



March 23, 2020

Carol Weiser
Benefits Tax Counsel
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Preston Rutledge
Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Victoria Judson
Associate Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

RE: Request for Relief and Guidance Because of COVID-19

Dear Ms. Weiser, Assistant Secretary Rutledge, and Ms. Judson:

On behalf of the SPARK Institute, we are writing to provide input on guidance needed in light of the significant disruption caused by COVID-19. We understand and appreciate that all federal agencies are working hard to help Americans deal with the crisis, and we know that the Department of the Treasury, the Employee Benefits Security Administration (“EBSA”) and the Internal Revenue Service (“IRS”) are working very hard to help. Our goal in this letter is to provide our input on what we believe are the pressing deadlines and issues facing defined contribution plans and IRAs.

Confirmation that Emergency Declaration is Treated as Disaster Declaration

The existence of a “federally declared disaster” under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, P.L. 100-707 (the Stafford Act) triggers a series of automatic delays in deadlines that apply to retirement and other benefit plans. Pursuant to Code¹ section 7508A, Revenue Procedure 2018-58 contains a list of time-sensitive acts, the performance of which are automatically postponed in the case of a federally declared disaster. Further, the Secretary of the Treasury has the authority to grant discretionary extensions through the IRS press release system for disaster relief. As explained below, the existence of a federal declared disaster is also relevant to the right to a hardship distribution. ***The most impactful action that Treasury can take quickly is to confirm that we have a nationwide disaster for purposes of all the deadlines in Revenue Procedure 2018-58.***

¹ Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended.

In the case of a federally declared disaster EBSA typically provides parallel relief and the Pension Benefit Guaranty Corporation (PBGC) automatically grants relief upon the IRS announcing discretionary extensions through the IRS press release system. The reason for uncertainty is because President Trump's declaration of a state of emergency references section 501 of the Stafford Act, but a different section of the Stafford Act has generally been invoked for natural disasters such as hurricanes.

President Trump's direction to Secretary Mnuchin stated: "I am also instructing Secretary Mnuchin to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant to 26 U.S.C. 7508A(a)." We further note that Notice 2020-17, which provides relief under section 7508A with respect to tax payments otherwise due April 15, 2020, appears to assume that there has been a "federally declared disaster" within the meaning of Code section 165(i)(2)(A). Otherwise the statutory authority for the Notice does not exist. Once that occurs, Code sections 7508A(b) and 7508A(d)(4) provides for both automatic and discretionary extensions of various time-sensitive acts related to pensions, and Revenue Procedure 2018-58 contains an extensive list.

Key Deadlines

As you surely know, SPARK members face the same challenges all American businesses face, and this is compounded by the fact that many time-sensitive acts require data and action from employers, plan administrators, and participants. In addition, many SPARK members rely on print vendors, who may not be able to get to the office and whose services cannot be performed from home.

Revenue Procedure 2018-58's and Code Section 7508A(d)'s list of time-sensitive acts include many deadlines, including (not a complete list):

- The requirement to repay loans through level amortization. SPARK members are expecting that hundreds of thousands of participants will be unable to repay loans and will default, because payroll cannot be timely processed, because participants will experience significant cuts in hours and wages, or because participants will be furloughed if the employer shuts down. We will need widespread relief for loan repayments; we would suggest for example that the deadline to repay a loan without incurring a deemed distribution is extended by one year.
- The 60-day period for a rollover.
- The requirement to make a required minimum distribution ("RMD"). For example, for individuals who attained age 70 ½ in 2019, the first RMD is due by April 1 of the following year.
- The requirement to distribute excess deferrals by April 15 of the following year.
- The requirements to distribute permissible withdrawals from an eligible automatic contribution arrangement within 90 days.

- The deadline to make an IRA contribution, which is the date prescribed for filing a return for that year, without regard to extensions.²
- The requirement for IRA trustees and issuers to furnish a Form 5498. Note that if the deadline for 2019 IRA contributions is extended, then a parallel extension of Form 5498 will be needed. In addition, IRAs that have unrelated business income tax must file a Form 990-T, and pay taxes, by April 15; we expect Form K-1s to be delayed this year.
- Distributions to satisfy the ADP and ACP tests must be made no later than two and a half months after the end of the year. This is particularly important because the deadline occurred on Monday, March 16, when most businesses were in the middle of making decisions to shut down. We understand SPARK members had significant difficulty completing these distributions, including with respect to HCEs new to the plan that may have had insufficient assets in their account to process the distribution because of the sudden market downturn.
- The requirement to file a Form 5500. This is an immediate problem for non-calendar year plans.
- The deadline for self-correction under EPCRS.

There are other looming deadlines that SPARK members have pointed out to us that are in need of separate relief and not addressed in the list in Revenue Procedure 2018-58:

- **403(b) amendments.** The remedial amendment period for 403(b) plans ends March 30, 2020. There are still many employers who have not adopted a restatement of their 403(b) plan but were planning to do so by the end of March.
- **Defined benefit plan restatements.** For pre-approved plans, the deadline to adopt the restatement is April 30, 2020. This is also the deadline to file a Form 5307 requesting a determination letter. Besides completing the filing and getting the necessary signatures, we would note that it will be challenging to provide the Notice to Interested Parties, which is typically posted where other employee notices are posted (i.e., in a now-empty break room).
- **Notice 2020-06.** The IRS notice providing relief for a financial institution that sent an incorrect RMD statement to an IRA owner who will attain age 70½ in 2020 is conditioned on further action by April 15, 2020.
- **EPCRS deadlines.** Various deadlines apply under EPCRS, beyond the self-correction deadline described in Revenue Procedure 2018-58. For example, there is a 45-day notice to participants when using the reduced QNEC safe harbor correction methods. In addition, there are various procedural deadlines, such as deadlines to sign and return compliance statements.

Because of the variety of deadlines described above, we do not have a single recommendation for the length of the delay. And the amount of needed delay depends in large part on when

² Notice 2020-18 states that the due date for individual returns are *automatically* postponed until July 15, 2020. The IRA contribution deadline is based on the due date for filing the return for the year “not including extensions thereof.” We are hopeful this deadline will be extended anyway, but at a minimum we need clarification that the extension of the filing deadline in Notice 2020-18 allows for an extension of the IRA contribution deadline.

businesses nationwide are able to resume normal operations. It seems very likely that we may not return to ordinary operations for months. Where there is not a compelling tax reason to insist on an earlier date, we recommend delaying deadlines to the end of 2020, or at least 180 days.

Distributions (Including Hardship and Unforeseeable Emergency)

Need for general relief. SPARK members report that their call centers are being inundated with requests for hardship distribution and unforeseeable emergency withdrawal requests. There are a number of technical questions raised by the COVID-19 situation, noted below. But SPARK members believe that, at this point, unless legislation is enacted very soon that provides distribution relief,³ it would be most effective for Treasury and IRS to simply announce that plans can make distributions from section 401(a), 401(k), 403(b), and 457(b) plans under the respective plan's hardship or unforeseeable emergency withdrawal provisions without the need for documentation or verification. While no one wants to see individuals take distributions from the plan prior to retirement, especially considering recent drops in the market, the fact is there is mounting unemployment and lost wages. It is critical that we allow access to those in need, without undue burden, as we have done in the past for natural disasters.⁴ Prior relief has made clear that: (a) plans are eligible for extended deadlines to adopt loan and hardship distribution amendments; (b) distributions can be taken to satisfy needs arising from circumstances that are not described in the safe harbor rules or the plan's terms; and (c) plans are temporarily able to avoid any substantiation normally part of the plan's procedures, although as soon as practicable, plan administrators must make a reasonable attempt to assemble any foregone documents.

Prior relief often focused solely on 401(k) and 403(b) plans, where the standard for in-service distribution is based on "hardship." We would urge you to keep in mind section 457(b) plans, which allow for withdrawals on account of an unforeseeable emergency. Unfortunately, because the standards in these plans focus on facts and circumstances, and because many SPARK members may have difficulty contacting plan sponsors to approve that the facts support an unforeseeable emergency withdrawal, we urge you to include unforeseeable emergency withdrawals in any relief.

As we are finalizing this letter, we note that legislation is rapidly being negotiated that will allow up to \$100,000 to be distributed from a plan without imposition of the 10% early withdrawal penalty and notwithstanding the restrictions that otherwise apply to in-service distributions. If this legislation does not pass, however, we recommend Treasury promulgate an interim final rule that provides a new safe harbor hardship distribution that allows for hardship

³ Congress is actively considered legislation that would allow for a distribution of up to \$100,000 from plans without the 10% penalty and without regard to otherwise applicable in-service distribution restrictions. If this occurs, our ask in these paragraphs should be largely moot. We will follow up with any guidance that might be needed under the legislation.

⁴ See, for example, Announcement 2017-11, which provides a qualified employer plan will not be treated as failing to satisfy any requirement under the Code or regulations merely because the plan makes a loan or a hardship distribution for a need arising from a natural disaster.

distributions for those affected by COVID-19 and is as easy as possible to document and administer.

Safe harbor event. Separate from our request for broad distribution relief, there are a few technical issues needing guidance. As you know, there is a new safe harbor hardship distribution event for “expenses and losses (including loss of income) incurred by the Participant on account of a disaster declared by the Federal Emergency Management Agency (FEMA) under the [Stafford Act], provided that the employee’s principal residence or principal place of employment at the time of the disaster was located in an area designated by FEMA for individual assistance with respect to the disaster.” This raises a number of issues.

First, pursuant to the point raised at the beginning, we need confirmation that there has been a FEMA disaster declaration. *Second*, even if there is a disaster declaration, the rules require that “the employee’s principal residence or principal place of employment at the time of the disaster was located in an area designated by FEMA for individual assistance.” Since the entire country, or nearly so, is affected by the COVID-19 outbreak, but the ordinary “individual relief” is not likely contemplated, it is unclear whether this standard is satisfied. Some individual states have been declared a disaster, but not all. Absent guidance, it is not clear whether and how a plan could assure compliance with this condition. *Third*, we would like guidance as to when the COVID-19 outbreak has created “expenses and losses (including loss of income).” This is a difficult standard to verify or substantiate quickly. There are likely millions of Americans whose income is affected, although for some it might be only temporarily. *Finally*, if Treasury and IRS do not believe that this safe harbor hardship event has been triggered, it is critical you let us know as soon as possible so that plans and participants can explore other options. (Note: While these issues may become mostly moot if Congress provides a broad distribution right to plans, a plan might decide not to add that new distribution right, and may still need to make decisions based on its current hardship rules.)

Standards for “severance from employment” and “leave of absence” during furlough. Many plans restrict distributions, absent hardship or unforeseeable emergency, until there is a “severance from employment” or similar termination of employment. Similarly, the RMD rules are delayed until a participant “retires.” We expect that, for the first time, many employers will place their employees on “furlough” or similar temporary leave of absence. By this we mean that the employee has not been terminated from employment; rather the employee is not being paid because the employer’s place of business is shut down but will be called back to work (and has the right to come to work) if and when there is work available. Taft-Hartley plan documents may address these situations but non-union plan documents typically do not. It would be helpful to have guidance on whether a furlough is a severance from employment.

Separately, most plans have procedures that allow a delay in loan repayments during an unpaid leave of absence. It is unclear whether the “furloughs” that are affecting employees would allow for a delay in loan repayments. In addition, some employers are actually paying employees during the furlough, at least for now. It would be helpful to know whether such “paid furloughs” would allow for a delay in repayment of loans under the plan’s leave of absence rules.

Contribution Delays

Delays in forwarding contributions. The payroll departments of many employers have been or will be sent home, either because of actual illness or the need to “shelter in place” to avoid contact. We expect that there will be a delay in forwarding contributions to the plan’s trust. EBSA rules, appropriately, provide strict timelines for forwarding of employee contributions. But in the wake of major disasters, EBSA has released guidance stating that it will not seek to enforce the provisions of Title I with respect to a temporary delay in the forwarding of such contributions to a plan to the extent that affected employers, and service providers, act reasonably, prudently and in the interest of employees to comply as soon as practical under the circumstances.⁵ We would ask EBSA to provide similar relief here.

Employer contributions. SPARK members noted a number of issues that will arise as thousands of business are put into serious economic turmoil. The leisure, restaurant, and travel industries, to name just a few, will be decimated financially for much of 2020. Employers are likely to need to delay their 2019 contributions, because those are tied to the filing of the 2019 return and, in addition to cash flow problems, there simply may not be individuals able to get into the office to forward the contribution.

Small employers often adopt safe harbor plan designs or SIMPLE IRAs which require employer contributions. In some cases, the law already provides a framework to stop employer contributions, but these are cumbersome and do not always apply.⁶ For example, the current rules require certain notices that may be difficult to send to employees, and the reduction in contributions cannot go into effect for at least 30 days after the notice is provided. The shutdown of many businesses was too sudden to have anticipated the need to provide this notice. We recommend (a) that the 30-day notice period be loosened to “within a reasonable time” or “as soon as practicable” and (b) that the rules for timing of safe harbor contributions be relaxed to the general deadlines for employer contributions (i.e. the last day of the tax filing deadline for the year).

Finally, we believe Treasury and IRS should consider providing *anti-cutback relief* for 2020 defined contribution employer contributions that may have accrued but not deposited to the plan. We appreciate this is a drastic step but it may be necessary for some businesses to stay afloat, especially as the economic impact of COVID-19 becomes clear.

Other Issues in Need of Guidance and Relief

ERISA required notices. While we typically do not request relief for the deadlines for participant notices, this is not a typical situation. We recommend EBSA consider providing

⁵ See for example relief provided in connection with Hurricane Harvey (August 30, 2017). <https://www.dol.gov/newsroom/releases/ebsa/ebsa20170830>. This relief also covered Title I issues associated with verification processes for loans and hardship, loan repayments, blackout notices, and group health plan compliance.

⁶ See Treas. Reg. § 1.401(k)-3(g).

enforcement relief for participant notices such as the benefit statement due for the first quarter of 2020.

Section 409A plans. Many SPARK members also administer nonqualified deferred compensation (“NQDC”) plans subject to section 409A. We raise two issues in this regard. First, per our comment earlier regarding section 457(b) plan unforeseeable emergency withdrawals, guidance with respect to such plans should also apply to section 409A plans that allow unforeseeable emergency withdrawals.

Second, NQDC plans are subject to very strict timing rules which are normally intended to prevent abuse but which do not allow for unprecedented emergencies. We urge consideration of providing relief from those strict requirements, where the employer or employee can demonstrate or represent that the error is related to COVID-19.⁷ While we appreciate that many participants in NQDC plans are highly compensated, and would agree that this may not be the highest priority, we still think it is appropriate to provide relief from the “foot faults” that may occur because of unavoidable problems in administration. The penalties for inadvertent violations of section 409A are, as you know, draconian.

Spousal consent requirements. In prior disaster relief, no relief has been granted from the requirement to obtain spousal consent for a distribution, where required. We appreciate the need to preserve that right. We would point out, however, that because of social distancing, it may not be possible for spousal consent to be witnessed in front of a plan representative or notary. We urge you to consider guidance allowing a plan to provide a distribution with a spousal signature if the spouse verifies verbally over the phone that he/she has consented, or allowing the spouse to appear via teleconferencing or other electronic conferencing technologies. That said, we recognize that some of these suggestions could increase the risk of fraud. We suggest you consult with participant groups for their views on this issue.

This is part of a broader problem we may see because of the large number of businesses that are closed and the large number of individuals who are unable to leave their home. For example, because of the “Know Your Customer” rules, individuals are sometimes required to provide a copy of their identification. It may be necessary to provide relief for individuals who are under quarantine and do not have scanning capabilities.

⁷ With respect to participants in NQDC plans who have a need to access deferred compensation that is subject to section 409A where that need is a result of the current pandemic, Treasury and IRS might consider, for example, permitting cancellation of deferral elections for 2020 compensation without penalty provided the individual is able to demonstrate or represent that the financial need is due to events related to COVID-19. Further, with respect to distribution elections, to the extent an inability to process distribution payments under the terms of a NQDC plan and section 409A was caused by events related to COVID-19, Treasury and IRS may consider, for example, treatment of distribution payments with a designated payment during 2019 that would have been treated as timely made if paid by March 15, 2020 but are paid after March 15, 2020 and not later than December 31, 2020 as having been made timely. In addition, to the extent the designated payment date for a distribution is a date in 2020, payment earlier than 30 days before the designated payment date should be treated as timely made and not treated as an impermissible acceleration of payment with respect to an individual who is able to demonstrate or represent that a financial need exists due to events related to COVID-19.

March 23, 2020

Electronic disclosure. The SPARK Institute has supported the use of electronic technologies for years, and we hope to see the final e-delivery regulations from EBSA soon. This would have been a wonderful time to have these new rules in place, because email, smartphone apps and the Web, unlike physical mail, is instantaneous and cannot transmit COVID-19. Separate from urging the finalization of those regulations, we suggest temporary relief allowing notices to be provided electronically, for example by email if the plan's records reflect an email address that the plan administrator reasonably believes is accessible to the participant.

Pre-approved plan cycle for defined contribution plans. We had expected the IRS to soon release opinion letters for the latest restatement cycle, anticipated for June 2020. This starts the period to obtain restatements from the hundreds of thousands of defined contribution plans that use a pre-approved plan, the vast majority of which are small employers. We would appreciate an update on the timing of this process and, we expect, additional time is going to be needed as businesses recover from the economic effects of COVID-19 in 2020.

* * * *

Thank you for all of your efforts in this trying time. If you feel a call would be helpful, please contact the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com; email is best during this period) with any questions.

Sincerely,



Tim Rouse
Executive Director

cc: Jeanne Klinefelter Wilson, Deputy Assistant Secretary, EBSA, Department of Labor
Joe Canary, Director, ORI, EBSA, Department of Labor
Stephen Tackney, Deputy Associate Chief Counsel, Internal Revenue Service