American Benefits Council

September 12, 2014

Sent via U.S. Mail

R. Joseph Durbala
Internal Revenue Service
Room 6129, 1111 Constitution Avenue NW
Washington, DC 20224

Re: Notice and Request for Comments Concerning Suspension or Reduction of Safe Harbor Nonelective Contributions

Dear Mr. Durbala:

The American Benefits Council (Council) appreciates the opportunity to provide comments in connection with the Notice and Request for Comments 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.

First and foremost we would like to thank the Internal Revenue Service (Service) and the Treasury Department (Treasury) for previously issuing guidance which allows sponsors of 401(k) safe harbor plans to discontinue nonelective contributions in the middle of a plan year provided certain conditions are met. The ability to maintain the plan while temporarily reducing or eliminating employer contributions during the economic downturn was a "win-win" for both the employer and employee when compared to the alternative of plan termination.

We would also like to thank Treasury and the Service for adding to its 2014-15 Priority Guidance Plan an item to provide guidance "under sections 401(k)(12) and (13) on safe harbor 401(k) plans regarding certain mid-year changes and certain business transactions." To assist with this new project, the Council has a few suggestions for improvements to the previously issued regulations which the Council believes will help facilitate use of the proposal while maintaining the appropriate policy perspective. The suggestions include (1) permitting changes that do not affect safe harbor features or any information contained in the notice, (2) allowing certain corrective and other amendments designed to maintain plan qualification, and (3) allowing certain amendments but only in connection with mergers and acquisitions.

AMENDMENTS THAT DO NOT AFFECT SAFE HARBOR FEATURES/NOTICE INFORMATION

If a plan is changed mid-year, but is enhanced in some way or otherwise changed in a way that would not have affected a participant's decision to contribute, that amendment should not affect safe harbor status. Plan sponsors should be allowed to make amendments that do not impact the safe harbor features or the notice information. Examples of such changes include amendments that would (1) change rules for investment elections, (2) add or remove participant loans or modify existing loan provisions, (3) change rollover rules, (4) add catch-up contribution provisions, (5) reduce the plan's normal retirement age, (6) waive service requirements for newly acquired business operations, and (7) allow immediate distribution to Alternate Payees in Qualified Domestic Relations Orders.

Since Code Section 401(k)(12) does not explicitly require that a safe harbor plan not be amended mid-year, we understand that the government's position is that such a requirement flows from the safe harbor notice, which is provided prior to the beginning of the year and serves as the basis upon which employees decide whether to contribute. Therefore, if a plan amendment would not alter that notice, then it should be allowed. Such a flexible rule is not inconsistent with the text of the Code or the current regulation. (*See* Treas. Reg. Section 1.401(k)-3(e)(1) (referring to plan provisions "that satisfy the rules of this section" must "remain in effect for an entire 12-month period.")) The Council urges Treasury and Service to allow such mid-year amendments without affecting the safe harbor status of a plan.

CORRECTIVE/QUALIFICATION AMENDMENTS

Certain amendments may be necessary for the continuing qualification of the plan or to correct a discrimination situation. For example, it should not have been necessary for the Service to tell plan sponsors that a safe harbor plan could be amended to comply with the U.S. Supreme Court's decision in *Windsor*. Treas. Reg. Section 1.401(a)(4)-11(g) allows a plan sponsor to adopt a corrective amendment within 9-1/2 months after the close of a plan year in order to remedy coverage or nondiscrimination testing issues. The Council recommends that Treasury and Service permit this type of corrective or qualification issue mid-year amendment without affecting the safe harbor status of the plan.

MERGER/ACQUISITION EXCEPTIONS

Finally, the Council recommends that Treasury and the Service borrow from previous regulations and allow exceptions for plans involved in corporate merger or acquisition transactions. This exception would allow a company that is acquiring another company that has a safe harbor plan to freeze the safe harbor formula mid-year so that the 401(k) plans involved in the corporate transaction can be merged. Otherwise, the safe harbor plan of a "company" acquired through asset acquisition may be terminated with distributions to participants. This leads to leakage if plan participants do not roll over the distributions.

If the safe harbor plan company is acquired through a stock purchase, the company's safe harbor plan generally would be frozen for the rest of the year. It cannot be terminated because 401(k) accounts cannot be distributed to participants who remain employees of the purchased company. The two companies involved would have to give 30 days' advance notice which can cause problems with the timing for participants to start salary reduction contributions in the buyer's non-safe harbor plan. In a corporate transaction, it should be easy to freeze a safe harbor formula mid-year, so that the 401(k) plans involved can be merged, keeping accounts in a retirement vehicle, allowing rollovers of loans, and avoiding administration of two 401(k) plans for months after such a transaction.

Although it may be possible to avoid some of these problems in the future by making all safe harbor notices conditional – telling participants that the plan might not be a safe harbor plan for the entire year – it would make the safe harbor notices less informative for participants if every plan distributes a conditional safe harbor notice.

Again, we appreciate this opportunity to comment on the issues which have arisen in connection with the safe harbor 401(k) regulations. If you have any questions or would like to discuss these comments further, please contact Jan Jacobson at 202-289-6700.

Sincerely,

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