



August 14, 2009

Via Electronic Filing

CC:PA:LPD:PR (REG-115699-09)

Room 5203

Internal Revenue Service

P.O. Box 7604

Ben Franklin Station

Washington, DC 20044

Re: Comment on Proposed Regulations: Suspension or Reduction of Safe Harbor Nonelective Contributions

Dear Sir or Madam:

The American Benefits Council (Council) and the Society for Human Resource Management (SHRM) appreciate the opportunity to comment on the proposed regulation concerning Suspension or Reduction of Safe Harbor Nonelective Contributions, which permits plan sponsors to discontinue 401(k) safe harbor nonelective contributions mid-year providing certain requirements are met. The Council is a public policy organization representing principally 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. SHRM is the world's largest association devoted to human resource management representing more than 250,000 members in over 140 countries. SHRM's members play a critical role in designing and implementing retirement savings plans in the workplace.

First and foremost we would like to thank the Internal Revenue Service (Service) and the Treasury Department (Treasury) for issuing the guidance which allows sponsors of 401(k) safe harbor plans to discontinue nonelective contributions in the middle of a plan year providing certain conditions are met. We understand that some employers were considering termination of their plans as their only alternative means of discontinuing nonelective contributions. The ability to maintain the plan while temporarily reducing or eliminating employer contributions during the current economic downturn is a “win-win” for both the employer and employee when compared to the alternative of plan termination. However, we do have a few suggestions for improvements to the proposed regulations which we believe will help facilitate use of the proposal while maintaining the appropriate policy perspective. The suggestions include (1) eliminating the substantial business hardship requirement, (2) eliminating or at least providing a transition period for suggested language additions to the annual safe harbor notice, (3) providing some leeway in the effective date, and (4) eliminating or modifying the requirement to prorate the compensation limit.

Hardship Requirement

The Council and SHRM strongly urge Treasury and the Service to consider eliminating the requirement that plan sponsors meet the substantial business hardship requirement found in Internal Revenue Code Section 412(c). The substantial business hardship standard in Section 412 is an extremely high bar, and we are concerned that some companies, while not technically meeting the substantial business hardship criteria, will nonetheless need to layoff employees or reduce hiring in order to maintain the nonelective contributions to its 401(k) plan. Further, while we greatly appreciate that a sponsor does not need to seek the Service’s blessing that it has had a substantial business hardship, the standard in Section 412 depends on all the facts and circumstances, and sponsors will have little certainty that they will be treated as satisfying the standard in the event of an audit. Moreover, there does not appear to be any policy basis under which the requirements for reducing or eliminating nonelective contributions should be more difficult than the requirements for reducing or eliminating safe harbor matching contributions (which does not have a comparable substantial business hardship requirement). Employee contributions are based on the matching contributions more than they are based on the nonelective contributions. There are times when unforeseen circumstances (such as the economy) create the need to cease contributions.

Annual Notice Requirement

The proposed regulations request comment on whether the annual notice should be modified to reflect that safe harbor nonelective and matching contributions may be suspended in certain circumstances. We strongly counsel against adding new content

requirements to the safe harbor notices. Suspension of contributions is a completely contingent possibility, as contingent as the possibility that the employer may terminate the plan, sell off a division, close a location or close its doors. Our members believe that the additional language would not influence plan participants since the safe harbor contributions must be provided through the amendment date and participants have the ability to change their elections in response to the contingency if it does occur. Further, we wonder whether employers would simply amend their plans after the start of the plan year to adopt the safe harbor provisions and provide the contingent notice with a follow-up notice, rather than providing the basic notice with language indicating that the contribution may be contingent.

While the Council and SHRM strongly advocate against this additional content requirement, if Treasury and the Service do add it, we urge that Treasury and the Service not require the additional language for the 2010 plan year. A hearing on the proposed regulations is currently scheduled for late September, so final regulations will likely not be issued until late 2009. Some service providers who prepare safe harbor notices for their retirement plan clients are drafting revisions to their safe harbor materials for 2010 now so they can do programming changes in the summer, followed by quality testing, before they generate and mail the notices to plan sponsors for distribution starting in October. Plan sponsors likewise may have distributed their 2010 annual safe harbor notices before the final regulations are issued. It is likely that many service providers and plan sponsors will be forced at the "11th hour" to create manual workarounds to create additional materials that will be mailed at additional costs if this requirement is implemented for 2010 plan years.

Effective Date

While this group is limited in number, we understand that some employers, anticipating the proposed regulations that had been informally confirmed prior to their issuance, suspended or reduced nonelective contributions prior to the May 18 publication date. Therefore, the Council and SHRM request that Treasury and the Service provide some leeway in the effective date of the regulations. We see little reason for treating a plan that otherwise satisfies the requirements of the proposed or final regulations as disqualified simply because the date of the suspension preceded publication of the proposed regulations.

Compensation Limit Proration

Finally, the preamble to the proposed regulations indicates that proration of the compensation limit (Code Section 401(a)(17)) for safe harbor plans using either the nonelective contributions or the matching contributions may be required for the time period that the plan was a safe harbor plan, if it is amended to discontinue safe harbor contributions. As a threshold matter, proration should not be required if ongoing employer contributions are made, for example, a nonelective of 1% of compensation,

even if those contributions are not considered safe harbor contributions. Finally, we note that there are a number of open issues about how proration would be implemented. In this regard, there is a question about how the proration is calculated if the safe harbor contribution is suspended mid-month (perhaps similar to the treatment under Treas. Reg. Section 1.415(j)-1(d)(2), where any portion of the month is counted as one whole month).

Again, we appreciate the opportunity to comment on the proposed regulations. If you have any questions or would like to discuss these comments further, please contact Jan Jacobson at 202-289-6700.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with the first and last names clearly legible.

Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council

A handwritten signature in black ink, appearing to read "Michael P. Aitken". The signature is cursive and somewhat stylized, with the first and last names clearly legible.

Michael P. Aitken
Director, Government Affairs
Society for Human Resource Management