



AMERICAN BENEFITS COUNCIL

July 30, 2010

Filed via e-mail to Notice.Comments@irs.counsel.treas.gov

Re: Notice 2010-43: Recommendations for 2010-2011 Guidance Priority List

Dear Sir or Madam:

The American Benefits Council (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 is writing to recommend items that should be included on the 2010-2011 Guidance Priority List, specifically items that pertain to employee benefits matters.

Partial Rollovers of After-Tax Amounts

The Council submitted two comment letters to the Internal Revenue Service, dated June 1, 2010 and October 26, 2009, requesting guidance on the tax treatment of a partial rollover to an IRA from a retirement plan that includes amounts attributable to after-tax employee contributions. There is no published guidance addressing the issue. However, in a newsletter published by the Service in March, 2010,² and in the updated 402(f) notice published in September, 2009,³ the Service suggests that the "pre-tax first" rule of section 402(c)(2) of the Internal Revenue Code only applies to a 60-day rollover.

The Council disagrees with the view expressed in the newsletter and the 402(f) notice. In our experience, the vast majority of payors of retirement plan distributions have been performing income tax withholding and tax reporting based on prior legal analyses, and their practices are inconsistent with the views reflected in the newsletter and 402(f) notice. In addition, we are not aware of any payors who have changed their reporting

² *Employee Plans News*, Volume 10, Spring 2010, available at <http://www.irs.gov/pub/irs-tege/spr10.pdf>.

³ Notice 2009-68.

and withholding procedures in light of the newsletter or 402(f) notice. Many have been reluctant to make costly changes in the absence of precedential guidance. This issue affects tens of thousands of individual taxpayers who are engaging in rollovers involving after-tax amounts and it is critical that the Service issue guidance as soon as practicable. Accordingly, we strongly recommend inclusion of this issue on the 2010-2011 Priority Guidance List.

Carry-Over Items

The Council's members are also anxious to see many of the issues that were on the 2009-2010 Priority Guidance List finalized. We appreciate that the Service and the Treasury Department have had a very busy year, particularly given the substantial demands associated with implementing health reform legislation. Nonetheless, we urge you to finish the many long-standing items on the current Priority Guidance List.

Most notably, we are anxious to see the pending final regulations on cash balance and pension equity plans as well as proposed regulations defining a market rate of return for hybrid plans. These regulations implement legislation enacted as part of the Pension Protection Act of 2006, which was enacted nearly four years ago. While we appreciate the relief the Service has provided in the meantime as well as the complexity of the issues presented, it would be enormously beneficial to have guidance addressing the remaining hybrid plan issues.

If you have any questions about these comments, please contact Jan Jacobson, the Council's senior counsel, retirement policy, at 202-289-6700.

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
American Benefits Council