



# AMERICAN BENEFITS COUNCIL

March 26, 2020

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## **Re: Immediate Need for Retirement-Related Emergency Relief**

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

On behalf of the American Benefits Council (“the Council”), and in light of the national emergency created by COVID-19, I am writing to request immediate guidance and relief to assist America’s retirement plan sponsors, participants and IRA owners during this unprecedented emergency. The Council stands ready to offer help in any way that we can to assist your agencies in making the requested guidance and relief available.

As discussed further below, there is an urgent need for your respective agencies to coordinate and extend many of the deadlines applicable to retirement plan sponsors, participants, and IRA owners, especially with regard to the deadlines that apply to various notices, disclosures, reporting, and filings. Accordingly, we are requesting that your agencies extend certain retirement-related deadlines occurring on or after March 13, 2020, for a period of one year or until a date that is at least 120 days beyond the expiration of the national emergency (whichever is earlier). Beyond these extended

deadlines, we also believe that there are other appropriate forms of relief that your agencies can offer during this national emergency. Each of these requests is detailed below and broken down by agency.

## **TREASURY & IRS**

### **I. Confirm and Extend Retirement-Related Deadlines**

The Internal Revenue Code (“Code”) imposes various deadlines on retirement plan sponsors, participants, and IRA owners. Because of the significant disruptions caused by the COVID-19 emergency, we are requesting that the Department of the Treasury and Internal Revenue Service (“IRS”): (1) confirm that certain automatic deadline extensions are already applicable; and (2) extend certain retirement-related deadlines for a period of one year or until a date that is at least 120 days beyond the expiration of the national emergency (whichever is earlier).

#### *Confirm the President’s “Emergency” Declaration is a “Disaster” Declaration.*

First, we are requesting confirmation that the President’s March 13, 2020 Emergency Declaration creates a nationwide “federally declared disaster area,” thereby triggering automatic extensions to the deadlines described in Code Section 7508A, Treas. Reg. Section 301.7508A-1, and Rev. Proc. 2018-58.<sup>1</sup>

On March 13, 2020, President Trump sent an Emergency Declaration to the heads of the Department of Homeland Security, the Department of the Treasury, the Department of Health and Human Services, and the Federal Emergency Management Agency announcing his determination that the COVID-19 pandemic warrants an emergency determination under Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act. Further, the President’s Emergency Declaration instructed the Secretary of the Treasury 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 are requesting confirmation that the President’s March 13 Emergency Declaration creates a nationwide “federally declared disaster area” because, in the event of a federally declared disaster, Code Section 7508A(d) automatically extends the deadlines for performing certain time-sensitive acts until 60 days after the latest “incident date” of the disaster, including the retirement-related deadlines described in Code Section 7508A(d)(4). Although there is currently no IRS guidance interpreting Code Section 7508A(d), the list of extended deadlines would apparently include the acts

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<sup>1</sup> Guidance is urgently needed in this regard as many of the deadlines included in Section 8 of Rev. Proc. 2018-58 are fast approaching, including for example the April 15 deadline for distributing excess deferrals.

described in Code Section 7508A, Treas. Reg. Section 301.7508A-1, and Rev. Proc. 2018-58, including the list of employee benefit deadlines described in Section 8 of that Revenue Procedure. Further, we would expect the latest “incident date” to mean the date on which the national emergency ends.

Based on the reference to Code Section 7508A(a) in the President’s Emergency Declaration and the fact that recent IRS guidance has invoked Code Section 7508A(a) to provide a nationwide extension of the due date for paying taxes, we believe that the President’s Emergency Declaration created, or should be treated as, a “federally declared disaster” for purposes of Code Section 7508A.

### *Postpone Retirement-Related Deadlines.*

Second, we are requesting that the Secretary of the Treasury use his authority under Code Section 7508A(a-b), with respect to the acts described in Code Section 7508A, Treas. Reg. Section 301.7508A-1, and Rev. Proc. 2018-58, to announce an extension of all deadlines occurring on or after March 13, 2020, for a period of one year or until a date that is at least 120 days beyond the expiration of the national emergency (whichever is earlier). Assuming that the President’s March 13 Emergency Declaration creates a “federally declared disaster,” Code Section 7508A(a) and the IRS’s press release system outlined in Rev. Proc. 2018-58 provide a clear avenue for making this relief available. In a similar regard, to the extent that any advanced notice requirements are otherwise due during the relief period (e.g., advanced notices of safe harbor plan changes), these notice requirements should be waived or reduced.

Beyond this list of previously enumerated deadlines, we are also aware of other retirement-related deadlines that we believe should be extended as part of any relief. Specifically, our members have expressed substantial concerns about their ability to comply with the Code’s various notice, disclosure, reporting, and filing deadlines because of the extreme disruption to their operations. These disruptions warrant extended deadlines for any retirement-related notices, disclosures, reporting, and filings not specifically addressed by the IRS press release system.

Additionally, we are aware of other retirement-related deadlines that warrant extensions but are not subject to the IRS press release system. These deadlines include, for example: (a) the March 31, 2020, remedial amendment deadline for 403(b) plans; (b) the April 30, 2020, deadlines for defined benefit plan sponsors to adopt pre-approved plan restatements and apply for individual determination letters using Form 5307; (c) the March 15 deadline for calendar year defined benefit plans to seek a minimum funding waiver for the 2019 plan year; and (d) various deadlines that apply under the Employee Plans Compliance Resolution System (“EPCRS”). To the extent that any of these deadlines are not covered by the existing IRS press release system for announcing disaster relief, all of these retirement-related acts should be extended for a period of one

year or until a date that is at least 120 days beyond the expiration of the national emergency (whichever is earlier).

Many of our members also have various matters currently under review by the IRS. This includes, for example, audits, determination letter applications, and voluntary submissions under EPCRS. In light of the extreme business conditions that the Council's members are experiencing, we request that Treasury and IRS approach all of these ongoing matters with maximum flexibility, especially with regard to deadlines and extension requests.

### ***Significant Disruptions Warrant Delays.***

Our members are very concerned that, in the absence of the above-described relief, it may be impossible to comply with some of the existing IRS deadlines. The disruptions created by the COVID-19 emergency are unprecedented and, in many cases, have prevented retirement plan sponsors and their service providers from physically showing up to work. This inability to be physically present at worksites is making it very difficult to comply with many of the Code's deadlines and nearly impossible to comply with the various notice and disclosure rules that require some disclosures to be physically mailed to retirement plan participants and IRA owners. Not only have our plan sponsor and service provider members been disrupted, the third-party vendors that they rely on to provide many of their printing and other services have also been subject to similar disruptions and closures. These services cannot be executed in a work from home environment and substantial delays are appropriate and necessary

## **II. Retirement Plan Distribution Relief**

### ***Relief for Hardship Distributions and Loans***

In the wake of more typical disasters, like hurricanes and wildfires, the IRS has issued Announcements (e.g., Announcement 2017-11) relaxing the rules for hardship distributions and loans. The purpose of these Announcements has generally been to ensure that retirement plan participants can quickly access funds in their retirement plan accounts without any unnecessary delays or other restrictions that might otherwise slow down a distribution. These prior Announcements have offered three critical forms of relief: (1) temporary relief from the requirements for substantiating and documenting hardship distributions; (2) hardship distributions for disaster-related needs that technically may not be covered by the safe-harbor rules or a plan's terms; and (3) extended deadlines for adopting plan amendments to add hardship and loan relief.

In light of the substantial disruptions and economic hardships created by the COVID-19 emergency, we are requesting that IRS issue guidance extending similar relief to address the immediate financial needs created by the COVID-19 emergency, including any needs resulting from an employee's need to find and pay for childcare

because of a school closing. Any such guidance should also permit plan administrators to rely on an employee's representations with regard to the amount or need of any distribution relating to the COVID-19 emergency (e.g., as a hardship distribution). Alternatively, if self-certification is not permitted, plan administrators will need very clear guidance on the documentation that must be collected in support of a distribution. We recognize that recent IRS guidance indicated that the IRS does not intend to issue further disaster relief Announcements. Nonetheless, given the magnitude and severity of recent events, we believe that Treasury and IRS should take all steps necessary to make it easier for retirement plan participants to access much-needed financial resources during this health and economic crisis.

If the IRS does not issue a disaster relief Announcement for hardship distributions and loans, we request that Treasury and IRS at least clarify that the President's March 13, 2020, Emergency Declaration creates grounds necessary for a participant to satisfy the new safe-harbor hardship event for "expenses and losses (including loss of income) incurred by the employee on account of a" federally declared disaster.

### *Leave of Absence*

In addition to the hardship and loan relief requested above, we are also requesting that Treasury and IRS provide guidance on the circumstances that give rise to a "bona fide leave of absence" within the meaning of Treas. Reg. Section 1.72(p)-1, Q&A-9. Pursuant to that rule, loan repayments can be suspended for participants who are experiencing a bona fide leave of absence. Within the context of the current emergency, it would be particularly useful for Treasury and IRS to clarify when a furloughed employee experiences a leave of absence and the extent to which an employee who is unable to work without pay because of a shelter in place order is experiencing a bona fide leave of absence.

### *Spousal Consent*

We are also very concerned about the ability of spouses to exercise their rights to consent to plan distributions that they affirmatively want. Because of the coronavirus, the availability of the required plan witnesses and/or notaries may be dramatically reduced or eliminated in many cases. We ask that the Administration work with all stakeholders, including participant groups, in addressing this urgent need – e.g., in permitting the witnessing of spousal consent using any approach that (1) is approved under any state law (without regard to whether the spouse is in that state) or (2) is reasonably designed to protect spouses' rights and prevent fraud. *Without this relief, many of the distributions authorized under the Coronavirus Aid, Relief, and Economic Security (CARES) Act will simply be unavailable.*<sup>2</sup>

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<sup>2</sup> As of our writing of this letter, we fully expect the CARES Act to be enacted in the coming days. Our letter assumes that the version of the CARES Act approved by the Senate on March 25, 2020, will become

## *Nonqualified Deferred Compensation*

Plans subject to Code Section 409A must comply with strict timing rules, and it may be appropriate to provide limited relief. For example, deferral elections for 2020 must be made in 2019 and generally cannot be changed. We suggest that Treasury and IRS consider allowing 2020 deferral elections to be reduced or canceled. Further, plans that are treated as “short-term” deferral plans under the Section 409A regulations must pay out compensation by mid-March, 2020, which was a very difficult period for many businesses. We recommend that a short-term deferral plan be treated as in compliance with the regulations so long as distributions are made as soon as practicable after March 15, 2020.

## **DOL & EBSA**

### **III. Relief for All ERISA-Covered Plans and Participants**

#### *Exercise Authority Under ERISA Section 518.*

In the event of a public health emergency, the CARES Act authorizes the Secretary of Labor to extend the deadlines for performing any actions that are required or permitted by the Employee Retirement Income Security Act (“ERISA”) for a period of up to one year – e.g., any notice, disclosure, reporting, and filing deadlines under ERISA. This new authority adds to the Secretary’s existing authority under ERISA Section 518. As we understand this authority, it authorizes the Secretary to actually extend the deadlines imposed by ERISA for all purposes up to one year, as opposed to simply delaying enforcement for up to one year. Given the magnitude and severity of the current emergency and Congress’s clear intent for the Secretary to exercise this new authority, we request that DOL and the Employee Benefits Security Administration (“EBSA”) grant the following forms of relief under Section 518.

#### *Standard Relief*

First, consistent with guidance issued by DOL and EBSA in the wake of previous disasters, we are requesting that DOL and EBSA issue guidance clearly announcing that its standard forms of disaster relief will be available to cover all ERISA-covered retirement plans and participants nationwide because of the emergency. This would include guidance indicating that: (a) a plan’s failure to follow certain procedural requirements for plan loans and other distributions will not be treated as a failure; (b) temporary delays in forwarding participant contributions will not violate ERISA

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law. If this does not occur as expected, we may follow up with additional requests for guidance and relief.

provided that employers and service providers act reasonably, prudently, and in the interest of employees to comply as soon as practicable; (c) the emergency creates circumstances beyond the administrator's control for purposes of the blackout notice timing rules; (d) plans are eligible for grace periods and other relief from ERISA's claims processing requirements; and (e) Form 5500 filing relief will be available to the extent provided by the IRS press release system. In providing these forms of relief, we request that DOL and EBSA make clear that such relief is being provided pursuant to the Secretary's authority under ERISA Section 518, as opposed to simply offering enforcement relief.

### *Extended Deadlines for All Notices, Disclosures, Reporting, and Filings*

Second, in light of the extreme business conditions created by the COVID-19 emergency, and consistent with our request to Treasury and IRS above, we are also requesting that under Section 518 DOL and EBSA make available a new form of relief to automatically extend, for one year or until a date that is at least 120 days beyond the expiration of the national emergency (whichever is earlier), the deadlines for any notices, disclosures, reporting, and filings required by ERISA. We fully appreciate the important role that each of these obligations play in protecting the retirement security of the American workforce. Nevertheless, given the overwhelming disruption that the COVID-19 emergency has caused for employer plan sponsors and their service providers, we believe that this type of temporary relief is appropriate and necessary.

In connection with this relief, we also strongly encourage EBSA to consider the extent to which it would be appropriate to temporarily relax its current rules for delivering ERISA-required notices and disclosures. Because of the physical limitations imposed by this emergency, our service provider members have informed us that it will be very difficult to get required documents timely delivered and returned by mail. This is being caused by disruptions in their own business operations and the operations of their third-party printing vendors (for outgoing mail) and scanning vendors (for incoming mail). Accordingly, we encourage EBSA to consider: (a) temporarily permitting participant notices and disclosures to be delivered electronically, even if such delivery methods would not satisfy the Department's existing or proposed electronic delivery safe harbors; and (b) clarifying that the current rule on controls for record retention under 29 CFR § 2520.107-1(b)(1) permits any image file (e.g., .jpeg, .bmp, .png) to be retained as a duplicate original.

In the context of participant notices and disclosures, we understand that one way to implement the overarching deadline extension could condition relief upon a plan or its service provider continuing to make participant notices and disclosures available online. At this stage, we believe that most of the Council's members and their service providers intend to make participant notices and disclosure available online throughout the emergency to the extent practicable. We do not know, however, whether it will be feasible to make all of these documents available online or whether information online

now will be updated and available throughout the crisis as business operations continue to be disrupted. Further, we are not sure whether this information will continue to be made available to participants in smaller plans. The Council would very much welcome the opportunity to discuss this issue further with EBSA if they are considering such an approach to address concerns about access.

## **PBGC**

### **IV. Automatic Relief from PBGC's Exceptions List**

#### *Temporarily Expand List of Extended Deadlines.*

PBGC's standard disaster relief procedures are keyed to the IRS press release system that is used to announce extended deadlines under the Internal Revenue Code. The Council very much appreciates PBGC's prior efforts to coordinate its disaster relief procedures with the relief announced by the IRS.

Pursuant to PBGC's standard disaster relief procedures, the extended deadlines announced through the IRS press release system also extend the deadlines for making PBGC premium payments and performing other time-sensitive acts under the authority of PBGC, except in the case of certain actions included on the PBGC's "Exceptions List." PBGC's standard disaster relief procedures do, however, permit plan sponsors to request extended deadlines for the actions on the Exception List on a case-by-case basis.

Given the substantial business disruptions created by the COVID-19 emergency, and consistent with our requests above, we are requesting PBGC to coordinate with its counterparts at IRS and EBSA to offer relief from all of the notice, disclosure, reporting and filing deadlines under its authority for a period of one year or until a date that is at least 120 days beyond the expiration of the national emergency (whichever is earlier). Importantly, this request includes relief from certain deadlines included on PBGC's Exceptions List, which are not automatically extended when IRS activates its press release system.

### **V. Provide Relief from Accrual of Penalties**

#### *Temporarily Suspend Accrual of PBGC Penalties During Extended Disaster Relief Period.*

PBGC's standard disaster relief procedures provide relief only where a deadline falls within the disaster period. For deadlines that precede that period, penalties can accrue during and after that period. We request that PBGC provide that it will disregard the extended disaster relief period (*i.e.*, the period including one year from March 13, 2020, or until a date at least 120 days beyond the expiration of the national emergency (whichever is earlier)) in determining the number of days of accrual of a penalty for late



payment of premiums under ERISA Section 4007(b) or for failure to timely provide required information under ERISA Section 4071 or ERISA Section 4302.

## **VI. Coordinate Extended Premium Deadlines with Extended Minimum Funding Deadlines**

### ***Ensure the Ability to Count Prior-Year Contributions for Variable-Rate Premium Purposes.***

PBGC's premium regulations (at 29 CFR § 4006.4(c)) provide that, when determining the fair market value of a plan's assets as part of the determination of the plan's unfunded vested benefits, "prior year contributions are included only to the extent received by the plan by the date the premium is filed." Since all minimum funding deadlines are expected to be extended under the CARES Act until at least January 1, 2021, it is possible that the extended PBGC deadline that we are requesting for (among other things) premium filings will be earlier than the extended deadline for making minimum funding contributions. Consider a calendar-year plan that makes its final contribution for the 2019 plan year on December 31, 2020, and that makes its premium filing for the 2020 plan year by an earlier extended deadline sometime in November of 2020. It is important that a plan in circumstances such as that be able to count its contributions for the prior plan year as part of its assets for purposes of determining its unfunded vested benefits. We therefore request that PBGC either: (1) clarify that it interprets its regulations as allowing such a plan, after it has made its premium filing without counting such contributions, to count such contributions as part of an amended premium filing that it submits after the contributions have been made (and thus to obtain an appropriate premium refund); or (2) state that it will allow such a plan to count such contributions as part of a premium filing it makes by the extended premium deadline, based on a commitment by the sponsor that the contributions will be made on a date certain on or before the extended deadline for making contributions (with the premium subject to adjustment if the commitment is not met).

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The Council greatly appreciates all of your efforts during this difficult time. If we can provide any further assistance, please feel free to contact me at [ldudley@abcstaff.org](mailto:ldudley@abcstaff.org) or 202-289-6700. Thank you for all you are doing.

Sincerely,



Lynn D. Dudley  
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