



October 15, 2009

Filed Electronically

Internal Revenue Service
CC:PA:LPD:PR (Notice 2009-71)
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comment on Guidance Relating to Eligible Combined Plans under §414(x) of the Code

Dear Sir or Madam,

This letter, which is submitted by the American Council of Life Insurers (“ACLI”) and the American Benefits Council (the “Council”), provides comments in response to Notice 2009-71 regarding guidance relating to eligible combined plans under 414(x) of the Internal Revenue Code (the “Code”). The Council is a public policy organization principally representing Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans. The Council offers an important and unique perspective of both the employer sponsors of retirement plans and the service providers that assist them. ACLI is the principal trade association of life insurers, representing 353 members that account for ninety-three (93) percent of the life insurance industry's total assets in the United States. The life insurance industry is one of the largest providers of products and services to employer-sponsored pension plans – both defined contribution and defined benefit plans. Twenty-two percent of the assets in employer-based retirement plans in America are managed by life insurers. ACLI members service approximately 40 percent of the small employer market.

ACLI and the Council appreciate the opportunity to comment and we applaud the commitment of the Treasury Department (“Treasury”) and the Internal Revenue Service (the “Service”) to provide guidance regarding eligible combined plans. Plan sponsors, plans, and participants all benefit from clear administrable rules. Although you are confined by the statute, we urge you to provide clear but flexible parameters for plan sponsors who may consider implementing combined plans. ACLI and the Council have seen little interest in creating these plans in the absence of such guidance. Some of the issues our members would like to see addressed are detailed below and we would welcome further opportunities to share our members’ perspectives as you move forward with your guidance.

Application of Accrual and Nondiscrimination Rules to Cash Balance Formula. Code section 414(x)(2)(B)(iii) provides minimum pay credits that would apply if the defined benefit portion of the plan is an applicable defined benefit plan as defined in Code section 411(a)(13)(B) (e.g., a cash balance plan). This minimum pay credit is expressed as a specified percentage that increases with age. Code section 411(b)(1) provides that a defined benefit plan must satisfy one of the three accrual rules of section 411(b)(1)(A), (B), and (C) with respect to benefits accruing under the plan (the 3% method, the 133-1/3% rule, or the fractional rule), referred to as the anti-backloading test. The minimum pay credit increases with age. Interest crediting (not exceeding a market rate of interest) is also required under Code Section 411(b)(5)(B)(i). It would be helpful if the guidance provides that plans using the minimum pay credits and interest crediting rates required or permitted under the statute automatically pass the accrual rules (avoiding any backloading issues) since this is a statutorily approved design.

Code section 401(a)(4) provides that all qualified retirement plans must satisfy the requirement that either the contributions or the benefits provided under the plan must be nondiscriminatory in amount. There are a number of safe harbors available to meet these requirements and there is also a general test for both nondiscriminatory contribution amounts and nondiscriminatory benefit amounts. Because the minimum pay credit is not uniform among all participants, it may be difficult to pass the 401(a)(4) tests depending on the specific demographics of the plan participants (e.g., if an employer's employee population at a point in time consists of older HCE's and younger NHCE's, then the plan may not be able to pass 401(a)(4) if it makes the minimum pay credit contribution, simply because of the specific demographics for that year). It would be helpful if the Service and Treasury would provide that the defined benefit portion of a plan incorporating the minimum pay credits under Code section 414(x)(2)(B)(iii) will automatically pass Code section 401(a)(4).

Flexibility of Plan Design - Contributions and Benefits above the Minimum

Eligible combined plans are subject to minimum benefits and minimum contributions. Code section 414(x)(2)(B) provides that a defined benefit plan under an eligible combined plan must provide a benefit that is no less than the specified amount (based on a stated percentage). Code section 414(x)(2)(C)(i)(II) provides for required matching contribution that must be made under the applicable defined contribution plan (a match of 50% up to 4% of compensation). Code section 414(x)(2)(i)(ii) states that in addition to the required matching contribution, an employer may also make nonelective contributions under the applicable defined contribution plan. Code section 414(x)(2)(D)(ii)(I) provides that immediate vesting must apply to the matching contribution, "including matching contributions in excess of the contributions required under subparagraph (C)(i)(II)." Please confirm that other defined benefit formulas and other matching contribution formulas may be used in lieu of the formulas provided in the statute, as long as (1) the formula used results in an amount not lower than the amount that would be provided under the statutory minimum; and (2) the plan passes the Code section 401(a)(4) nondiscrimination test (not using permitted disparity). Also, it would be helpful if Treasury and the Service could confirm that all of the testing provisions under Code section 401(a)(4) other than permitted disparity, including the various safe harbors, are available to eligible combined plans. Finally, we ask you to confirm that the Code section 414(x)(4), which provides that the defined

contribution and defined benefit plans under an eligible combined plan is treated as meeting the top-heavy rules, applies even if a plan provides for a different formula.

Determination of Final Average Pay. Code section 414(x)(2)(B)(i) provides a minimum benefit that must be provided under a (traditional) defined benefit portion of the eligible combined plan. The accrued benefit, when expressed as an annual benefit, may not be less than a specified percentage of the participant's final average pay. Final average pay is determined using the period of consecutive years (not to exceed 5) during which the participant had the greatest aggregate compensation from the employer (sometimes referred to as "high 5"). Read broadly, this requirement appears to allow use of any five consecutive years throughout the employee's working career with that employer. However, such extensive records may not be available in all cases and tracking compensation throughout employees' careers may not be administratively feasible. Employers adopting new plans may not have salary history records from the date of commencement of employment for many employees and such a broad reading would discourage implementation. ACLI and the Council suggest a regulatory clarification that the high 5 calculation is more limited, perhaps the high 5 year period after the plan is implemented.

Notice Requirements. Code section 414(x)(2)(C)(i)(I) requires that the defined contribution plan under the eligible combined plan must constitute an automatic contribution arrangement, and Code section 414(x)(5)(B) provides a notice requirement for the automatic contribution arrangement. Please provide guidance on the content and timing of this notice that is consistent with the guidance on existing automatic enrollment notices (*e.g.*, qualified automatic contribution arrangements and eligible automatic contribution arrangements). If IRS and Treasury determine that the existing notice rules for defined benefit and 401(k) plans would not apply in the same manner to eligible combined plans, then it would be helpful if model notices could be provided.

Existing Defined Benefit Plans. Please provide guidance on how an applicable defined contribution plan can be added to an existing defined benefit plan to form an eligible combined plan.

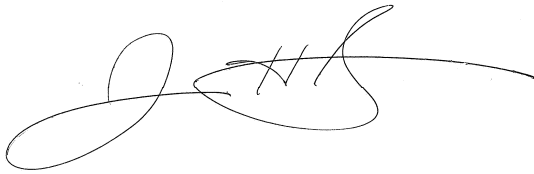
Sample Plan Language. It would be helpful if the Service would provide sample plan language in the form of listings of required modifications (LRMs) for eligible combined plans. Alternatively, we would appreciate guidance on which provisions must be included in the single plan document for the eligible combined plan.

Annuity Contracts and Custodial Accounts. Code section 414(x)(2)(A)(iii) provides that the assets of the eligible combined plan are to be held in a "single trust" forming part of the plan. In addition, the assets must be clearly identified and allocated to the defined benefit plan and the applicable defined contribution plan to the extent necessary for the separate application of the tax qualification rules. Code section 401(f) provides that a custodial account, an annuity contract, or a contract (other than a life, health or accident, property, casualty, or liability insurance contract) issued by an insurance company qualified to do business in a State shall be treated as a qualified trust under this section if; the custodial account or contract would, except for the fact that it is not a trust, constitute a qualified trust under this section; and, in the case of a custodial account, the assets thereof are held by a bank (as defined in section 408(n)) or another person

who demonstrates, to the satisfaction of the Secretary, that the manner in which he will hold the assets will be consistent with the requirements of this section. Please confirm that, for purposes of the “single trust” rule, an eligible combined plan may be funded with one or more contracts and/or custodial accounts described in Code section 401(f) provided that it is clear under such contract(s) and/or custodial account(s) to which portion or portions of the eligible combined plan the assets held under such contract(s) or account(s) apply.

* * * * *

On behalf of the Council and ACLI member companies, thank you for consideration of these comments. As stated above, we welcome the opportunity to discuss these comments and engage in a productive dialogue with the Service and Treasury on these important issues.



James H. Szostek
Director, Taxes & Retirement Security
American Council of Life Insurers

(202) 624-2378
jimoszostek@acli.com



Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council

(202) 289-6700
jjacobson@abcstaff.org



Shannon Salinas
Counsel, Taxes & Retirement Security
American Council of Life Insurers

(202) 624-2028
shannonsalinas@acli.com