of Cassandra Burns attached as Appendix "B."
[3] See IRS Notice 2004-59, § I. See also Rev. Proc. 94-42.
[4] 2007-2 C. B. 54.
[5] Pub. L. No. 109-280 (August 17, 2006).
[6] Pub. L. No. 93-406 (September 2, 1974).
[7] See Joint Explanatory Statement of the Committee of Conference, Pub. L. No. 93-406, at page 286.
[8] See, generally, Temp. Treas. Reg §11.412(c)-(7), Treas. Dec. 7758 (December 26, 1974).
[9] Reorganization Plan No. 4 of 1978, 1979-1 C.B. 480, transferred this function to the Secretary of the Treasury.

> Subsection (c)(8) provides that certain plan amendments adopted after the close of the plan year may be given retroactive effect. Under section 412(c)(8), a plan amendment adopted after the close of a plan year will be deemed to have been made on the first day of the plan year at the election of the plan administrator as long as the amendment does not reduce the accrued benefit of any participant determined as of the beginning of such plan year.[10]

The preamble then goes on to recite the more detailed rules and protections that must be satisfied under the law if a retroactive amendment is to reduce a participant's accrued benefit. The regulation itself simply paraphrases the statute.[11]

The enactment of the Pension Protection Act of 2006[12] ("PPA '06") put into the law a new set of funding rules and placed limits on plan amendments that increase benefits based on the funding status of the plan. It did not, however, eliminate the ability of plan administrators to give retroactive effect to plan amendments that increase benefits if the plan is fully funded. To the contrary, Congress demonstrated a clear intent to preserve this option by moving and re-codifying the provisions of IRC Section 412(c)(8) as IRC Section 412(d)(2). To suggest Congress intended in some way to change or otherwise limit prior law in this regard flies in the face of established precepts for statutory construction.

As has been noted, the Gray Book answer at issue cites as authority the procedural rules for "discretionary" amendments found in Revenue Procedure 2007-44.[13] Specifically, Section 5.05 of Revenue Procedure 2007-44 sets forth a general rule that mandates that a "discretionary" amendment must be adopted no later than the last day of the plan year to which it applies. Section 5.07 of the Procedure, however, provides exceptions to that general rule. Specifically, Section 5.07 notes that Section 5.05 does not apply "…where a statutory provision or guidance provides another specific deadline for the adoption of a particular type of interim amendment that is earlier or later than the deadlines under Section 5.05."[14]

It is noteworthy that Revenue Procedure 2007-44 acknowledged that there are exceptions to the general rule of Section 5.05.[15] However, Section 5.07 of Revenue Procedure 2007-44 distinguishes between the exceptions that apply to an "interim" plan amendment and those that apply to a "discretionary" plan amendment.[16] The language of this Section appears to attempt to preclude Congress from enacting any law that would permit an extended adoption deadline for a "discretionary' plan amendment. In particular, Section 5.07 (1) of the Revenue Procedure provides that a statutory provision, as enacted by Congress, can extend the adoption deadline for an "interim" amendment, but not for a "discretionary" amendment. Clearly, the IRS does not have the authority to limit Congress in this way.[17]

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[10] Treas. Dec. 7758, (December 26. 1974).
[11] See Temp Reg. §11.412(c)-7, Treas. Dec. 7758 (December 26, 1974).
[12] Pub. L. 109-280 (August 17, 2006).
[13] Although not specified in the Gray Book answer, §5.05 of Rev. Proc. 07-44 provides procedures for determining the deadline for an amendment with respect to any plan.
[14] Rev. Proc. 07-44, §5.07(2).
[15] Id. The predecessor procedure, Rev. Proc. 2005-66 did not include any exceptions. See §5.05.
[16] Id.
[17] Moreover, as defined, the exception of Section 5.07 would not permit an amendment contemplated by Regulation §1.401(a) (4) – 11(g) to be adopted after the end of a plan year since it does not relate to a"… change in a qualification requirement [that] includes a statutory change or a change in the requirements provided in regulations or other guidance published in the Internal Revenue Bulletin." See Rev. Proc. 07-44 §5.01

Revenue procedures are intended to provide statements of procedure or general instructional information.[18] As such, they are routinely amended, corrected or otherwise updated. Revenue Procedure 2007-44 is a prime example of this process in that it updated Revenue Procedure 2005-66 to add exceptions with regard to plan amendment deadlines. Unfortunately, the updated language in Section 5.07 of the procedure is incorrect as a matter of law in that it fails to recognize that Congress has the ultimate authority to write statutes that extend the deadline for adoption of a "discretionary" amendment. Congress has exercised that authority in IRC Section 412(d)(2). Revenue Procedure 2007-44 must be corrected to reflect that Congress, not the IRS, has the ultimate authority to determine when a plan amendment can be given retroactive effect. In addition, the IRS must follow the clear intent of Congress and recognize the legal effect of retroactive amendments adopted pursuant to IRC Section 412(d)(2).

ASPPA and ACOPA recommend that the IRS abrogate the position enunciated in the 2011 Gray Book and, to the extent necessary, amend Revenue Procedure 2007-44 and otherwise issue guidance that affirms the clear language of IRC Section 412(d)(2) and by doing so, recognize Congressional authority to extend the deadline for adoption of a "discretionary" amendment under this statutory exception.

II. Dialogue with Interested Parties

As discussed above in the text at footnote 2, our members have reported that plan sponsors who have recently submitted determination letter requests are being threatened with the issuance of an adverse letter and proposed disqualification on the basis of the position outlined in the 2011 Gray Book. Despite the cautionary language provided in the introductory statement of the Gray Book, it is being cited by some reviewing agents as the ruling position of the IRS with regard to determination letter requests.[19] Moreover, our members have been told that this position is coming directly from the Manager of Quality Assurance for Determination Letters, Mr. Andy Fedders.[20]

The position being taken by Mr. Fedders is particularly troubling to our membership, and the employee benefits community at large, because it comes without any dialogue by the IRS with interested parties. ASPPA and ACOPA reached out to the IRS and Treasury Department in our July 19, 2011, letter to express our concerns that the 2011 Gray Book answer was in conflict with the prior position of the Service and contrary to the statute as commonly understood by retirement actuaries, legal professionals and the employee benefits community.[21] Informal comments made by a Treasury official at the 2011 ASPPA Annual Conference acknowledged receipt of our letter and indicated that our concerns were being "evaluated." We raised the issue again during a June 13, 2013, meeting with IRS and Treasury personnel and were told once again that the issue was still "under consideration."

As we believed that a dialogue would occur with regard to the issues we raised, we were shocked to get reports from our members that plan sponsors who had adopted amendments in conformance with IRC Section 412(d)(2) were being threatened with adverse determination letters by IRS reviewers. Sponsors of these plans are being asked to enter into closing agreements with monetary sanctions to avoid disqualification. Equally shocking is the inconsistent application of this position as our members have

[18] See Internal Revenue Manual §32.2.2.4
[19] See Appendix "B".
[20] See text attached as Appendix "C" which was reported by an ASPPA/ACOPA member to have been provided by a determination letter reviewer as an email from Mr. Fedders in his role as Manager of Quality Assurance for Determination Letters.
[21] See for example, S. Tripodi, Vol. 2, *ERISA Outline Book* at page 3B.155 (2014 edition); G. Neff McGhie, III, *Defined Benefit Answer Book* §13.38 (5th edition, 2014 supplement). See also 2001 Gray Book, Question and Answer 2.

also informed us that some plan sponsors have received favorable determination letters in factual circumstances strikingly similar to those where disqualification has been threatened.

Needless to say, a great deal of trust and goodwill between the Service and the employee benefits community has been squandered by the manner in which this issue has been handled. At the very least, ASPPA and ACOPA would have expected a face-to-face meeting at which the underlying basis for the Service's position could be explained before plan sponsors would be "ambushed" in the determination letter review process. Our members are now being exposed to threats of malpractice from their clients based on a ruling policy adopted without the dialogue and trust that is the hallmark of ASPPA's and ACOPA's relationship with the Service.

ASPPA and ACOPA recommend that the Service immediately put in abeyance any determination letter application where disqualification is being threatened in regard to the adoption of an IRC Section 412(d)(2) amendment. We respectfully request an immediate face-to-face meeting to discuss the underlying issue and the opportunity to explain our concerns. We have always approached issues, such as this, in good faith and with transparency. We ask the Service to do the same by working with the employee benefits community to reach a fair resolution of this matter.

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These comments were primarily prepared by Craig Hoffman, General Counsel and Director of Regulatory Affairs for ASPPA. Please contact him at (703) 516-9300 with any questions or comments. Thank you for your time and consideration.

Sincerely,

/s/
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Executive Director/CEO ASPPA

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

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

/s/
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President ACOPA

cc:

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