



AMERICAN BENEFITS
COUNCIL

May 1, 2012

Filed electronically via e-mail to Notice.Comments@irsounsel.treas.gov

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2012-25)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: Notice 2012-25, Request for Comments on 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 relating to employee benefit matters that should be included on the Internal Revenue Service (“Service”) 2012-2013 Guidance Priority List.

The Council is submitting a letter separately recommending a project to modify the current nondiscrimination and minimum participation regulations to protect older, long-service participants. This letter focuses on other recommendations for the Guidance Priority List.

I. ADDITIONAL ITEMS FOR CONSIDERATION

A. Guidance on Puerto Rico Plans and 81-100 Trusts

In Notice 2012-6, the Service extended and expanded the transition relief for retirement plans that qualify under the Puerto Rico Internal Revenue Code. The relief

allowed such plans to continue to invest in 81-100 group trusts. The Service indicated that further guidance would be provided. We have two recommendations regarding this guidance.

First, we believe that the transition guidance for trust investments should be made permanent. In other words, Puerto Rico qualified plans described in Section 1022(i)(1) of ERISA should be allowed to continue to invest in Section 81-100 group trusts as well as master trusts. At the very least, such investments should be allowed when Puerto Rico plan investments constitute a *de minimis* portion of the investments in the trust as more fully described in the Council's recent comment letter.¹

Second, Treasury and the Service should clarify that Rev. Rul. 2008-40 (as modified by Rev. Rul. 2011-1 and Notice 2012-6) allows for transfers from a 403(b) plan to a Puerto Rico only plan. The Council believes that the same policies that underlie the special grace period for transfers from a 401(a) plan should equally support transfers from a 403(b) plan.

B. In-Plan Roth Conversions and Lump Sum NUA Treatment

Council members have expressed interest in additional guidance on the relationship between in-plan Roth conversions under Internal Revenue Code ("Code") section 402A(c)(4) and the rules regarding net unrealized appreciation in Code section 402(e)(4).

By way of background, the rules allowing exclusion of net unrealized appreciation ("NUA") apply to distributions of all employer securities when the distribution is part of a lump sum distribution – that is, a distribution upon the occurrence of certain events within one taxable year of the balance to the credit of the participant. A question has arisen whether an in-plan Roth conversion is treated as a distribution for purposes of this rule. For example, if a participant was to receive, in one taxable year, a distribution of employer securities representing part of the account, and made an in-plan Roth conversion of the remaining account, it is unclear if the participant has incurred a "lump sum" distribution. Similarly, it is unclear if a partial in-plan Roth conversion in one year might prevent a participant from taking advantage of NUA treatment in a lump sum distribution in a later year.

In Notice 2010-84, Q&A-3, the Service listed four purposes for which an in-plan Roth conversion is not treated like a distribution. Code section 402(e)(4) is not on the list. We believe the Service should consider adding Code section 402(e)(4) to the list. However, because of the uncertainty regarding this issue, we recommend that such a change apply on a prospective basis only.

¹ See Council Letter of April 16, 2012, available at http://www.americanbenefitscouncil.org/documents2012/prplans_council-letter041612.pdf

II. CARRYOVER ITEMS

There are a number of items that are on the 2011-2012 Guidance Priority List – and which have not been completed – that we recommend be carried over to the 2012-2013 Guidance Priority List.

A. Partial Rollovers of After-tax Amounts

As the Council has mentioned in previous letters,² it is very important that the Service provide guidance as soon as possible on the tax treatment of a partial rollover to an IRA from a retirement plan that includes amounts attributable to after-tax employee contributions. In a newsletter published by the Service in March 2010 and in the updated 402(f) notice published in September 2009, the Service suggested that the “pre-tax first” rule of Code section 402(c)(2) only applies to a 60-day rollover. This informal guidance is inconsistent with the text of Code section 402(c)(2) and the historical view and practice of plans and service providers. Because of the uncertainty of the issue, 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.

B. Suspension of Safe Harbor Contributions

In May 2009, the Department of Treasury and the Service published proposed regulations that would allow plans to suspend safe harbor contributions. Those regulations have yet to be finalized. The Council supports finalization of these regulations. As we described in our comment letter and our hearing testimony, we believe a number of improvements should be made in the final regulation, including (1) eliminating the hardship requirement, (2) eliminating or at least providing a transition period for language in the annual safe harbor notice, (3) modifying the requirement to prorate the compensation limit, and (4) providing leeway in the effective date.³

² See Council letters of July 30, 2010, available at http://www.americanbenefitscouncil.org/documents/irs-business-plan_council-comments073010.pdf; June 1, 2010, available at http://www.americanbenefitscouncil.org/documents/followup_letter_re_402c2.pdf; and October 26, 2009, available at http://www.americanbenefitscouncil.org/documents/402f_notice_abc-cmnts_102609.pdf

³ A copy of the Council’s comment letter, filed jointly with the Society for Human Resource Management, is available here: http://www.americanbenefitscouncil.org/documents/irs_commentletter-safeharbor_abc-shrm081409.pdf

C. Hybrid Plans

In October 2010, the Service issued final and proposed hybrid plan regulations. The current Guidance Priority List includes a project to issue final regulations under Code sections 411(a)(3) and 411(b)(5) relating to hybrid plans. On September 7, 2011, the Council – along with five other groups representing employer retirement plan sponsors – submitted recommendations to the Service identifying outstanding policy issues with regard to hybrid plan regulations.⁴ The joint submission addresses in detail critical issues that must still be clarified or addressed in the final and proposed regulations, including whipsaw and hybrid plan benefits; projecting variable interest credits into the future, market rate of return; and transition and effective date issues. This joint letter follows a January 12, 2011, letter filed by the Council and the Coalition to Preserve the Defined Benefit System, focusing primarily on market rate of return issues.⁵ We urge prompt action on hybrid plans.

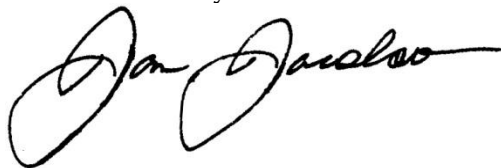
D. Pension Equity Plans

The 2011-2012 Guidance Priority List contains a project to provide guidance on pension equity plans. Although pension equity plans have received less attention than cash balance plans, they represent an important and commonly used design. It is important that plan sponsors of pension equity plans have certainty regarding their plans. The proposed and final hybrid plan regulations do not provide sufficient guidance regarding pension equity plans. We urge the Service to move forward on this project.

* * *

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

Sincerely,



Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council

⁴ A copy of the joint letter is available here:

http://americanbenefitscouncil.org/documents/hybrids_group-submission090711.pdf

⁵ A copy of the letter is available here:

http://americanbenefitscouncil.org/documents/hybrid_plan_letter_00139077-3.pdf