August 31, 2015

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on Mid-Year Amendments to Safe Harbor 401(k) Plans

Dear Commissioner Koskinen:

Enclosed please find comments on mid-year amendments to safe harbor 401(k) plans (“Comments”). These Comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss the Comments with you or your staff if that would be helpful.

Sincerely,

George C. Howell, III
Chair, Section of Taxation

Enclosure

cc: William J. Wilkins, Chief Counsel, Internal Revenue Service
    Erik Corwin, Deputy Chief Counsel (Technical), Internal Revenue Service
    Victoria A. Judson, Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service
    Mark J. Mazur, Assistant Secretary (Tax Policy), Department of the Treasury
    Emily McMahon, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
    George Bostick, Benefits Tax Counsel, Department of the Treasury
These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation (the “Section”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, these Comments should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Mark A. Bodron and Susan A. Wetzel of the Section’s Employee Benefits Committee (the “Committee”). Substantive contributions were made by Matthew Eickman, Chair of the Committee’s Subcommittee on Defined Contribution Plans (the “Subcommittee”). These Comments were reviewed by Robert A. Miller, Chair of the Committee. These Comments were further reviewed by Kurt L.P. Lawson, Council Director for the Committee, and by Peter H. Blessing, the Section’s Vice Chair (Government Relations).

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments or have advised clients on the application of such principles, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: August 31, 2015
EXECUTIVE SUMMARY

Increasing numbers of employers are adopting “safe harbor” section 401(k)\textsuperscript{1} and 401(m) plans as they seek alternatives to simplify retirement plan administration, reduce their administrative costs, and increase the retirement savings of their workforces. These Comments are submitted in response to a request by the Internal Revenue Service (the “Service”)\textsuperscript{2} for comments on when and to what extent a safe harbor section 401(k) or 401(m) plan may be amended after the beginning of a plan year without losing its safe harbor status.\textsuperscript{3}

It is not uncommon for an employer to decide that it needs to amend a plan in mid-year. For example, new legal requirements might arise, or the employer’s relationship with the existing plan vendor might sour after the beginning of the year. Generally such amendments are permitted in the case of non-safe harbor section 401(k) and 401(m) plans. However, some notices and announcements issued by the Service dealing with mid-year amendments, and some informal statements by representatives of the Service, suggest that the Service takes the position that mid-year amendments are not permitted in the case of safe harbor section 401(k) and section 401(m) plans unless they are expressly permitted by the regulations or in guidance of general applicability published in the Internal Revenue Bulletin, even if they do not change any plan provisions that are required for safe harbor plan status.

These Comments describe the dilemmas this position creates for employers. They also argue that it is not required by the statute or the existing regulations and does not further the interests of good tax policy or tax administration. They therefore recommend that the Service and the Department of the Treasury (the “Treasury”) issue guidance clarifying that mid-year amendments to safe harbor section 401(k) and section 401(m) plans are permitted if (i) they do not affect plan provisions that are required for safe harbor plan status or (ii) they change provisions that are required for safe harbor plan status but the change is done in a way that is beneficial to all eligible employees (or all eligible nonhighly compensated employees) and is otherwise consistent with the safe harbor requirements. We believe that such guidance will permit appropriate mid-year changes to safe harbor section 401(k) and section 401(m) plans that are consistent with the requirements and intent of the statute.

We appreciate the opportunity to provide the Service and the Treasury with these Comments. We would be pleased to discuss our comments and suggested recommendation with representatives of the Service and the Treasury.

\textsuperscript{1} References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated.

\textsuperscript{2} See E-mail from Victoria A. Judson, Associate Chief Counsel (TEGE), to Robert A. Miller, Chair of the Committee (May 8, 2015).

\textsuperscript{3} These Comments do not address mid-year amendments to Safe Harbor Plan made in connection with mergers and acquisitions.
I. CURRENT STATE OF THE LAW REGARDING MID-YEAR AMENDMENTS TO SAFE HARBOR PLANS

A. Overview of Statutory Provisions Addressing Safe Harbor Plans

The Small Business Job Protection Act of 1996 (the “SBJPA”) added section 401(k)(12) as a safe harbor alternative to the actual deferral percentage nondiscrimination test (the “ADP test”) in section 401(k)(3) that otherwise applies to elective contributions. A plan satisfies section 401(k)(12) if, among other requirements, it (i) provides either safe harbor matching contributions or safe harbor nonelective contributions (referred to collectively herein as “safe harbor contributions”), (ii) provides for immediate vesting of the safe harbor contributions and subjects them to the same withdrawal restrictions as elective contributions, and (iii) complies with a notice requirement. (A plan that satisfies these requirements is referred to herein as a “Traditional Safe Harbor Plan.”) The SBJPA also added section 401(m)(11) as a safe harbor alternative to the actual contribution percentage nondiscrimination test (the “ACP test”) in section 401(m)(2) that otherwise applies to matching contributions. A plan satisfies section 401(m)(11) if it complies with the contribution and notice requirements of section 401(k)(12) and imposes certain compensation-based limits on matching contributions.

Ten years later, the Pension Protection Act of 2006 (the “PPA”) added section 401(k)(13) as another safe harbor alternative to the ADP test. A plan satisfies section 401(k)(13) if, among other requirements, it (i) provides either safe harbor matching contributions or safe harbor nonelective contributions, (ii) provides for automatic elective contributions meeting...
certain requirements unless the employee elects otherwise, (iii) provides for 100% vesting of the safe harbor contributions after two years of service and subjects them to the same withdrawal restrictions as elective contributions, and (iv) complies with a notice requirement. (A plan that satisfies these requirements is referred to herein as having a qualified automatic contribution arrangement or “QACA,” and a plan that has a QACA and a Traditional Safe Harbor Plan are referred to collectively herein as a “Safe Harbor Plan.”) The PPA also added section 401(m)(12) as another safe harbor alternative to the ACP test. A plan satisfies section 401(m)(12) if it has a QACA and imposes the compensation-based limits on matching contributions required by section 401(m)(11).

To satisfy the notice requirement, a notice must be provided to all employees who are eligible to participate in the plan that is “sufficiently accurate and comprehensive” to inform them of their “rights and obligations” under the plan (referred to herein as a “Safe Harbor Notice”). The Safe Harbor Notice must be provided to eligible employees within a reasonable period of time before the beginning of the plan year or, in the year an employee becomes eligible, within a reasonable period before the employee becomes eligible. The Code does not require any specific content for the Safe Harbor Notice for a Traditional Safe Harbor Plan. However, it requires the Safe Harbor Notice for a QACA to inform the employee (i) that he or she may choose not to have elective contributions made to the plan, (ii) about how the elective contributions will be invested in the absence of an investment election, and (iii) that he or she has a reasonable period of time after receiving the notice and before the first deferral is made to make either such election.

B. Overview of Safe Harbor Plan Regulations

The Service and the Treasury issued final regulations under section 401(k) and (m) in 2004 addressing the requirements for Safe Harbor Plans. The statute neither addresses nor prohibits mid-year amendments to such plans. However, the regulations state that a plan will not satisfy the requirements for Safe Harbor Plans unless “plan provisions that satisfy [those

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15 The minimum automatic contribution rate is three percent of compensation, and the maximum contribution rate is 10% of compensation, but, if the contribution rate is less than six percent, the plan must provide that the percentage will increase one percent each plan year until it reaches six percent of compensation. See I.R.C. § 401(k)(13)(C)(iii).


22 See Reg. §§ 1.401(k)-3, 1.401(m)-3.
requirements[” are adopted before the beginning of the plan year and remain in effect throughout a full 12-month plan year. The preamble to the final regulations explained that:

This requirement is consistent with the notion that the statute specifies a certain contribution level for NHCEs in order to be deemed to pass the nondiscrimination requirements. If the contribution level is not maintained for a full 12-month year, the employer contributions made on behalf of NHCEs should not support what could be a full year’s contribution by the HCEs.

The regulations also state that a plan will not satisfy any of the nondiscrimination tests for elective contributions (not merely the requirements for Safe Harbor Plans) if it is amended to “change” the plan provisions required for Safe Harbor Plan status during the plan year, except as otherwise provided in a later subsection of the regulations or in guidance of general applicability published in the Internal Revenue Bulletin. This rule did not appear in the proposed regulations, and the preamble to the final regulations did not explain why it was added. The Service and the Treasury might have felt it was implicit in the other rules.

The regulations expressly permit mid-year amendments to a Safe Harbor Plan in two circumstances. First, they permit safe harbor contributions to be eliminated if the plan is terminated before the end of the plan year if certain notice or business hardship requirements are satisfied. Second, they permit safe harbor contributions to be reduced or eliminated if the following requirements are satisfied:

1. The employer either (i) is operating at an economic loss (as described in section 412(c)(2)(A)) for the plan year, or (ii) includes in the Safe Harbor Notice a statement that the plan may be amended during the plan year to reduce or suspend safe harbor matching or nonelective contributions, as applicable, and that the reduction or suspension will not apply until at least 30 days after all eligible employees are provided notice of the reduction or suspension;

2. All eligible employees are provided a supplemental notice that describes (i) the consequences of the amendment that reduces or suspends future safe harbor contributions; (ii) the procedures for changing elective contribution and after-tax contribution elections; and (iii) the effective date of the amendment (the “Supplemental Notice”);

See Reg. §§ 1.401(k)-3(e)(1), 1.401(m)-3(f)(1). The regulation provides special rules for a new plan initially established after the first of the plan year. See Reg. §§ 1.401(k)-3(e)(2), 1.401(m)-3(f)(2).


See Reg. §§ 1.401(k)-3(e)(1), 1.401(m)-3(f)(1).

See Reg. §§ 1.401(k)-3(e)(4), 1.401(m)-3(f)(4).

See Reg. §§ 1.401(k)-3(g), 1.401(m)-3(h).

Clause (1) applies for plan years beginning on and after January 1, 2015, with respect to safe harbor matching contributions. See T.D. 9641, supra note 21.
the reduction or suspension is effective no earlier than the later of (i) the date the amendment is adopted implementing the change or (ii) 30 days after eligible employees are provided the Supplemental Notice;

(4) eligible employees are given a reasonable opportunity (including a reasonable period after receipt of the Supplemental Notice) prior to the reduction or suspension to change their elective contribution and after-tax contribution elections; and

(5) the plan (i) is amended to provide that the ADP test will be satisfied for the entire plan year in which the reduction or suspension occurs using the current year testing method; and (ii) satisfies the Safe Harbor Plan requirements in the regulations with respect to amounts deferred through the effective date of the amendment.

Note that both of these circumstances involve amendments reducing or eliminating safe harbor contributions, which are required for Safe Harbor Plan status, and not other types of plan amendments. There is no express prohibition in the regulations regarding plan amendments that do not change any plan provisions that are required for Safe Harbor Plan status.

Outside of the regulations, the Service has provided guidance expressly permitting mid-year amendments to Safe Harbor Plans in the following circumstances:

- Announcement 2007-59\(^{29}\) provides that a plan will not fail to be a Safe Harbor Plan merely because it is amended after the first day of the plan year to add a Roth 401(k) feature or to allow hardship withdrawals. The announcement said it was responding to employer “concerns” about adding such provisions to Safe Harbor Plans during a plan year, and requested comments as to whether additional guidance was needed with respect to mid-year changes to Safe Harbor Plans.

- Notice 2010-84\(^{30}\) allowed a Safe Harbor Plan to be amended effective in the middle of the 2010 plan year to add an in-plan Roth rollover feature permitted by the Small Business Jobs Act of 2010,\(^{31}\) provided the amendment was adopted no later than December 31, 2011. The notice did not explicitly address the mid-year amendment issue.

- Notice 2013-74\(^{32}\) allowed a Safe Harbor Plan to be amended in the middle of the 2013 or 2014 plan year to reflect the extension of in-plan Roth rollovers to otherwise nondistributable amounts by the American Taxpayer Relief Act of 2012,\(^{33}\) provided the amendment was adopted no later than December 31, 2014. The notice recited that sponsors of Safe Harbor Plans generally “are prohibited from making mid-year changes to plan provisions that satisfy [Reg.] § 1.401(k)-3.”

\(^{29}\) 2007-1 C.B. 1448.

\(^{30}\) 2010-51 I.R.B. 872.


\(^{32}\) 2013-52 I.R.B. 819.
• Notice 2014-37 provides that a plan will not fail to be a Safe Harbor Plan merely because it is amended after the first day of the plan year to comply with the Supreme Court’s ruling on same-sex marriages in United States v. Windsor. The notice recited that a Safe Harbor Plan generally “must be adopted before the beginning of the plan year and be maintained throughout a full 12-month plan year.”

Representatives of the Service have made informal statements in speeches and similar settings that, except in the circumstances listed above or in circumstances described in future guidance published in the Internal Revenue Bulletin, any amendment to a Safe Harbor Plan after the beginning of the plan year will violate the Safe Harbor Plan requirements and presumably disqualify the plan. Before Notice 2014-37, many practitioners assumed that, even if this was the Service’s position, it would not apply to mid-year amendments needed to comply with applicable legal requirements. However, following the issuance of Notice 2014-37, there is concern that even these amendments might not be allowed.

The regulations also set forth certain minimum content that must be included in the Safe Harbor Notice. Most of it relates to the core elements of the safe harbor provisions, such as the level of safe harbor matching and nonelective contributions and how to make elective contributions. A small amount relates to other aspects of the plan, such as information about withdrawals (which is not limited to the withdrawal restrictions that apply to safe harbor contributions) and contact information for individuals from whom additional information about the plan can be obtained.

II. RECOMMENDATION

We recommend that the Service and the Treasury issue guidance clarifying that an amendment to a Safe Harbor Plan will not violate the plan-year rule in the regulations and cause the loss of Safe Harbor Plan status for a plan year merely because it is adopted or effective after the beginning of the plan year if (i) the amendment does not change a provision that is required in order for the plan to be a Safe Harbor Plan or (ii) it changes a provision that is required in order for the plan to be a Safe Harbor Plan, but does so in a way that benefits all eligible employees (or all eligible nonhighly compensated employees) and is otherwise consistent with the Safe Harbor Plan requirements.

If this recommendation is adopted, the mid-year amendments that will be prohibited (unless permitted in guidance of general applicability published in the Internal Revenue Bulletin) will include:

(1) Changing the safe harbor matching or nonelective contributions that exempt the plan from ADP testing and, if applicable, ACP testing, for a plan year, unless

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36 See Reg. § 1.401(k)-3(d)(2)(ii).
37 See Reg. §§ 1.401(k)-3(b)-(c), 1.401(m)-3(b)-(c).
the amendment increases those contributions for all eligible employees (or all eligible nonhighly compensated employees);

(2) Amending any provision in a way that results in the ratio of matching contributions made on account of a highly compensated employee’s elective contributions for a plan year to those elective contributions being greater than the same ratio for any eligible nonhighly compensated employee at the same level of compensation;  

(3) Amending any plan provisions that impose permissible restrictions on elective contributions made by nonhighly compensated employees for a plan year, unless the amendment makes it easier for all eligible employees (or all eligible nonhighly compensated employees) to make elective contributions or to make larger elective contributions;

(4) Amending the vesting provisions that are required to apply to safe harbor contributions, unless, in the case of a QACA, the amendment reduces the vesting period for all eligible employees (or all eligible nonhighly compensated employees); and

(5) In the case of a QACA, changing the rates at which automatic contributions are made unless the employee elects otherwise.

III. EXPLANATION

A. Comprehensive Prohibition on Mid-Year Amendments Creates Dilemmas for Employers

The existing notices and announcements, coupled with informal statements by representatives of the Service, has caused many employers and their legal counsels to assume that there is a comprehensive prohibition on mid-year amendments to Safe Harbor Plans and consequently to try to avoid making any mid-year amendments at all even if they do not impact the safe harbor features of the plan. Such a conservative approach might limit the risk of violating the plan-year requirement in the regulations, but in our experience it has at least two serious shortcomings.

First, it is not clear what a comprehensive prohibition on mid-year amendments covers, and therefore what amendments need to be avoided. Does it mean, for example, that a mid-year

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38 See Reg. § 1.401(k)-3(c)(4).
39 See Reg. § 1.401(k)-3(c)(6).
41 See I.R.C. § 401(k)(13)(C), Reg. § 1.401(k)-3(j). Arguably increasing those rates would benefit employees and therefore should be permitted, but not every employee would agree.
42 At the other end of the spectrum, anecdotally, the limited amount of guidance has resulted in many plan sponsors and their advisors making changes to Safe Harbor Plans without ever realizing that they might have jeopardized the safe harbor status of the plans.
change in the trustee or the third-party administrator (the “TPA”) or in the types of investments permitted under the plan and trust documents will trigger a loss of safe harbor status? What about a change in the plan sponsor or a plan merger or spin-off? What about a change to a safe harbor feature that provides more benefits to plan participants rather than less, such as an increase in the rate of matching contributions? What about a change to a provision that is unrelated to any safe harbor features, such as an increase in the number of plan loans that may be outstanding at any given time or an amendment permitting in-kind rollovers of plan loans from another plan? What about a change to a portion of the plan that is mandatorily disaggregated under section 410(b), such one covering employees in a qualified separate line of business? The number and type of amendments that could be covered by such a broad prohibition would be almost limitless, and many of them would have little, if any, relationship to the core Safe Harbor Plan requirements.

Second, even if it were clear what a comprehensive prohibition on mid-year amendments covered, as a practical matter many such amendments would be difficult or impossible to avoid. Even well-informed employers frequently face issues in the day-to-day operations of their businesses that require changes to the plan before the end of the plan year, such as corporate transactions and changes in pre-approved (master and prototype and volume-submitter) plan documents and TPAs. Furthermore, the reality is that many Safe Harbor Plans are maintained by smaller employers that do not have in-house employee benefits counsel and do not routinely reach out to external employee benefits counsel, so often there is no legal counsel who can warn the employer of the potential dangers of making mid-year amendments.

The problem with pre-approved plans is particularly common and acute. Rarely are two pre-approved plans sponsored by different TPAs identical in form. Adoption agreements often vary widely in the elections that are available. Even if the adoption agreements are similar, the base plan documents also vary greatly by provider. For example, one base plan document might provide that distributions and withdrawals from the Plan will be taken first from the participant’s Roth deferral account and then from his pre-tax elective contribution account, while the next might provide that distributions are taken equally from both Roth and pre-tax elective contribution accounts. These types of differences are buried in the base plan document and, unless the employer compares each of the base plan documents, are difficult to find.

Furthermore, not only do smaller employers disproportionately maintain Safe Harbor Plans, but they also disproportionately use pre-approved plans and do not routinely engage employee benefits counsel to review the plan document and identify relevant differences. Instead, they often simply sign the adoption agreement that has been completed by the TPA.43

43 Partly this occurs because they lack the funds to pay for an attorney. Partly, however, it occurs because they do not realize that the adoption agreement and base plan document are legal documents warranting a legal review. TPAs inform the employer that the plan document form has been approved by the Service and no changes are permitted. The TPAs then complete the adoption agreement for the employer, and, while some TPAs might walk through the completed adoption agreement with the employer, there is never a discussion of the lengthier base plan document. Often, the account manager or client representative at the new TPA counsels the employer regarding what elections should be made in the adoption agreement. It is not unusual for them to suggest changes to the plan that would be beneficial to participants, such as reducing eligibility periods, expanding the class of covered employees, or adding automatic enrollment.
If the employer or its legal counsel does find differences between the adoption agreements and base plan documents, there often is nothing the employer can do about it, short of refusing to change TPAs. Adopters of pre-approved plans generally have no ability to customize the plan document. Since a change in TPAs is often triggered by either a need for better service or a desire to reduce plan fees and costs (which often are borne by participants), employers are trapped between two bad choices: either (i) face a breach of fiduciary duty claim or prohibited transaction if they remain with a TPA that, for example, is providing bad service, charging higher fees, or refusing to disclose the direct and indirect fees it receives,\(^\text{44}\) or (ii) risk disqualification by adopting a new pre-approved plan that results in mid-year amendments to a Safe Harbor Plan.

The limited amount of existing guidance also creates a potentially dangerous trap for the unwary. If an employer makes an impermissible mid-year amendment to a Safe Harbor Plan, that could eliminate the plan’s safe harbor status for the year in which the amendment occurred. The Service most likely would not discover the problem until the plan sought a determination letter\(^\text{45}\) or the Service reviewed the plan document on audit, which almost certainly would be in a plan year after the plan year in which the mid-year amendment was made. Since Safe Harbor Plans cannot include default ADP testing and ACP testing in the event of a failure to maintain safe harbor status,\(^\text{46}\) the employers could not simply run the nondiscrimination testing for the year of the mid-year amendment without first retroactively amending the plan. Arguably, the employer could retroactively amend the plan to include ADP/ACP testing for the year of the mid-year amendment, but if the issue was discovered under the determination letter process or on an audit, the employer would not be able to do this through the Employee Plans Compliance Resolution System.\(^\text{47}\) Instead, it would be subject to Audit Cap (and the higher sanction costs) for correction.

B. Comprehensive Prohibition on Mid-Year Amendments Is Not Supported by Statute or Safe Harbor Plan Regulations

We believe that a comprehensive prohibition on mid-year amendments to Safe Harbor Plans is not required by the statute or the accompanying regulations. Neither the statute nor the regulations expressly state that mid-year amendments generally are not permitted. As noted above, the statute is completely silent on this issue, and the regulations focus solely on plan provisions required for Safe Harbor Plan status. Regulation section 1.401(k)-3(e)(1) states, in pertinent part, that:

except as provided in paragraph (g) of this section or in guidance of general applicability published in the Internal Revenue Bulletin [citation omitted], a plan

\(^{44}\) See 29 C.F.R. § 2550.408b-2(c)(1)(ix)(G) (requiring a plan fiduciary to terminate a TPA contract in certain circumstances if it fails to provide adequate disclosure of its fees).

\(^{45}\) Most employers on pre-approved plans do not apply for determination letters, and in the event the determination letter program is eliminated for individually designed plans, see Announcement 2015-19, 2015-32 I.R.B. 157, no safe harbor plans would apply for determination letters, making the audit process the only time any arguably improper mid-year amendments would be discovered.

\(^{46}\) See Reg. §§ 1.401(k)-1(e)(7), 1.401(m)-1(c)(2).

which includes provisions that satisfy the rules of [§ 1.401(k)-3] will not satisfy the requirements of § 1.401(k)-1(b) if it is amended to change such provisions for that plan year.\footnote{48}

We believe that the use of the phrase “such provisions” limits the restriction on mid-year amendments to changes to a plan’s safe harbor contribution provisions. We believe that the reference to Regulation section 1.401(k)-3(g) supports this interpretation, as it focuses solely reductions and suspensions of “safe harbor matching contributions” and “safe harbor nonelective contributions.”\footnote{49}

It has been suggested that allowing mid-year amendments to Safe Harbor Plans would be inconsistent with the Safe Harbor Notice requirement that applies to those plans. However, as noted above, most of the required content of the Safe Harbor Notice relates to the core elements of the safe harbor provisions. Even if mid-year amendments are permitted, the accuracy of the remaining portions of the Safe Harbor Notice can easily be ensured by including a statement that the employer reserves the right to amend everything but the core elements of the safe harbor provisions during the plan year. We do not believe there is any more need to prohibit those amendments – in order to protect employees’ expectations and help them make the best contribution decisions – than there is to prohibit the same amendments to non-Safe Harbor Plans for the same reasons.

We also believe that a comprehensive prohibition on mid-year amendments to Safe Harbor Plans would not further the interests of good tax policy and tax administration, for at least two reasons. First, it would impose an administrative burden on the Service by requiring it to anticipate and provide guidance on every essential mid-year amendment that needs to be made to Safe Harbor Plans, similar to the guidance it had to provide regarding the Windsor decision. Second, unless the Service is able to provide extensive, flexible and timely guidance, it will delay the adoption of many amendments that are unobjectionable or even desirable as a policy matter. These include replacing under-performing TPAs and trustees, reducing the length of the vesting schedule, or adding or enhancing participant loans, hardship distributions or other in-service distributions to the plan – all items that would be beneficial to participants.

C. Conclusion

While we believe, as noted in these Comments, that the ability to make mid-year amendments to a Safe Harbor Plan to the extent described above already is provided for in the statute and Regulation sections 1.401(k)-3(e)(1) and 1.401(m)-3(f)(1), we also know that there is significant uncertainty among employers, their legal advisors and TPAs regarding this issue and therefore recommend that the Service and the Treasury issue guidance clarifying that mid-year amendments are permitted if they do not affect provisions that are required to be a Safe Harbor Plan, or affect such provisions in a way that is beneficial to employees.

Ultimately, we believe it would be helpful for this guidance to be incorporated into the regulations themselves. We recognize, however, that amending a regulation is not a speedy

\footnote{48} Emphasis added. Reg. § 1.401(m)-1(f)(1) is similar.

\footnote{49} Reg. § 1.401(m)-1(h) is similar.
process. Therefore, we suggest that less formal guidance be issued before that process is complete, perhaps in the form of FAQs on the Service’s website or a discussion in the Service’s “Employee Plans News” newsletter.