



AMERICAN BENEFITS COUNCIL

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Submitted via email

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Dear Mark, Vicki and Robert:

The American Benefits Council (the "Council") would like to thank Treasury and the Internal Revenue Service again for issuing Notice 2014-5. We believe that the Notice was a major step forward in addressing critical problems with respect to the inadvertent effects of the nondiscrimination rules on plans that attempt to grandfather participants from changes in a defined benefit ("DB") plan. ***However, we are writing today to emphasize the critical need to extend the temporary relief provided by the Notice. Unless the temporary relief is extended in the next few months, thousands more participants will have their benefits frozen.***

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.

IN GENERAL

Many companies are transitioning away from a traditional DB plan benefit formula in one of various ways. This can arise, for example, by reason of (1) closing the plan to new hires, (2) converting the plan from a traditional plan to a hybrid plan, or (3) moving acquired employees from disparate benefit formulas to a uniform benefit formula. 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 prime example is closing a traditional DB plan to new hires (who often receive an additional contribution under the company's defined contribution ("DC") plan), but allowing existing employees to continue to participate in the DB plan.

These "grandfathering" arrangements are very helpful to the older longer service employees who (1) often have made retirement plans based on the benefit formula previously in effect, and (2) would lose the higher benefits provided by DB plans at the end of a career, without having benefited from higher DC plan contributions in earlier years. However, these grandfather arrangements can, over time, cause nondiscrimination testing problems (under Code sections 401(a)(4) and 410(b), as well as under the minimum participation requirements of Code section 401(a)(26)). *As discussed in detail in our prior submissions on this set of issues, these nondiscrimination testing problems have already led many employers to freeze benefits. And many thousands more will lose benefits in 2016 unless prompt guidance from Treasury and the Service is provided.*

TIME PRESSURES

Briefly, the temporary relief provided by Notice 2014-5 expires at the end of 2015. As has been happening almost every year recently, and will happen in future years on an increasingly broader scale, many employers will be forced to take corrective action in 2016 in the absence of meaningful relief from the nondiscrimination problems referenced above. As discussed in our prior submissions, in most cases, that corrective action will likely include a complete freeze of benefits for participants who had previously been accruing benefits.

A company that needs to freeze its plan effective January 1, 2016 will begin planning for that action long before the end of 2015. A company must (1) go through a thorough analysis of the testing issues, (2) evaluate the options for addressing those issues, (3) develop recommendations for senior management and the Board that illustrate the advantages and disadvantages of different courses of action, (4) present those recommendations to senior management and the Board, (5) make plans to implement the decisions made by senior management and the Board, and (6) implement the decisions, including very intense communication efforts with affected participants.

The above process can easily take at least a year. And there is a crossover point during this process when decisions are made that will be implemented regardless of changes in the law. After senior management and the Board are briefed on the numerous aspects of a recommendation to freeze a plan and the decision is made to freeze, it is generally too late to go back to the decision-makers to report on detailed changes in the law that may or may not be workable. The decision has been made. And in order to implement a large change like a plan freeze with corresponding fundamental changes to the company's 401(k) plan, that decision generally must be made many months ahead of time, at least six to nine months in some cases.

Accordingly, we are already hearing from companies stating that they will need to make a final decision in the next few months on whether to completely freeze their plan starting in 2016. In the absence of regulatory or legislative solutions by that time, the companies indicate that the decision will likely be to freeze the plan.

ADDITIONAL TEMPORARY RELIEF NEEDED

In order to avoid having thousands more participants lose benefits, we urge you to do the following:

- **We ask you to promptly announce that the temporary relief provided by Notice 2014-5 has been extended for three years through 2018.** The regulatory process can take a lot of time to work through; many regulatory projects take much longer than three years. In this case, as reflected in our comments on the Notice, there is a large distance between the solutions raised in the Notice and the solutions that would solve the problems that have been identified, leading many to conclude that the regulatory process may not be a short one.
- **We ask you to extend the temporary relief to apply to the other major issues that we have identified in our comments:** (1) the benefits, rights, and features issue with respect to both DB plans and DC plan (e.g., regarding the level of matching contributions), (2) the ability to use matching, ESOP, and 403(b) contributions in determining whether a DB/DC plan satisfies the nondiscrimination tests, (3) the minimum participation issues, and (4) the use of make-whole contributions in DC plans to make up for a complete freeze of a DB plan.

PERMANENT SOLUTIONS NEEDED

The need for the temporary relief noted above is urgent. But we also very much need to find permanent solutions to the above issues. We look forward to continuing to work with you on those permanent solutions. We urge you to consider the solutions described in our prior submissions, the most recent of which was dated February 28, 2014.

We look forward to discussing these issues, which are so critically important to participants and plan sponsors across the country

Sincerely,

A handwritten signature in black ink that reads "Lynn D. Dudley". The signature is written in a cursive style with a large, prominent "L" and "D".

Lynn D. Dudley
Senior Vice President,
Global Retirement
& Compensation Policy