AMERICAN BENEFITS
COUNCIL

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Re: Request for Relief and Guidance on CARES Act Retirement Relief

Dear Ms. Weiser and Ms. Judson:

On behalf of the American Benefits Council ("the Council"), we are writing to request relief and guidance on the Coronavirus Aid, Relief and Economic Security (CARES) Act provisions affecting retirement plans. If we can be of any assistance in your efforts to provide additional relief and guidance, we would be happy to offer help in any way that we can.

This letter follows up on our March 26, 2020,[1] and April 20, 2020,[2] letters requesting the U.S. Treasury Department and Internal Revenue Service (IRS) to provide relief and guidance pursuant to their statutory authority that preceded the enactment of the CARES Act. Since that time, Treasury and IRS have responded to many of those requests, including an extension of certain retirement-related deadlines through IRS Notice 2020-23, specific extensions of the plan restatement deadlines that apply to

[1] Council Letter to Treasury/IRS/DOL/PBGC Regarding Immediate Need for Retirement-Related Emergency Relief, available at https://www.americanbenefitscouncil.org/pub/?id=1C8FAF08-1866-DAAC-99FB-0ED037160EE5

[2] Council Letter to Treasury/IRS Regarding Notarization Rules, available at https://www.americanbenefitscouncil.org/pub/?id=20BE3929-1866-DAAC-99FB-2073D07877B4

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403(b) plans and pre-approved defined benefit plans, and FAQs on the CARES Act posted on the IRS website. The Council greatly appreciates all of this relief and guidance, especially in light of the difficult circumstances under which it was developed.

Spousal Consent Relief Still Needed

Although the remainder of this letter will primarily focus on requests for relief and guidance that are specific to the CARES Act, we would first like to reiterate one request from our March 26, 2020 and April 20, 2020 letters. Specifically, the Council continues to urge Treasury and IRS to find a solution to the obstacles that have been created by the "physical presence" requirement for spousal consent imposed through Treasury Regulation Section 1.401(a)-21(d)(6). Since we wrote you in March, two significant developments have occurred. First, as mentioned in our April 20, 2020 letter, the Federal Thrift Savings Plan (TSP) adopted a rule completely waiving the requirement for notarization of spousal consent for distributions.[3] In doing so, the TSP noted:

- "The coronavirus pandemic has disrupted day-to-day life in an unprecedented way. These disruptions, which include mandatory business and school closures, stay-at-home/shelter-in-place orders, and quarantines ***have made it difficult and unsafe*** to have forms notarized in-person" (emphasis added).

- Requiring notarized spousal consent "has become an extraordinary hurdle for married TSP participants who need to request a withdrawal during this difficult time."

We agree wholeheartedly that federal workers and their spouses should not be put in the impossible position of either risking their lives or accessing their retirement benefits. Of course, the same is true for all Americans.

Second, almost all states have now approved, either on a temporary or permanent basis, the ability for state-licensed notaries to perform "remote" e-notarizations.[4] These procedures include significant safeguards to prevent fraud. States are recognizing that in the past few months, Americans have, out of necessity, embraced many new forms of technology in all parts of their lives as a means to avoid physical contact. We think it is very important for Treasury and IRS to similarly embrace these alternatives in the context of spousal consent, even if only temporarily.

[3] 85 Fed. Reg. 21311 (Apr. 17, 2020).

[4] According to the National Association of Secretaries of State, 47 states have either authorized remote e-notarization through an existing law or emergency action. See https://www.nass.org/initiatives/remote-electronic-notarization (visited May 17, 2020).

I. General Request for Flexibility and Relief

As discussed in greater detail below, the CARES Act included a series of provisions that were intended to provide immediate relief to retirement plans, plan sponsors, plan participants, IRA owners, and IRA issuers and custodians. This included, for example, various forms of retirement plan distribution and loan relief, a waiver of required minimum distributions (RMDs) otherwise due from defined contribution plans and IRAs in 2020, and minimum funding relief for defined benefit plans. This relief became effective immediately when the CARES Act was signed into law on March 27, 2020, and the retirement plan sponsors and service providers responsible for administering our nations' private retirement savings system immediately experienced a surge in requests to implement the CARES Act relief.

To meet this demand, plan sponsors and service providers took immediate action to make the various forms of CARES Act relief available. In light of the CARES Act's sudden effective date and the extreme business conditions under which the CARES Act is being implemented, the Council is generally requesting Treasury and IRS to issue CARES Act relief and guidance that provides flexibility to affected plans and participants, and as appropriate, to provide relief for reasonable and good faith efforts to implement the various forms of relief.

II. Coronavirus-Related Distributions

Section 2202 of the CARES Act permits certain qualified individuals to receive a coronavirus-related distribution (CRD) from a retirement plan or IRA on or after January 1, 2020, and before December 31, 2020. A distribution's treatment as a CRD has significant tax benefits for individual taxpayers, including an exemption from the 10 percent early withdrawal tax penalty, the ability to include the distribution in income over three years, and the ability to recontribute the distribution to a retirement plan or IRA within three years.

Expand the Circumstances that Make Individuals Eligible for CRDs

In order to treat a distribution as a CRD, an individual must: (1) have been diagnosed with COVID-19 with a test approved by the Centers for Disease Control and Prevention, (2) have a spouse or dependent who was diagnosed with COVID-19 with such a test or (3) have experienced "adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors as determined by the Secretary of the Treasury (or the Secretary's delegate)."

The Council urges Treasury and IRS to exercise its authority under the CARES Act to expand the list of circumstances under which an individual will be treated as experiencing adverse financial consequences for purposes of determining whether a distribution can be treated as a CRD. In addition to the circumstances already described in the statute, we encourage Treasury and IRS to specifically recognize CRD eligibility for individuals experiencing adverse financial consequences as a result of:

- A reduction or deferment of wages (even if there is no reduction in hours);
- A voluntary termination of employment due to the ongoing emergency; and
- A spouse or dependent's loss of income as a result of any circumstances that would qualify a plan participant or IRA owner for a CRD, if such circumstances involved such participant or owner.

In light of the challenge with availability of testing, we also encourage the IRS to exercise its authority to allow those who have been diagnosed with COVID-19 by a licensed physician, or whose spouse or dependent has been so diagnosed, to be eligible for a CRD.

This expanded list of circumstances should not only apply for purposes of determining whether an individual is eligible for a CRD, but also for purposes of determining whether an individual is eligible for the two types of retirement plan loan relief described in Section 2202(b) of the CARES Act.

Repayments

The CARES Act permits CRDs to be repaid to a retirement plan or IRA within three years of the distribution. The CARES Act does not, however, state whether employer-sponsored retirement plans are required to accept these repayments. Accordingly, we request that Treasury and IRS confirm that employer-sponsored retirement plans are not required, under any circumstance, to accept repayments made pursuant to the CARES Act's special repayment rules even if the plan otherwise accepts rollover contributions. Of course, individuals may always utilize an IRA for these repayments. This flexibility would be consistent with IRS guidance already indicating that the CARES Act distribution and loan relief is optional for plan sponsors.

The recently released IRS FAQs addressing the CARES Act distribution and loan relief indicate that "if a plan does not accept any rollover contributions, the plan is not required to change its terms or procedures to accept repayments" of CRDs pursuant to the CARES Act's extended repayment rules. This guidance does not, however, directly address whether a plan that otherwise accepts rollover contributions can impose restrictions on repayments of CRDs under the CARES Act's extended recontribution rules. For example, the CARES Act and relevant IRS guidance does not indicate

whether a plan that otherwise accepts rollover contributions can choose not to accept repayments of CRDs that are repaid after the ordinary 60-day rollover deadline and/or choose only to accept repayments of CRDs that were made from the same plan receiving the repayment.

We do not believe that the CARES Act prevents a plan from imposing any such restrictions. In general, plans can impose restrictions on the acceptance of rollover contributions, such as accepting them only from active employees or only from pre-tax amounts. Accordingly, we request that Treasury and IRS clarify that employer-sponsored retirement plans are not required to accept any CRD repayments from participants who are making repayments pursuant to the CARES Act's extended repayment rules, even if a plan otherwise accepts rollovers. Additionally, we specifically request confirmation that a plan is not required to accept CRD repayments if a former employee liquidated his or her entire account balance and no longer has an interest in the plan. As you know, the employee or former employee can still recontribute the distribution to an IRA.

In a similar regard, the recent IRS FAQs on the CARES Act's distribution and loan relief indicated that repayments of CRDs will be "treated as rollover contributions." This characterization not only permits recontributions to be excluded from an individual's income, it would also appear to permit repayments of CRDs to be subsequently distributed by plan participants in accordance with the in-service distribution rules that otherwise apply to rollover contributions. Thus, we request that Treasury and IRS confirm that repayments of CRDs can be subsequently distributed in accordance with the restrictions that apply to other types of rollover contributions – e.g., CRD repayments can be distributed before a participant has a separation from service or experiences some other distributable event.

Self-Certification for Repayments

In the context of repayments, we request that Treasury and IRS expressly clarify that the relief in Q&A-14 of Section 1.401(a)(31)-1 of the Treasury Regulations will be available, consistent with IRS Notice 2005-92, to plans that accept repayments of CRDs. Effectively, that regulatory relief says that a plan that accepts an invalid rollover contribution will not be treated as having a qualification failure if: (1) when accepting the rollover, the plan administrator reasonably concluded that the contribution was a valid rollover contribution; and (2) the invalid rollover contribution is distributed within a reasonable time if the rollover contribution is determined to be invalid.

In Notice 2005-92, the IRS indicated that in determining whether a plan "reasonably concluded" that a repayment of a Katrina distribution was valid, the plan administrator could rely on an employee's reasonable representations with regard to whether the employee was a qualified individual. In the current context of CRD repayments, we ask

that Treasury and IRS permit plan administrators to similarly rely on an employee's reasonable representations when determining whether the employee was a qualified individual. Furthermore, we ask that Treasury and IRS permit plan administrators to rely on an employee's reasonable representations for all purposes relevant to determining whether a plan administrator reasonably concluded that an employee could make a CRD repayment. Thus, for example, the plan administrator should be permitted to rely on an employee's reasonable representations regarding the date on which the CRD was originally received, the amount received as a CRD, and the qualified status of the distributing plan.

'Actual Knowledge to the Contrary'

Consistent with Section 2202(a)(4)(B) of the CARES Act, the IRS FAQs on the CARES Act distribution and loan relief recognize that "[t]he administrator of an eligible retirement plan may rely on an individual's certification that the individual satisfies the conditions to be a qualified individual in determining whether a distribution is a coronavirus-related distribution." Unlike Section 2202(a)(4)(B) of the CARES Act, however, the IRS FAQs condition this reliance on the plan administrator not having "actual knowledge to the contrary." We understand that this condition is consistent with the self-certification standards previously announced in Notice 2005-92. However, Congress did not include an "actual knowledge to the contrary" condition in Section 2204(a)(4)(B) of the CARES Act.

We understand that you may be concerned about fraud, which is already prohibited, but plan administrators are concerned about the potential that knowledge could be imputed in some way or that the need to make inquiries of the plan sponsor would slow down the CRD. For example, it might be assumed that the plan sponsor would know whether or not the participant or the participant's spouse or dependent has been diagnosed with COVID-19 based on an employee continuing to report to work. It also might be assumed that the plan sponsor would know whether or not the participant has been laid off or furloughed based on the employee's continued employment with the employer who is sponsoring the plan. However, even in that case, it is possible that an employee could have been laid off or furloughed by a different employer. None of this assumed knowledge should be imputed as actual knowledge to the plan administrator. Accordingly, we request that future IRS guidance either remove this standard or clearly indicate "actual knowledge" does not include imputed knowledge. Although this "actual knowledge" standard seems reasonable, it may create confusion and delays in processing CRDs, especially when a plan administrator relies on a third-party claims processor to process distribution requests.

In addition, an "actual knowledge" standard would be very hard for IRS auditors to check on audit. Given the thousands of CRDs being processed, a much more manageable audit process would be to verify that the self-certification was received.

Safe Harbor Notices

We have been hearing that, in some cases, the notice requirements that apply to safe harbor plans when making mid-year changes are discouraging plan sponsors from adopting the CARES Act distribution and loan relief. For example, because so many employees have been laid off or furloughed as a result of the pandemic, there are higher than normal costs and other difficulties associated with distributing updated notices in paper to employees for whom an employer does not have an email address. We understand this is especially an issue for employees who do not typically receive a company issued email address, such as hospitality and service sector employees.

In recognition of these barriers, we request that Treasury and IRS waive the updated safe harbor notice requirement for mid-year changes as it relates to any addition of the CARES Act distribution and loan relief. As an alternative, we would request that Treasury and IRS provide enforcement relief for the safe harbor notice requirement for mid-year changes that is similar to EBSA Disaster Relief Notice 2020-01. For example, such relief could provide that, given the extraordinary circumstances created by the pandemic, plans are not required to send an updated safe harbor notice before adding any of the CARES Act distribution and loan relief, and the notice requirement will be deemed satisfied provided that the plan administrator acts in good faith and furnishes the notice as soon as administratively practicable, even if furnished later than 30 days after the change is adopted.

Availability of CRDs

Consistent with the text of the CARES Act, the IRS FAQs on the CARES Act distribution and loan relief indicate that CRDs can be made to qualified individuals from January 1, 2020, to December 30, 2020. We are concerned that this ending date will create confusion because participants may naturally assume they can receive CRDs on the last day of 2020, December 31. To avoid potential confusion and mistakes by individual retirement savers and plan administrators, we request that Treasury and IRS use their regulatory authority to permit CRDs to be made through the end of 2020, instead of preventing individuals who might otherwise be eligible to receive a CRD from doing so on the last day of 2020.

III. LOAN RELIEF

The CARES Act provides two forms of loan relief for qualified individuals: (1) it permits plans to increase their maximum loan limit up to the lesser of $100,000 or 100 percent of a participant's vested account balance; and (2) it permits plans to provide an additional year for plan participants to make certain loan repayments.

Clarity Needed on One-Year Delay

There is significant uncertainty about how the one-year loan repayment delay should be implemented by plans that choose to make the delay available. The recent IRS FAQs on the CARES Act distribution and loan relief restate the statutory relief and refer readers to Section 5.B of Notice 2005-92. Although Notice 2005-92 provided a helpful safe harbor for plans that chose to implement loan relief provided by the Katrina Emergency Tax Relief Act of 2005 (KETRA), because of timing differences between the 2005 relief for Katrina distributions and the 2020 relief for individuals affected by coronavirus, it is not clear how plans should implement the one-year repayment delay under the CARES Act. Accordingly, we request that Treasury and IRS provide: (1) additional guidance on this one-year repayment delay; and (2) relief for plans that are implementing the delay based on a reasonable good faith interpretation of the statutory provisions.

One reading of the recent IRS FAQs suggests that the IRS will be making available a loan repayment safe harbor similar to the safe harbor described in Notice 2005-92. In order to be eligible for that previous safe harbor, plans were required to resume loan repayments upon the end of the suspension period. As applied to the 2020 CARES Act relief, this would suggest that plans must resume loan repayments beginning on January 1, 2021, with the loan reamortized to reflect accrued interest and the end date of the loan extended by the length of the suspension. This resumption schedule is difficult to reconcile with the one-year extension of loan repayments that are otherwise due on or after March 27, 2020, and before January 1, 2021. If repayments must resume at the end of the suspension period – i.e., in January 2021 – arguably none of the suspended loan repayments would be extended for a period of one year. At most, this would result in a nine-month delay of loan repayments. Thus, in order to create a true one-year delay, it might be necessary for all repayments to be delayed for a participant until after March 27, 2021, and potentially through December 31, 2021, for participants whose loan suspension commences in December 2020, in order to align with the 12 months provided in the statute.

We encourage Treasury and IRS to provide a loan repayment safe harbor similar to the safe harbor envisioned by Notice 2005-92, but to also account for the inconsistency described in the preceding paragraph. Moreover, given the fact that plans have not been able to clearly apply prior IRS guidance interpreting similar loan suspensions, we request that Treasury and IRS provide relief for plans that implement the CARES Act loan relief in accordance with a good faith and reasonable interpretation of the statute. In some cases, for example, we understand that some retirement plans intend to depart from the safe harbor described in Notice 2005-92 in order to ensure that any loan repayment due during the relief period is delayed for a period of at least one year, while others are departing from the safe harbor to give participants the benefit of the full nine months that could have been realized had they requested suspension at the

earliest possible opportunity. These plans should not be required to redo their systems and communications, or be penalized, because of the ambiguities in the statute.

Another question that has arisen as plan administrators have examined Notice 2005-92 is that the sole example in the notice does not involve a loan that would have ended during the suspension period. We would appreciate confirmation that such a loan is suspended and extended just as a loan that would not have ended before the end of 2020.

Furthermore, we also request that Treasury and IRS clarify that the CARES Act loan relief provides a one-year repayment delay for loans that can be "cured" on or after March 27, 2020, in accordance with Q&A-10 of 1.72(p)-1 of the Treasury Regulations, even if the loan had defaulted because of a missed repayment due before March 27, 2020. Specifically, we ask that Treasury and IRS clarify that the CARES Act permits a loan suspension as long as the loan had not been deemed distributed before March 27, 2020.

Finally, we request that any IRS guidance on this issue provide plan administrators with flexibility in how they implement the loan relief. For example, it would be helpful to know that, even if any potential safe harbor permits the maximum repayment period to be extended by the length of the suspension period, plans may choose shorter repayment periods.

Availability of Increased Loans

The IRS FAQs on the CARES Act's distribution and loan relief indicate that the CARES Act permits employers to increase the maximum loan amount available to qualified individuals from March 27, 2020, to September 22, 2020. This September 22 deadline reflects one reasonable interpretation of the deadline imposed by the CARES Act, which makes this relief available during "the 180-day period beginning on [March 27, 2020]." Nevertheless, we believe that another reasonable interpretation of this deadline would permit participants to receive loans pursuant to the increased loan limits as late as September 23, 2020. Accordingly, we request that Treasury and IRS clarify that loans subject to the increased loan limits can be made available to plan participants through September 23, 2020.

Self-Certification

As mentioned above, the CARES Act permits plan administrators to rely on an employee's self-certification for purposes of determining whether a plan participant is a qualified individual eligible to receive a CRD. The statute is, by comparison, silent with respect to whether self-certification can be used to determine whether an individual is a

qualified individual for purposes of the CARES Act's retirement plan loan relief. We do not interpret this statutory silence as preventing a plan administrator from relying on an employee's self-certification when determining whether the individual is eligible for the CARES Act's loan relief.

Accordingly, we request that Treasury and IRS clarify that plan administrators can rely on an employee's self-certification when determining whether an individual is eligible for the CARES Act's loan relief by reason of satisfying the conditions described in Section 2202(a)(4)(A)(ii) of the CARES Act. We think this clarification would not only be consistent with Congressional intent, but would also be consistent with the relief provided in Section 5.C of Notice 2005-92. Specifically, that prior guidance said that, "A qualified employer plan is permitted to rely on a participant's reasonable representations that such participant is a qualified individual and therefore qualifies for the special treatment for loans under Section 103 of KETRA, unless the plan administrator (or other responsible person) with respect to the qualified employer plan has actual knowledge to the contrary."

Loan Suspension under Notice 2020-23

In addition to the loan suspension made available by Section 2202 of the CARES Act, plan sponsors and service providers are also working to implement the loan repayment suspension that was made available by IRS Notice 2020-23, through a cross reference to IRS Revenue Procedure 2018-58. Effectively, Notice 2020-23 delays plan loan repayments due on or after April 1, 2020, and before July 15, 2020, until July 15, 2020, even for participants who are not qualified individuals for purposes of the CARES Act relief.

Because plans will be implementing the CARES Act loan relief and Notice 2020-23 loan relief in tandem, we request that any IRS guidance interpreting the CARES Act loan relief also provide guidance on how the regulatory loan extension should be applied and how the regulatory extension interacts with the statutory extension. For example, plans would benefit from clear guidance on whether the regulatory suspension period can be disregarded for purposes of the maximum repayment period described in Code Section 72(p)(2)(B). Also, it would be very helpful to get clear guidance on whether, and how, loans can be reamortized following the regulatory suspension period.

Like the CARES Act's loan suspension, plan sponsors had little time to prepare for the scale of the regulatory relief provided in Notice 2020-23 and are taking different approaches to implement the loan repayment delay triggered by Notice 2020-23. Accordingly, we request that any guidance on the regulatory loan delay provide plan sponsors with flexibility and relief for any reasonable and good faith interpretations of the regulatory loan suspension.

IV. 2020 RMD WAIVER

For defined contribution retirement plans and IRAs, the CARES Act waives RMDs otherwise due in 2020. Since the enactment of the CARES Act, retirement plans and service providers have been working hard to implement this RMD waiver based on the principles described in IRS Notice 2009-82. Notice 2009-82 interpreted very similar RMD relief provided by Congress through the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA").

Apply the Principles of Notice 2009-82

Because the CARES Act's 2020 RMD waiver is substantially similar to the 2009 RMD waiver included in WRERA, we request that Treasury and IRS expressly confirm it will be interpreting the 2020 RMD waiver consistent with the principles described in Notice 2009-82. Specifically, the Council requests that, similar to Notice 2009-82, any IRS guidance interpreting the 2020 RMD waiver provides: (1) transition relief through December 31, 2020, for plans that were unable to timely comply with, or were unsure about their options for implementing, the 2020 RMD waiver; (2) relief for participants receiving RMDs that would otherwise not be eligible for rollover as periodic distributions; and (3) a fixed and extended rollover deadline of December 31, 2020, for any distributions received in 2020 that would have otherwise been treated as RMDs, but for the CARES Act.

Application to DB Plans

Section 2203 of the CARES Act states that the RMD relief applies to defined contribution plans. We have received questions about whether the waiver applies to defined benefit plans in a few discrete situations. For example, in the case of defined benefit plans that are hybrid plans, where the participant's only interest is a lump-sum account, the defined benefit plan is required to treat the lump sum as an individual account plan which follows the defined contribution plan rules for RMDs (see Treasury Regulation Section 1.401(a)(9)-6, Q&A-1(d)). In addition, some defined benefit plans have a "deferred retirement option" or "DROP account," or a separate account described in Code Section 414(k). Potential application of the RMD waiver in this instance would be particularly relevant to governmental plans, which are allowed to comply with the RMD requirements using any reasonable and good faith interpretation, and thus might be able to apply the RMD waiver in limited instances.

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The Council greatly appreciates all of your efforts during this difficult time, including the important guidance that Treasury and IRS have already provided. If we can provide any further assistance, please feel free to contact me at jjacobson@abcstaff.org or 202-289-6700. Thank you for all you are doing.

Sincerely,

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