



April 2, 2008

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CC:PA:LPD: PR (Reg-136701-07)
Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comment on proposed regulation on diversification requirements for certain defined contribution plans

Dear Sir or Madam:

The American Benefits Council (Council) appreciates the opportunity to comment on the proposed regulations concerning employer stock diversification requirements for certain defined contribution plans. 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.

The Council would like to commend the Internal Revenue Service (Service) and the U.S. Treasury Department (Treasury) for providing significant transition guidance in Notice 2006-17 and following up with proposed regulations that have been very helpful to plan sponsors required to meet the new employer stock diversification requirements enacted as part of the Pension Protection Act of 2006 (PPA). The Council has a few recommendations of clarifications or changes to the proposed regulations that would ease administrative difficulties while facilitating the new diversification requirements.

First, the Council recognizes and appreciates the Service and Treasury efforts to provide a smooth transition by allowing reliance on either Notice 2006-107 or the

proposed regulations prior to the effective date of the final regulations. However, we continue to urge you to clarify that plan sponsors may rely on a good faith interpretation of the statutory provisions for any issues for which clear and complete direction was not provided in the transition guidance, pending the issuance of final regulations. As indicated in our March 16, 2007 letter, plan sponsors were required to make reasonable interpretations of the new requirement based on the statute and the transition guidance, and it does not seem appropriate to punish plan sponsors for making reasonable interpretations in order to operate their plans.

The Council also commends the Service and Treasury for addressing many of the Council's concerns expressed in the March 16 letter. However, in addition to the good faith compliance issue, the Council requests that the Service and Treasury clarify and/or make changes or additions to the following areas in the final regulations: (1) round-trip restrictions, (2) brokerage accounts, (3) multiple stock funds and leveraged contributions, (4) stable value fund restrictions and (5) cutback relief for diversification distributions. The Council also recommends that the final regulations address other issues raised in our earlier letter that were not addressed in the proposed regulations.

Round-trip Restrictions

The proposed regulations generally provide that restrictions on investing (or reinvesting) in employer securities are treated as prohibited restrictions if not imposed on other plan assets. The Council recognizes that the proposed regulations allow some specific restrictions and conditions on the employer stock investment that were not permitted under the transition guidance and commends the Service and Treasury for providing this flexibility which will help ease administration. However, Council members are still concerned about limitations on "round-trip" restrictions, particularly with respect to the interaction of the employer stock diversification regulations with the Department of Labor's qualified default investment alternative (QDIA) regulation.

The preamble to the proposed regulations states that a plan will be permitted to impose reasonable restrictions on the timing and number of investment elections that an individual can make to invest in employer securities, provided that the restrictions are designed to limit short-term trading in employer securities and provides an example restricting purchases within 7 days of a sale of employer securities. The Council urges the Service and Treasury to clarify that the 7-day example is merely illustrative and that round-trip restrictions of more than 7 days would be permitted. At a minimum, the final regulations should permit a 30-day roundtrip restriction without regard to whether other investment options have that restriction. And where there has been a pattern of short-term trading

by a participant, a limit of one trade in employer securities per quarter should be treated as reasonable; an example to that effect would be very helpful.

Council members are also concerned about the interaction of the employer stock diversification regulation's general prohibition on restrictions which are not placed on other investment options when coupled with the QDIA regulation's requirement that qualified default investments be restriction-free for 90 days. The Council understands that service providers have difficulty in administering restrictions only after 90 days and, therefore, many QDIAs will need to be permanently restriction-free. The Council urges Treasury and the Service to permit such restriction-free QDIAs without limiting the restrictions on employer stock investments. At a minimum, Treasury and the Service should clarify that the restriction-free 90-day period for QDIAs does not cause the plan to violate the employer stock diversification rules if restrictions are placed on all other investment options besides the QDIA (with the exception of a brokerage account as discussed below).

Brokerage Windows

Many plans offer brokerage windows and have trading restrictions on all of the underlying (non-brokerage window) funds that are not applied to the brokerage window (such as 20 trades per year). Generally, only a very small percentage of plan participants access brokerage windows. If the number of participants using a brokerage window is de minimus, it does not make sense to let the open nature of those windows affect the vast majority investing in the plan's main menu of funds. Many employers have a legitimate interest in restricting rapid trading among funds, but little interest in restricting trading flexibility to the very few who elect to use a brokerage window. This fact pattern was clearly not what Congress intended to prohibit. The final regulations should allow plans to limit imposition of restrictions to the non-brokerage window investment selections.

Multiple Stock Funds and Leveraged Contributions

As indicated in the Council's March 16 letter, the Council requests that the final regulations clarify restrictions that are permitted when a plan includes multiple stock fund investments and/or includes a fund that is closed except for allocations due to repayment of a loan (similar to a leveraged ESOP). In the former situation, the regulations should clarify that plans are permitted to restrict reinvestments in only one employer stock fund when the plan allows investment in another employer stock fund, provided that the stock contained in each fund has the same characteristics except for differences in the cost basis to the trust.

With regard to the allocations within the plan solely due to the repayment of a loan, the regulations should clarify that the employer stock fund will be treated like a closed fund. In other words, restrictions on reinvestment in employer stock will be permitted so long as no employee contributions can be invested in the employer stock fund and only employer contributions used to repay an existing loan can be used to allocate previously purchased employer stock (released from suspension and allocated to participants upon repayment of the loan).

Stable Value Fund Clarifications

Notice 2006-7 allows a plan to impose a restriction on investment in employer securities that is not imposed on a stable value fund and the Council appreciates the clarification in the proposed regulations that applies this exception to other investments that are similar to a stable value fund. However, the proposed regulation applies an additional limitation that the plan cannot impose a restriction on transfers from the employer securities fund that is not imposed on other funds, essentially limiting the exception to transfers into the “stable value” fund, not transfers out. The Council recommends that this new limitation be eliminated because of the need to have one restriction-free liquid investment product to facilitate the purchase and sales of other investment offerings that are subject to the limitations. Otherwise, the plan participant could decide to purchase another offered investment which has restrictions (including employer stock) but not be permitted to use the money in the “stable value” type investment because he or she has used up the maximum number of “sales” of the stable value fund.

Cutback Relief for Elimination of Diversification Distributions

Some 401(k) plans that include Employee Stock Ownership Plans (ESOPs) (either as part of the plan or the entire plan) allow a diversification distribution option for participants under the diversification requirements of Internal Revenue Code Section 401(a)(28). With the addition of the new diversification requirements required by the PPA, these diversification distributions are no longer necessary but are considered protected optional forms of benefit which cannot be eliminated as to amounts already accrued absent cutback relief. If the employer stock in the plan is now fully diversifiable in accordance with the employer stock diversification requirements, there is no policy reason to continue the option for diversification distributions.

The Commissioner of the Treasury has the authority to grant cutback relief so that diversification distributions as to already accrued amounts can be eliminated. The Council urges Treasury to provide such relief in order to

eliminate the administrative difficulties which would arise from grandfathering previously accrued amounts.

Again, we appreciate the opportunity to comment on these employer stock diversification issues. We believe the American Benefits Council offers an important and unique perspective of the employer sponsors of retirement plans and service providers to the plans and we would be please to make this perspective and additional information available to the Service and Treasury. If this would be helpful, please call me at 202-289-6700.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is written in a cursive style with large, flowing loops.

Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council