



June 15, 2012

Submitted electronically at www.regulations.gov

Internal Revenue Service
CC:PA:LPD:PR
1111 Constitution Ave NW
Washington DC, 20044

Re: Advance Notice of Proposed Rulemaking; Determination of
Governmental Plan Status (IRS-REG-157714-06)

Dear Sir or Madam:

The American Benefits Council (the Council) is pleased to submit these comments on the Department of Treasury's and Internal Revenue Service's advance notice of proposed rulemaking (ANPRM) on the definition of "governmental plan" under Internal Revenue Code (Code) section 414(d).

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's membership includes sponsors of governmental plans and organizations that provide services to governmental plans.

This project is a long awaited first step by the Treasury and the IRS to provide comprehensive guidance on the term "governmental plan" within the meaning of Code section 414(d). Sections 3(32) and 4021(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA) contain a similar, although not identical definition, as do other sections of the Code. An entity must know whether or not a benefit plan for its employees is a governmental plan because governmental plans are subject to different rules than plans sponsored by non-governmental entities. Governmental plans are exempt from some rules (such as ERISA's fiduciary rules and pension insurance program, and many tax qualification rules) and subject to others (such as a prohibition on offering a 401(k) cash or deferred arrangement).

We applaud Treasury and the IRS for taking a measured approach. The Council appreciates Treasury and the IRS's utilization of an ANPRM to give interested parties significant input on the final product. Regulations under Code section 414(d) will affect a significant amount of prior guidance, case law, and agency rulings. While the Council encourages Treasury and the IRS to complete this project, we also believe it is important that the approach be thoughtful. As such, in addition to our specific comments below, we encourage Treasury and IRS to continue to work closely with the Department of Labor (DOL) and the Pension Benefit Guaranty Corporation to ensure that there is a coordinated set of rules.

It is important that Treasury and the IRS resolve this project so that governmental plans can again receive rulings on their status. Since Treasury and IRS first announced it would undertake this project, governmental plans largely have been unable to receive rulings on their status from either the IRS or the DOL. Previously, state and local governments and related agencies and instrumentalities had been able to receive assurances about their plans' status. This freeze on rulings puts governmental entities who sponsor (or wish to sponsor) a benefit plan in a difficult position because the consequences of being wrong are very significant.

Treasury and the IRS should avoid the disruption that would occur from significantly undercutting existing guidance on which governmental entities have relied. As Treasury and the IRS recognize in the ANPRM, the proposal builds on years of prior interpretations and case law on this topic. Any final rule should not act to "pull the rug out" from under entities that have relied on prior rulings and interpretations. For many governmental plans, reliance on longstanding DOL guidance permitting the inclusion of a *de minimis* number of private sector employees in their plans and reliance on other definitions of "political subdivision" in Treasury regulations are two examples where this could occur under the approach taken in the ANPRM.

Reliance on DOL guidance on de minimis exception. The ANPRM states that a "main factor" as to whether an agency or instrumentality is a governmental entity is whether an entity's employees are "treated in the same manner as employees of the State ... for purposes other than providing employee benefits." Similarly, the ANPRM states that a plan is "established and maintained" by a government only if the "participants covered by the plan are employees of that governmental entity." Thus, the ANPRM appears to depart from longstanding DOL guidance permitting plans to retain governmental plan status despite the plan's inclusion of a *de minimis* number of non-governmental employees.¹ Treasury and the IRS requested comments on this issue.² While the ANPRM appears to address a plan that includes non-governmental employees

¹ See DOL Adv. Op. 1999-10A (July 26, 1999); see also DOL Adv. Op. 2005-17A (June 22, 2005); DOL Adv. Op. 2005-07A (May 3, 2005); DOL Adv. Op. 2005-01A (Feb. 14, 2005); DOL Adv. Op. 2000-08A (June 12, 2000); DOL Adv. Op. 1995-27A (Nov. 8, 1995); DOL Adv. Op. 1995-15A (June 26, 1995).

² See 76 Fed. Reg. 69,172, 69,181 (Nov. 8, 2011).

associated with a union or trust fund,³ the proposal would not cover a plan that includes a *de minimis* number of “private-sector” employees. We urge Treasury and IRS to think carefully – and to consult closely with DOL – before reversing many years of guidance upon which governmental plan sponsors have relied.

Reliance on current definitions of “political subdivision. The ANPRM defines political subdivision as a “regional, territorial, or local authority, such as a county or municipality (such as a municipal corporation), that is created or recognized by State statute to exercise sovereign powers (which generally means the power of taxation, the power of eminent domain, and the police power).” This is similar to, but a truncated version of, a longer list of entities that may qualify as political subdivisions under Treasury Regulation § 1.103-1(b).

These are a few examples, and we expect comments from interested parties will discuss others. We urge Treasury and the IRS to seriously consider these concerns.

Treasury and the IRS should consider the inclusion of safe harbors in the definitions of “political subdivision” and “agency or instrumentality of a State.” The ANPRM uses a “facts and circumstances test” to determine whether a particular entity is a “political subdivision” or “agency or instrumentality of a State.” Under this facts and circumstances approach, the ANPRM sets forth a list of “major factors” and “other factors” that would be used to make the determination. We understand that Treasury and the IRS will be considering a number of different alternative approaches to the facts and circumstances model, including the use of safe harbors. We request that Treasury and the IRS consider utilizing a safe harbor approach when developing the proposed and final regulations. This approach will remove uncertainties that the current factors could create for many entities and avoid additional administrative burdens in having to issue rulings on whether a particular entity satisfies the factors.

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Again, we appreciate the opportunity to comment on the ANPRM. We believe that the American Benefits Council offers an important and unique perspective of both

³ DOL has determined that governmental plans include plans established and maintained pursuant to collective bargaining between a government employer and a labor union where the plan covered only governmental employees and former employees and is substantially funded by the governmental employer. *See, e.g.* DOL Adv. Op. 2002-11A (Oct. 17, 2002); *see also* DOL Adv. Op. 2000-11A (Sept. 11, 2000); DOL Adv. Op. 2000-7A (May 17, 2000); DOL Adv. Op. 2000-6A (May 17, 2000). Similarly, DOL has held that a plan that covers a *de minimis* number of employees of a union that represents governmental employees can qualify as a governmental plan. *See* DOL Adv. Op. 2004-01A (Jan. 27, 2004); *see also* DOL Adv. Op. 2002-11A (Oct. 17, 2002); DOL Adv. Op. 2000-4A (Mar. 30, 2000). DOL has advised that employees of a plan’s own trust fund as well as its governmental employees can be a governmental plan. DOL Adv. Op. 1999-15A (Nov. 19, 1999). *Cf.* DOL Adv. Op. 2012-01A (Apr. 27, 2012) (substantial level of private sector participation is not *de minimis*).

the employer-sponsors of retirement plans and the service providers that assist them, and we look forward to working with you on these changes.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson
Senior Counsel, Retirement Policy