April 28, 2016
Submitted Electronically

CC:PA:LPD:PR (REG-125761-14)
Room 5203
Internal Revenue Service
POB 7604
Ben Franklin Station
Washington, DC 20044

Dear Sir or Madam,

The undersigned organizations would like to thank Treasury and the Internal Revenue Service (IRS) for issuing proposed regulations providing nondiscrimination relief for closed defined benefit plans. We believe the proposed regulations are a tremendous first step in addressing concerns as companies modify plans to meet the needs of the workforce and businesses. Acknowledging that these are complex rules and every DB plan has a specific plan structure and will need to review and assess these rules individually, the following is provided to highlight key areas that we believe need to be considered or addressed. Furthermore, we commend you for withdrawing the Qualified Supplemental Executive Retirement Plans provisions from the proposed defined benefit (DB) nondiscrimination relief.

Background

Many companies are transitioning or have transitioned from a defined benefit (DB) plan to a defined contribution (DC) plan. In the context of such transitions, it is not unusual for companies to grandfather some or all of the existing employees under the benefit formula in effect. A common example is to close a traditional pension plan to new workers (who often receive an additional contribution under the company's DC plan), while allowing existing employees to continue to participate in the plan. This is typically known as a "soft freeze". This type of freeze can help those existing employees realize very significant benefits that are provided by a DB formula late in an employee's career.

Under current law, DB plans that cover non-union employees cannot benefit highly paid employees disproportionately. In order to determine whether such plans are in compliance, employers must perform what is known as nondiscrimination testing. However, since many employers have implemented a "soft freeze" in recent years but provide grandfathering arrangements to protect older, longer service employees, these plans are confronted with the prospect of failing nondiscrimination testing. Such failure is primarily due to the fact that, with attrition, the employees who remain covered under the DB plan become proportionately higher paid and, in general, have greater seniority within the company.

Temporary Guidance

In December of 2013, the IRS issued Notice 2014-5 (and its subsequent extension, Notice 2015-28) which has provided temporary relief for satisfying nondiscrimination requirements through January 1, 2017. The Notice allowed employers to combine their DB and DC plans for nondiscrimination testing as long as the plan satisfied certain criteria before the end of 2013. This allowed and continues to allow employers to take the DC benefits offered to all employees into consideration when evaluating the level of benefits being provided. This temporary relief was and still is very

much appreciated; however, it is not a complete solution and does not address all of the testing requirements. The relief did not address the nondiscrimination requirements for benefits, rights, and features (BRF) and the inability to use the matching contribution component of the DC plan for cross testing purpose. As a result, many employers could still face nondiscrimination testing failure, even with this temporary relief.

Immediate Action Needed and a Recommended Simplified Solution

Due to concerns over the complexity and much needed clarification regarding the draft regulations, the undersigned organizations encourage Treasury and the IRS to extend the temporary guidance (Notices 2014-5 and 2015-28) until the date the final regulations are effective. Furthermore, we request that any extension of the guidance also include guidance pertaining to BRF.

We also strongly encourage Treasury and the IRS to consider making the temporary guidance a permanent solution. Plans have been relying on the temporary guidance since 2013 and it would allow a plan to meet the nondiscrimination requirements permanently if the plan satisfied the nondiscrimination test at the time it was closed, or at a later date. This provides a clear solution that would address plans' concerns that over time, their soft frozen plans may inadvertently violate the nondiscrimination rules. ***Issuing this relief as permanent and adding guidance pertaining to BRF would be an effective and timely means of resolving the important nondiscrimination testing issue for closed DB plans.***

Proposed Regulations

The proposed regulations mark a significant step forward with respect to the necessary relief for a plan sponsor still maintaining DB plans. However, the draft regulations are highly technical and substantial issues remain unaddressed. Further clarification is needed especially in areas where conditions for relief are subjective.

Closed DB Plan Testing Relief

In summary, the draft regulations would allow closed DB plans to utilize cross testing once the plan has been closed for 5 years as long as:

- The DB Plan passed testing for the five year period under the existing rule structure;
- The DB Plan was in effect for at least five years before it was closed; and,
- Any amendments since the five years prior to closure did not significantly change the plan formula or coverage, subject to certain exceptions. For example, the following would not cause a plan to fail to qualify for the relief: (1) an amendment after the closing that was "nondiscriminatory," (2) a "de minimis" change to the benefit formula, or (3) coverage was extended to an acquired group before closure.

Additional clarification on what types of amendments satisfy the conditions of being "de minimis" or "nondiscriminatory" are critical. For example, how would changes in definition of compensation be classified? How would one classify a changed level of early retirement subsidies? Furthermore, it is unclear whether a plan that was passing under the temporary relief provisions in place from 2014 to 2016 would satisfy the 5 year post-closing testing requirement. How does one define a "plan closure date" for a DB/DC plan which includes multiple plans with varying freeze dates?

Furthermore, this rule does not provide reasonable consideration and plan flexibility for companies that have undertaken Merger and Acquisition (M&A) activities. When a company shifts its

retirement program from a DB plan to a DC plan, nondiscrimination testing protocols become distorted when the company acquires or merges with another who still has active DB plans. Rather than immediately closing the pension plan offered by a merged entity, a company may desire to continue the plan for its older, long-service employees for an additional period of time to ease in the transition to a DC plan. As such, we respectfully ask for you to prevent business transactions from causing nondiscrimination failures; for example a DB plan should be permitted to continue to use the business transaction transition rule under Code section 410(b)(6)(C) despite having closed after the transaction. Otherwise, business transactions may trigger the need to freeze completely.

We also encourage eliminating both the prohibition on pre-closing amendments and the five-year delay after closing for the relief to apply. For plans that closed prior to the issuance of the proposed regulations, there is no need for this rule to prevent abuse as no one could have taken advantage of the new testing relief before the testing relief existed. For other plans, Regulation §1.401(a)(4)-5(a) already prohibits amendments from being timed to discriminate significantly in favor of highly compensated employees, which is the abuse targeted by the prohibition on pre-closing amendments. Furthermore, in light of the ban on discriminatory plan enhancements after closing, there is no reason for the five-year delay after closing for the relief to apply.

Finally, we ask for future regulations to permit DB and DC plans to be tested together for all testing purposes without regard to whether they have the same plan year, just as they are tested together under the average benefit percentage test. There were also two specific items not included in the proposed regulations. There is no relief for plans with less than 50 active participants and there is no allowance for matching contributions in cross testing.

We are very concerned regarding the lack of clarity and reliance on subjectivity in this proposed guidance, as highlighted above. We strongly encourage further clarification on the amendments prescribed in the guidance, addressing M&A activity, eliminating the prohibition on pre-closing amendments and the five-year delay for the relief to apply, permitting DB and DC plans to be tested together for all testing purposes, and relief for plans with less than 50 active participants.

<u>DC Transition Contribution Relief</u>
Understanding the challenge around testing transition contributions under current rules, the proposed regulations do provide some relief when transition contributions are provided, in addition to non-elective contributions provided to other employees. However, there is no relief for situations where transition contributions are provided on a stand-alone basis (other than matching).

The undersigned organizations seek guidance related to transition contributions that are provided on a stand-alone basis and additional clarification surrounding "provided in a consistent manner of all similarly situated employees" and a clearer definition of "similarly situated employees." Furthermore, we request consideration of lower threshold for minimum allocation gateway. We suggest eliminating the 7.5% allocation rate for DB/DC plans, allow a 5% threshold for closed plans, and eliminating both the prohibition on pre-closing amendments and the five-year delay after closing for the relief to apply.

<u>Benefits, Rights and Features</u>
Under current rules, certain BRF of a plan must separately pass nondiscrimination testing requirements. These features run into passing issues over time similar to the broader plan testing issues when a plan is closed to new employees

We thank Treasury and the IRS for including BRF in their proposed regulations. The draft provides testing relief for BRFs if the BRF in the closed DB plan has passed testing for five years after the plan is closed, and the amendment limiting the BRF also resulted in a significant change in the "type" of benefit formula. The relief references only a cash balance conversion. If a plan qualifies for relief, the BRF does not need to be tested again.

Unfortunately, the undersigned organizations believe this relief is too narrow for many plans to qualify. In fact, a traditional plan closure is not likely to be considered a change in "type" of benefit formula. ***We encourage future guidance, whether via an extension of the temporary guidance or through final regulations, to issue relief for all BRFs, even if an amendment was not part of the significant plan change. Furthermore, consider eliminating both the prohibition on pre-closing amendments and the five-year delay after closing for the relief to apply.***

Thank you for the opportunity to submit a comment letter and we request a meeting to discuss the regulations and our concerns as soon as possible. We reiterate that this is a strong step forward in addressing the nondiscrimination testing issues and thank you for your consideration of our thoughts on the draft regulations. We look forward to working with you as you continue to resolve this issue.

Sincerely,

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