IRS QUESTIONS AND ANSWERS - DEFINED CONTRIBUTION PLANS - 2015

The Q&A committee solicits, screens and submits questions from ASPPA members to various government agency panelists as part of the ASPPA Annual Conference and other ASPPA conferences. Members of the Q&A subcommittee generally meet with the government agency panelists to screen and preview the submitted questions.

The answers reflect the ASPPA representatives' interpretation of the IRS officials' responses, and are not direct quotes. They are intended to reflect as accurately as possible the statements made by the government representatives.

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2015 Q#	Question	Proposed Answer	Government Panel Response
1	A plan limits deferrals to 10% of base pay and matches 50 cents on the dollar. If base pay does not satisfy IRC §414(s) for a year, does this create different match rates for each employee that require Benefits, Rights and Features (BRF) testing under Treas. Reg. §1.401(a)(4)-4? Another example is a plan that matches 50 cents on the dollar on the first 6% contributed but limits deferrals and the maximum match on base pay. Base pay fails §414(s) for a year. Does this create different rates of matching contributions subject to BRF testing? Consider a two life case: Name. Total Pay. Base pay. Inclusion pct. Owner. 500,000. 300,000. 100% Staff. 50,000. 40,000. 80% For the staff, the maximum match is 3% of base pay but only 2.4% of §415 pay For the HCES the max match is 3% of both base and §415 pay Treas. Reg. §1.401(a)(4)-4 includes the following in the definition of Other Rights and Features for BRF testing: "Examples. Other rights and features include, but are not limited to— (D) The right to make each rate of elective contributions described in Treas. Reg. 1.401(k)–6 (determining the rate based on the plan's definition of the compensation out of which the elective contributions are made (regardless of whether that definition satisfies section 414(s)), but also treating different rates as existing if they are based on definitions of compensation or other requirements or formulas that are not substantially the same); ... (G) The right to each rate of allocation of matching contributions described in §1.401(m)–1(a)(2) (determining the rate using the amount of matching, elective, and after-tax employee contributions determined after any corrections under §§1.401(k)–2(b)(1)(i), 1.401(m)–2(b)(1)(i), but also treating different rates as existing if they are based on definitions of compensation or other requirements or formulas that are not substantially the same);" The underlined text does not appear in the section relating to the rate of matching contributions.	No. As long as all employees may defer based on the same (or substantially similar) definition of pay and the same match formula applies to all employees based on the same definition of pay used for deferrals, separate rates of match are not created. If, on the other hand, the deferral rates were based on base pay, but one could get a dollar-for-dollar match up to 3% of §415 comp, so that match is based on a different definition of compensation than the deferrals, then it is possible that different rates of match are available. For example, suppose you have 1 HCE earning $200,000 base pay who has $240,000 of §415 comp, and you have 1 NHC earning $25,000 base pay that has $26,000 of 415 comp. If they both defer 5% of base pay, the HCE defers $10,000 and the NHCE defers $1,250. The match for the HCE is $7,200 (3% x $240,000), whereas the match for the NHCE is $780. If these were the only two employees, we would have a discriminatory rate of match, because the HCE has received a rate of $7,200/$10,000, or 72% match, but the NHCE has received a rate of $780/$1,250, or 62.4%. If there are other employees, the plan would have to calculate the rates of match and determine whether the current availability test is met based on the rates of match available at the various rates of deferral. If base pay is used for both purposes, then the HCE and NHCE get the same rate of match if they defer at the same percentage of base pay, no matter what the deferral rate. The ACP test will take care of any discrimination issues regarding the amount of match allocated as a percentage of §414(s) compensation.	The Panel agrees with the proposed answer.
2	Client sponsors a defined benefit pension plan (DB) and a 401(k) plan under a offset arrangement (the profit sharing component of the 401(k) plan is used for the offset). Due to the offset, the owner is the only participant who ends up with an accrued benefit in the DB. The DB provides for a large insured death benefit. There are no life insurance provisions in the 401(k) plan. Both plans are aggregated for nondiscrimination testing for benefits and contributions, etc.. Due to the fact that the 401(k) plan has no life insurance provisions, is there a discrimination problem?	As the plans are aggregated for nondiscrimination testing, they must be aggregated for BRFs and life insurance coverage is a BRF (see Treas. Reg. Section §1.401(a)(4)-4(e)(2), definition of an ancillary benefit includes ancillary life insurance benefits and preretirement death benefits under a defined benefit plan). It is not clear how one would give comparable benefits in the DC plan, but it's a problem not to.	To be discussed from the podium.
3	A safe harbor 401(k) plan uses the top-heavy exemption of IRC §416(g)(4)(H) (consists solely of deferrals and ADP test safe harbor contributions). The employer must make a QNEC to the account of one non-key employee to correct for a missed deferral opportunity. Does this QNEC contribution mean that the employer is not able to use the top-heavy exemption for the plan year?	The employer is still able to use the top-heavy exemption. The corrective QNEC is characterized as a deferral and is not an employer contribution for purposes of determining whether the plan satisfies the top-heavy exemption. Since the contributions to the plan consist solely of employee deferrals and safe harbor contributions, the exemption is available.	To be discussed from the podium.
4	If a qualified plan is offering Qualified Longevity Annuity Contracts (QLACs) must the QLACs be based on a non-sex-distinct mortality table?	In July, 2014, the IRS released guidance on how QLACs are treated for RMD purposes. Treas. Reg. §1.401(a)(9)-6. The regulation is silent regarding use of unisex or sex-distinct mortality tables. However, mortality tables used for other plan purposes, §415 limitations or present value calculation of survivor benefits (§417)(e)(3)), use a blended table because of concerns about employment discrimination. See Rev. Rul. 2001-62 and Rev. Rul. 2007-67. Therefore, we believe that a sex-neutral table is required.	In a qualified plan, it is a problem to use a sex-based table. (It would be okay in an IRA, however.)

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5	Can an Eligible Automatic Contribution Arrangement be terminated mid-year (can it even be amended mid-year)? If so, what is the consequence to the plan in relation to permissive withdrawal rights and the 6-month period for making corrective distributions for a failed ADP/ACP test without being subject to a 10% excise tax?	For deferrals made during the time the plan has an Eligible Automatic Contribution Arrangement, withdrawals would be permissible. If the plan is terminated mid-year the 6 month period for correction is available because the plan satisfied the EACA requirements for the full plan year. If the plan is not terminated, but the EACA is terminated, the 6-month correction period would not be available for the plan year that the EACA was terminated.	To be discussed from the podium.
6	Must a plan that defines compensation as W-2 income apply a deferral election to non-cash, fringe benefit compensation, thereby requiring employers to withhold and contribute additional cash compensation? The failure to do so results in an elective deferral failure. Please explain the rationale for applying a cash-or-deferred election to non-cash compensation.	The issue revolves around the interpretation of the deferral election made by the participant. It would be best if the plan and the deferral election form exclude, for deferral purposes, non-cash compensation and other cash items that present problems (such as cash tips that are not pooled). Section 401(k)(2)(A) defines a cash or deferral arrangement as a plan under which a covered employee may elect to have the employer make payments as contributions to a trust under the plan on behalf of the employee OR to the employee directly in cash. Ultimately, regardless of the plan's definition of compensation or the actual deferral election, because there is no ability to make a deferral election on taxable fringe benefits, a percentage election has to, by definition, apply only to compensation that is deferrable. If it's not deferrable, it is not in the percentage calculation.	The regulations clearly define a CODA as an election between cash and deferring. If the deferral election is x% of W-2 compensation, that's what should be deferred, even if it means that the deferral represents a different percentage of cash compensation. It makes sense to redefine compensation or to modify the deferral election form if this is not the desired outcome.
7	A plan document provides that, for allocation purposes, each participant in his/her own group. There is one participant who will be receiving $0 contribution. Does this preclude the plan from using the average benefits test to pass §410(b) coverage (we know it doesn't preclude the use of that test for general nondiscrimination testing)? The issue is that excluding someone by name is an unreasonable classification for purposes of the average benefits test (Treas. Reg. §1.401(b)-4(b)).	It's a facts and circumstances determination. If in a single year a single participant fails to receive a contribution, it is not considered to be an exclusion of the individual by name and, therefore, it is not an unreasonable classification. If, however, a participant receives a zero allocation consistently for a period of years, the plan's allocation procedures may be considered a de-facto exclusion by name, which is an unreasonable classification for purposes of the §410(b) average benefits test. The plan would be forced to satisfy IRC §410(b) by meeting the ratio percentage test.	To be discussed from podium.
8	A plan provides that required minimum distributions (RMDs) when a participant dies before distributions have begun will be made according to the life expectancy rule if there is a non-spouse designated beneficiary. The plan does not find out about a participant's death (it was a former employee who did not elect a distribution while alive) until after the required beginning date (i.e., the 12/31 of the year following the year of death). Under EPCRS, procedures must be in place to prevent the error from occurring again. How does a plan address this when knowledge of death is not received timely?	It's not a plan issue. It's a participant penalty. The procedure in place should be that the plan sponsor responds within an appropriate timeframe once knowledge of the participant death has been received to implement the RMDs. The plan sponsor should also have proof that the benefit statements and appropriate notices have been mailed to the last known address of the participant.	Noncompliance with §401(a)(9) is a qualification failure for the Plan, (especially because its written terms will not have been followed in operation), and also subjects the recipient to a 50% excise tax under IRC §4974 on the amount not distributed as required. (SCP might be available, if it is established that the failure is isolated, immaterial, insignificant, etc., and the employer has procedures in place to prevent recurrence.) To be discussed further from the podium.
9	Is it a permissible cutback of benefits under IRC §411(d)(6) if an amendment is made to an existing plan to add mandatory distributions (regardless of the amount) once a benefit is no longer immediately distributable (i.e., after the later of NRA or age 62)?	Yes. It is a permissible cutback of benefits to amend a plan to add this mandatory distribution provision. Treas. Reg. §1.411(d)-4 A-2(b)(2)(iv) provides an exception to the anti-cutback rules for mandatory (i.e., involuntary) distributions. The first sentence of this section states: "A plan may be amended to provide for the involuntary distribution of an employee's benefit to the extent such involuntary distribution is permitted under Sections 411(a)(11) and 417(e)." Although IRC §411(a)(11) and Treas. Reg. §1.411(a)-11(c) generally provide that, if the distribution exceeds $5,000, then participant consent is required, Treas. Reg. §1.411(a)-11(c)(4) provides that, once the benefit is no longer immediately distributable, the benefit can be paid without consent. The regulation defines a benefit that is immediately distributable to be a benefit that is payable prior to the later of NRA or age 62.	The Panel agrees with the proposed answer.

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10	Revenue Procedure 2013-12 allows failures in SIMPLE-IRA plans to be self-corrected, but only for "insignificant" violations. Suppose a relatively small business intends to terminate a SIMPLE-IRA, but, due to their misunderstanding of the requirements, they did not give appropriate advance notice to the employees for 2014, although they did notify the custodian that they were terminating the plan for 2014. When this error is discovered late in 2014, they realize this must be corrected, and that the correction will involve the normal 50% of the missed deferral opportunity, plus the full 3% match, for a total of 4.5% plus earnings for ALL eligible participants, based upon entire 2014 salaries. In spite of the fact that this involves all participants, it is a one-time occurrence. Can this reasonably be considered to be an "insignificant" violation eligible for self-correction?	The initial question that must be asked is: what is the potential penalty for not having notified the employees of the termination of the SIMPLE-IRA? The employer has not withheld any contributions from the employee payroll (as if the termination was validly done). No tax deductions have been taken by the employer or the employees. No contributions have been made to the IRAs. If the Service was to "disqualify" the SIMPLE-IRA, what would it actually do? Prior years were correctly administered. The IRAs themselves do not appear to be at risk. No current deductions have been made which could be disallowed. No excess contributions have been made which could endanger the IRAs. This may be a situation where the employer simply notifies the employees as soon as it realizes that it failed to properly notify them, and no further action is necessary since there are no penalties that could be applied by the Service.	The Panel partially disagrees with the proposed response. Although the IRAs of the participants might not be "at risk," a SIMPLE-IRA plan may not be terminated before the start of the next year. In order to terminate a SIMPLE-IRA plan, an employer must notify employees within a reasonable time before November 2, and notify the SIMPLE-IRA plan's financial institution and payroll provider that SIMPLE-IRA contributions will not be made for the next and future years. Failure to provide the employee notification will subject the employer to a penalty under IRC §6693(c). In addition to the penalty, the written terms of the SIMPLE-IRA will not have been followed. This can be resolved under EPCRS. To be discussed further from the podium.
11	Distributions are permitted from the a profit sharing (PS) plan after the attainment of a stated age. How young can that stated age be (e.g., could we use age 21)? Of course, restricted money, such as salary deferrals, can't be lower than age 59½.	Treas. Reg. §1.401-1(b)(1)(ii) provides that: "A profit-sharing plan is a plan established and maintained by an employer to provide for the participation in his profits by his employees or their beneficiaries. The plan must provide a definite predetermined formula for allocating the contributions made to the plan among the participants and for distributing the funds accumulated under the plan after a fixed number of years, the attainment of a stated age, or upon the prior occurrence of some event such as layoff, illness, disability, retirement, death, or severance of employment." The Service has ruled that a "fixed number of years" means at least 2 years (Rev. Rul. 71-295, 1971-2 C.B. 184), and it is permissible to allow distributions to be made from a PS plan after as little as two years. Thus, unlike a pension plan, there is no minimum age restriction, so long as the plan provides for a specific period of years or age. That means the plan may allow the employee to withdraw funds that have accumulated for a specified period of at least two years. The stated age for an in-service distribution may be any age specified by the plan, including an age that is earlier than normal retirement age, regardless of whether the employee has terminated employment. Therefore, using age 21 as the 'stated age' is consistent with the regulations.	To be discussed from podium.
12	Now that the IRS has extended to "practices and procedures" relief for repeated §415(c) corrections to cover nonelective contributions made up to 9½ months after the close of the year, there is a greater chance that, in an ADP-tested plan, the excess annual addition attributable to deferrals may not be known until after the 2½ deadline for correcting excess contributions without an excise tax. Suppose an employer makes a profit sharing contribution on August 1, 2015, for the 2014 plan year. The 2014 return is on extension until September 15, 2015. On March 10, 2015, the plan refunded elective deferrals to correct an ADP testing failure. The profit sharing allocation for 2 HCEs, when added to their deferrals for the plan year, causes the following excess annual additions: HCE #1: $4,000 excess annual addition HCE #2: $2,200 excess annual addition On March 10, HCE #1 and HCE #2 each received a refund of $3,000 of excess contributions (adjusted for earnings) How should the plan handle this?	The amount distributed to HCE#1 in March is characterized as part of the excess annual additions correction generated by the profit sharing contribution made in August. Because HCE's #1's total excess annual additions is $4,000, but he received a distribution of $3000 in March, an additional $1,000 must be distributed to HCE#1. HCE #1 receives ONE Form 1099 for 2015 showing $4,000 Code E (for the EPCRS correction). Because HCE#2's total excess annual additions are $2,200, and HCE#2 received $3,000 in March, there is no additional distribution to HCE#2 as a result of the profit sharing contribution. Therefore, $2,200 of the $3,000 distributed in March is characterized as an excess annual addition correction. The remaining $800 is treated as the ADP correction amount. Because HCE #2's March distribution is bifurcated into two different types of distribution, HCE#2 receives TWO Forms 1099 for 2015, one showing $2,200 Code E (for the EPCRS correction) and $800 Code 8 (for the ADP correction). No retesting of the ADP test is needed, even though a different result would have occurred had the excess annual addition portion of HCE#1's and HCE #2's deferrals been disregarded from the ADP test.	SCP can be used to correct certain recurring excess annual additions, and under Rev. Proc. 2015-28, a plan that provides for elective deferrals and nonelective employer contributions that are not matching contributions can correct by distributing them within 9½ months after the end of the plan year. Assuming this is a calendar year plan, in order to correct under SCP, over and above the initial $3,000 for HCE excess deferrals, HCE #1 should receive an additional $1,000 distribution of excess §415(c) contributions, denoted on Form 1099R with Code "E" (for EPCRS corrective distribution). HCE#2's distribution of a $3,000 excess deferral will resolve the §415(c) issue.

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13	A recent article in the IRS *Employee Plan News* stated that a Plan Sponsor must retain "an executed plan loan note" in relation to a participant loan. Most organizations have gone to the paperless loan process where the participant requests the loan online, receives an amortization schedule, a loan confirmation, etc. and the endorsement and/or negotiation of the loan check constitutes agreement to the terms of the loan. If this 'agreement' is clearly outlined to the participant, is the maintenance of the cancelled check sufficient documentation of the "executed plan note"?	"An executed plan note" would include any electronic version of the plan note that was properly applied for and processed. See Treas. Reg. §1.72(p)-1; Q&A-3(b). Copies of these documents must be available to the plan and provided upon request for any IRS review of the necessary documentation.	The Panel agrees with the proposed answer. We also note the article being referred to specifically provides: "A plan sponsor should retain these records, in paper or electronic format …" [emphasis added], and then goes on to list the other types of evidentiary materials that should also be retained to substantiate the existence of a loan that meets the exception-from-distribution rules of IRC §72(p).
14	If, by the time an error is discovered that otherwise qualifies for correction under Appendix A, .05(8) or .05(9) as set forth in Rev. Proc. 2015-28, the affected employee has terminated, may the correction method still be used, even though the plan cannot actually start correct deferrals?	Yes, the correction may still be used.	The Panel agrees with the proposed answer. Rev. Proc. 2015-28 added Appendix A, §.05(9) to supplement existing EPCRS correction requirements/methodology, and can be used to correct missed deferrals for an employee who terminates, as long as correction occurs within the stipulated time frame. If these time frames or other requirements are not met, the plan sponsor may use the other safe harbor correction methods available under Rev. Proc. 2013-12, Appendix A, §.05, or Appendix B.
15	If correct deferrals are started in accordance with the applicable correction method under Appendix A, .05(8) or .05(9) as set forth in Rev. Proc. 2015-28, and the required notice is provided to the employee, will the Plan Sponsor be allowed to finish the correction (i.e., make the corrective contribution for the missed matching contribution), even if the IRS commences an audit before the contribution is made? In some cases there might be a delay of a year or more between correcting the deferral error and actually funding the corrective match.	Yes, the correction may still be used.	The Panel agrees with the proposed answer. Although plans generally cannot avail themselves of EPCRS relief if they are "under examination," if the employer can establish that it has initiated an EPCRS self-correction activity prior to notification of examination by the IRS, that correction can continue.
16	Treas. Reg. §1.414(s)-1(c)(3) provides: (3) Safe harbor alternative definition. Under the safe harbor alternative definition in this paragraph (c)(3), compensation is compensation as defined in paragraph (c)(2) of this section, reduced by all of the following items (even if includible in gross income): reimbursements or other expense allowances, fringe benefits (cash and noncash), moving expenses, deferred compensation, and welfare benefits." (Emphasis added.) The regulation, therefore, contemplates that it is possible to have cash fringe benefits that may be excluded under the safe harbor adjustment to compensation. Can you provide an example of a "cash" fringe benefit? It is clear that cash payments to an employee are taxable income. For example, IRS Publication 15-B provides that: Cash and cash equivalent fringe benefits (for example, use of gift card, charge card, or credit card), no matter how little, are never excludable as a de minimis benefit, except for overtime meal money or transportation fare.	You must first determine if the fringe benefit is taxable or not. Certain de minimis fringe benefits are not taxable and therefore don't enter into the issue of §414(s) compensation. The IRS looks at cash or cash equivalent (gift cards) as never excludable from income except as follows: Cash or cash equivalent items provided by the employer are never excludable from income. An exception applies for occasional meal money or transportation fare to allow an employee to work beyond normal hours. Gift certificates that are redeemable for general merchandise or have a cash equivalent value are not de minimis benefits and are taxable. [http://www.irs.gov/Government-Entities/Federal,-State-&-Local-Governments/De-Minimis-Fringe-Benefits] So, we've now determined that your cash/gift card is taxable. Can it be excluded under the alternative safe harbor definition of Treas. Reg. §1.414(s)-1(c)(3)? If you are going to use that alternative, you must exclude a bunch of things, including this: a) Cash and/or non-cash fringe benefits-these are any taxable "extras," such as the personal use of a company car, educational assistance, etc. So, the question becomes: is this cash/gift card a "cash or non-cash fringe benefit"? IRS Publication 15B is Employer's Tax Guide to Fringe Benefits: Basically, the cash or gift card is a taxable fringe benefit and there would fall under the list of "must exclude" if you are using the alternate definition of comp. The §414(s) reg could apply if the cash exception pointed out from Pub. 15b is included in §415 current income definition. If it is, then it's in compensation and, therefore, can be excluded under §414(s). The §414 reg may then have some meaning where cash can be a fringe benefit. The §414(s) reg could apply if the cash exception pointed out from Pub. 15b is included in §415 current income definition. If it is, then it's in compensation and, therefore, can be excluded under §414(s). The §414 reg may then have some meaning where cash can be a fringe benefit.	Look to the regulations to IRC §132 for a guide about fringe benefits. For these benefits to be excludible from income, they must be de minimis and cannot be in a cash form. So, if it is in a cash form, there is no exclusion from income. (For example, if an employer who normally gives employees turkeys at the holidays, instead provides a $25 cash payment to buy a turkey, that is a taxable cash fringe benefit.) But, if the plan uses the safe harbor definition that backs out cash or noncash fringe benefits, then it would be backed out from the plan definition of income (notwithstanding the fact that it is taxable). Of course, there are some common sense issues here; this cannot constitute part of someone's primary compensation when examined on a facts-and-circumstances basis.

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17	A defined contribution plan had a stated termination date of May 1, 2015. Assets have not been distributed yet. This plan has not been restated onto the new approved pre-approved defined contribution plans (PPA documents). The employer does not want to submit the plan for a determination letter upon plan termination using Form 5310. Can the employer restate the plan now?	Yes. While a plan generally cannot be amended after the plan termination date, the plan is technically not terminated until assets have been distributed. The plan may certainly be "unterminated" for purpose of amending to bring it into compliance, and including language to that effect (including language saying that "notwithstanding this amendment, no additional benefits shall accrue after the original termination date of XXXX") and then re-terminating as of the adoption date of the amendment should work just fine.	Rev. Rul. 89-87 provides that a qualified plan is not in fact terminated unless all plan assets have been distributed to plan participants, in accordance with the terms of the plan, as soon as administratively feasible after the date of termination. A distribution of plan assets which is completed within one year following the date of plan termination specified by the employer will be presumed to have been made as soon as administratively feasible. A determination letter submission/amendments made to the plan within this time frame will be deemed made on account of plan termination on the basis of all facts and circumstances, and probably on account of termination if within the time frame.
18	Can a participant could return a hardship distribution to the plan if the reason for the hardship was no longer valid? Example – I contract to buy a house, request a hardship distribution that is granted to me. After I get the money the house sale falls through.	There is no mechanism for returning an unused hardship distribution to the plan. A deposit of those funds back to the plan would constitute an after-tax employee contribution. The fact that the reason for the hardship was valid at the time it was made is sufficient for the hardship distribution to be permissible, so there is no qualification problem with the fact that the house purchase ultimately fell through. The participant should likely bank the proceeds of the distribution in anticipation of ultimately buying a different house.	To be discussed from the podium.
19	A hospital is owned by county and is a governmental entity. The hospital's emergency room is in an affiliated service group with hospital but is not a governmental entity. Treas. Reg. §1.410(b)-6(g)(2) allows a 401(k) plan to exclude governmental employees for coverage testing if the employees are precluded from being covered due to IRC §401(k)(4)(B)(ii). **Question 1**: Does this exclusion apply where the 401(k) plan covering the non-governmental employees provides for a 3% nonelective safe harbor (SH) contribution? **Question 2**: Does the exclusion apply if the employer also makes a 1% nonelective contribution for the hospital employees?	**Answer 1**: Yes, the §410(b) test exclusion applies. The 3% contribution is a nonelective contribution, but it is made as an alternative to the nondiscrimination testing that would otherwise apply. Therefore it is part of the 401(k) component of the plan. **Answer 2**: No. The 1% contribution made for the hospital employees is not part of a 401(k) component of the plan so the hospital employees are no longer excludable. Also, the 3% safe harbor nonelective contribution and the 1% nonelective contribution for the hospital employees are both nonelective contributions that must be taken into account in applying nondiscrimination tests of §401(a)(4).	To be discussed from the podium.
20	An employer has a calendar plan year 401(k) 3% nonelective safe harbor (SH) plan. Eligibility is age 21; no service requirement, and entry date is daily. The employer is hiring a group of 60 individuals on 8/1/15. The employer cannot afford to continue the SH contribution with the additional hires. The employer will amend the plan effective 7/31/15 to remove the 3% SH contribution and at the same time add a 6-month eligibility requirement. The plan provided the notice of the removal of the SH contribution on 7/20/15, and assuming the amendment is adopted in the 30 days, the SH contribution must be made to all eligible participants through 8/19 (30 days after notice is given). Can the 7/31 amendment apply to the newly hired individuals, thereby not requiring the SH contribution because they are subject to the 6-month eligibility condition? Is the answer different if the 60 employees are being hired in connection with a §410(b)(6)(C) transaction?	The prohibition on mid-year amendments to a SH plan would normally preclude the amendment to change to eligibility requirements. In this case, however, the amendment to change eligibility is permissible because there is no cutback of benefits (since the individuals are not participants yet) and because the plan will not be a SH for 2015 due to the mid-year elimination of the SH contribution	The proposed answer is incorrect, unless the employer is operating at an economic loss or the employees are warned in the pre-year notice of a possible suspension.
21	We have a calendar year 401(k) plan with the 3% non-elective SH and immediate eligibility. The employer desires to change the eligibility provision to the standard 1 year of service provision, effective as of the date of adoption of the amendment during the year and only affecting employees hired after that date. Is such an amendment permissible?	No.	To be discussed from the podium.

2015 Q#	Question	Proposed Answer	Government Panel Response
22	Fact Pattern: • Participant properly auto-enrolled at 5% of comp on 1/1/11 • Plan provides for auto-escalation of 1% per year, on each of next three anniversaries (1/1) • Plan fails to escalate; P remains at 5% • Error discovered and corrected 7/1/15 Question: Do I have one failure date, on 1/1/12, such that the correction occurred 2½ years after the PYE "in which the failure first occurs," and the plan will owe a 50% QNEC on the missed deferrals at each step up along the way. OR, do I have one failure as of 1/1/12 – and the 50% QNEC would be due for the 1% increase from 5% to 6%, a separate failure for the 1/1/13 failure to increase from 6% to 7% - which is corrected within 2 years of the PYE of failure, so 25% QNEC for those missed deferrals and so on? What if the participant was not increased in 2012, was increased 1% in 2013, not increased in 2014, and the error discovered and corrected in 2015. Would you consider that two distinct errors?	The question correctly identifies the issue to be whether there is one failure that began in 2012 and continued to the present, or whether each increase failure is a separate event. Under new EPCRS, if there two separate failures, the 25% QNEC would apply to those increase failures that occurred within the self-correction period. If not, all increase failures are subject to the 50% QNEC rule.	There is a single failure that stretches from when incorrect elective deferrals began until correct elective deferrals begin. The deadline for beginning to make correct elective deferrals in order to qualify for the relief is counted from the time the failure begins. In other words, no partial relief is available for erroneous deferrals during the ending period of the failure.
23	Companies A, B, and C have some common ownership. An analysis of the brother-sister rules reflects that Company A and Company B are part of one controlled group (CG#1), and Company B and Company C are part of a second controlled group (CG#2), but that Companies A, B, and C do not constitute a controlled group. Q1: Do we have two separate controlled groups, or does the fact that Company B is common member of both brother-sister groups mean that we have one big controlled group? One could argue that, if A and B are part of one CG, they are one "employer" for plan purposes. When B is part of a CG with C, then, that entire "employer" (including A) is part of a controlled group with C. On the other hand, A, B, and C do not stand up as a brother-sister controlled group when tested using the rules in 414(b) and (c). Q2: Suppose further that only Companies A and B participate in a retirement plan together. Company C does not participate in the plan at all. If we consider the entities to be separate controlled groups in answer to the first question, it would seem that we would need to do one coverage/nondiscrimination test for A and B (CG#1), and then we would need to test B and C (CG#2) together for coverage (showing that the exclusion of C employees from the plan does not cause the plan to fail coverage). If the coverage test for CG#2 is passed, we would then need to show that B can pass nondiscrimination testing on its own (without A) to show that CG #2 meets Section 401(a)(4). Do you agree?	There is no guidance on the issue of how to treat overlapping brother-sister controlled groups in the Code or the regulations. Therefore, the answer to Q1 is unclear. As a result, either treating all three companies as a controlled group or treating the CG#1 and CG#2 separately is acceptable, so long as it is done consistently. If you treat the two controlled groups as separate, it makes sense that CG #2 would need to meet coverage on its own, and that, having done so, separate ADP and ACP tests with only Company B would need to be done to demonstrate that deferrals and matches in CG#2 are nondiscriminatory.	To be discussed from the podium.