AMERICAN BENEFITS COUNCIL

December 26, 2018

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Dear Carol, David, and Vicki:

On behalf of the American Benefits Council ("Council"), I am writing concerning guidance on retirement issues related to student loan repayments. We believe that there is a great opportunity to work together to advance retirement security, especially for employees so burdened with student debt that they cannot afford to save for retirement. In this regard, the Council would very much like the opportunity to meet with you so that Council members can share their thoughts, as summarized below, on these critical issues.

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.

As noted above, the student debt burden on American workers is a significant, broad, and pressing financial issue for workers of all ages that goes beyond the retirement plan issues discussed in this letter, but these retirement plan-related issues are a vital part of addressing the challenge. In addition, we recognize that a full solution to these retirement plan-related issues may require legislation. But there is much that can be achieved without legislation, and we applaud the IRS for issuing Private Letter Ruling ("PLR") 201833012, which provides a mechanism under current law for employers to help employees overburdened with student debt save for retirement.

Employers commonly make matching contributions on behalf of employees who contribute to a 401(k) plan. An employee burdened by student debt, however, might be unable to afford to make any contributions to a plan, and therefore miss out on a valuable employer match. The PLR approved an arrangement under which the plan treated student loan repayments as elective contributions to the plan, solely for purposes of eligibility for a "matching" contribution.

We are writing today to request guidance of general applicability that can help spur greater development of these programs. That guidance would, of course, reiterate the core discussion of the contingent benefit rule addressed in the PLR. The guidance can hopefully also address the other key issues discussed below.

CORE DISCUSSION OF THE CONTINGENT BENEFIT RULE

There has been some uncertainty about whether the conclusions reached in the PLR were based in any way on the particular facts presented, such as the particular matching formula or the structure and timing of the true-up matching contribution. We do not see anything in the law or the PLR that would limit the application of the same legal principles to other types of matching arrangements (such as 50% matches on elective contributions up to 6% of pay) or "true-up" matching contributions that are made during the plan year (such as on a monthly or pay period basis). Confirmation of these points in guidance would be helpful. It would also be helpful for the guidance to, of course, confirm that 403(b) plans can include such student loan matching arrangements.

ADMINISTRATION

One of the major challenges facing plans in implementing a student loan matching program is the administrative burden of documenting that an employee has actually made a student loan repayment and the amount of that repayment. It would be very helpful if guidance could be issued confirming that plan sponsors are not required to collect any documentation regarding the student loan, including loan agreements and cancelled checks to reflect the amount of the repayment. Plan sponsors should be able to rely on generally applicable fiduciary rules that govern the operation of their plans in administering these student loan programs. Indeed, plan sponsors have their own financial motivations for ensuring that matching contributions are appropriately applied.

One of the key points here is that these programs are just beginning. In order for them to develop and flourish, employers need administrative flexibility, which is why workable administrative systems, including use of employee certifications, should be allowed. Beyond facilitating what is doable today, the guidance should more generally be flexible enough to accommodate innovations and new developments in this area.

NONDISCRIMINATION TESTING

The approach approved in the PLR may work for some companies, particularly larger companies that can pass coverage and nondiscrimination testing based on the composition of its workforce. For many others, however, the approach will create nondiscrimination and coverage testing problems, because the "matching" contributions are technically nonelective contributions that must be tested separately for coverage and nondiscrimination. We believe that it is within the authority of Treasury and the IRS to address certain of these issues in guidance of general applicability. Set forth below are recommendations for inclusion in such guidance.

Allow safe harbor plans to use the approach described in the PLR: Under one interpretation of current law, as explained below, it appears that a safe harbor 401(k) plan could not use the arrangement described in the PLR.

An employee who makes an elective contribution and also repays a student loan must receive the nonelective contribution first, before receiving any remaining available matches on the elective contribution in order to avoid violating the "contingent benefit rule." [1] Otherwise, receiving the nonelective contribution would impermissibly be contingent on the employee not making elective contributions.

In this context, because participants participating in the plan's student loan program receive a nonelective contribution instead of a matching contribution, any nonelective contribution received by a nonhighly compensated employee ("NHCE") could cause a violation of the safe harbor requirement in Reg. §1.401(k)-3(c)(4) if any highly compensated employee ("HCE") receives a full match. The NHCE, in this case, would be eligible for a lower rate of matching contribution than the HCE, which is prohibited by the statute and regulation.

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[1] The contingent benefit rule prohibits any benefit (other than an employer match) from being conditioned (directly or indirectly) on an employee electing to make or not make elective contribution to a plan. Code section 401(k)(4)(A); Regulation 1.401(k)-1(e)(6).

Treasury and the IRS could easily provide guidance solving this problem by clarifying that in the above situation, all NHCEs are eligible for the same rate of matching contribution as all HCEs. This is clearly true as of the beginning of the year, and the fact that an NHCE can take a voluntary action, i.e., requesting a nonelective contribution based on a student loan repayment, does not mean that the NHCE was eligible for a lower rate of matching contribution.

Permit matching contributions to be aggregated with nonelective contributions for purposes of helping the nonelective contributions satisfy the coverage and nondiscrimination in amounts tests: Many of the problems preventing employers from offering the student loan arrangement described in the PLR stem from the need to test nonelective contributions separately. Accordingly, if employees receiving or eligible to receive these nonelective contributions are disproportionately highly compensated, the nonelective contribution portion of the plan can fail in any year to satisfy the coverage and/or nondiscrimination rules.

This challenge can be addressed by permitting the matching contribution portion of a plan to be aggregated with the nonelective contribution portion of a plan to help the latter satisfy the coverage and nondiscrimination in amounts test. There is no statutory or policy reason why in this situation the matching contribution part of a plan cannot be aggregated with nonelective contributions to help nonelective contributions satisfy the applicable rules. In fact, the regulations already permit this aggregation in the average benefit percentage test context.[2] There is no reason not to permit the same aggregation treatment here.

This would require a change to the regulations, but it would be a broadly needed and appropriate change. This could be easily done by issuing a Notice announcing the intent to make this change through a regulatory amendment, retroactive to the date of the amendment.

Benefits, rights, and features ("BRF") testing, issue one: Assume, for example, that a plan provides a dollar for dollar match on elective contributions up to 6% of pay. Assume that such a plan also provides the same match on student loan repayments, so that the total match available cannot exceed 6% of pay. Assume further that an NHCE makes a student loan repayment of 6% of pay and gets the full match. In that situation, if the NHCE makes an elective contribution, it would not be matched, raising a question of how that NHCE should be treated for purposes of testing the "right to each rate of allocation of matching contributions" under Reg. § 1.401(a)(4)-4(e)(3)(iii)(G). In our view, the answer is the same answer discussed above regarding safe harbor plans. The full matching rate was made available to that NHCE. That fact should not be negated by

[2] *See* Regulation § 1.401(b)-7(e)(1).

the fact that the employee made a voluntary decision to request a match on student loan repayments.

Alternatively, another way to address this issue would be to permit the availability of the nonelective contribution to be aggregated with the availability of the matching contribution for purposes helping the latter satisfy BRF testing. This is an eminently logical conclusion that conform the law to the substance of the arrangement. The NHCE in this example can receive what are effectively matching contributions on the same basis as all others in the plan. There is no reason to treat the NHCE as effectively not having matches available to her.

Benefits, rights, and features testing, issue two: There may be somewhat different timing for (1) making matching contributions on elective contributions, versus (2) making matching contributions on student loan repayments, with the latter being made later. We request guidance stating that if all eligible employees had the choice to get the earlier match by making elective contributions, the earlier match is available to all eligible employees for purposes of BRF testing.

Nondiscriminatory classification test: Under the section 410(b) coverage rules, the nonelective contribution portion of a plan must be tested separately (unless that is modified as proposed above). If such portion of the plan cannot satisfy the ratio percentage test, then such portion would be required to satisfy the average benefit test, which requires satisfaction of the nondiscriminatory classification test. The nondiscriminatory classification test includes the "reasonable classification" rule, which requires that "the classification [of employees covered by the plan] is reasonable and is established under objective business criteria that identify the category of employees who benefit under the plan."[3] There is no guidance regarding whether a reasonable classification could be a group of employees that (1) are paying back a student loan, and (2) request an employer contribution based on that payment. Thus, without guidance on this point, adoption of the student loan arrangement would come with some legal uncertainty.

We see no reason why such a group of employees would be unreasonable or raise any of the concerns that gave rise to this regulatory requirement. Accordingly, we request guidance that this type of group would satisfy the reasonable classification component of the nondiscriminatory classification test.

ADP and ACP testing: If the employees using the student loan program are disproportionately NHCEs, then the student loan program could cause testing problems under the ADP test applicable to elective deferrals or the ACP test applicable

[3] Regulation § 1.410(b)-4(b).

to matching contributions. We ask you to consider using your regulatory authority to permit the student loan matches to serve as qualified nonelective contributions, without having to be tested separately as nonelectives. The case for such treatment is especially strong with respect to the ACP test, since the student loan nonelectives are functionally the same as the plan's matching contributions.

ELIMINATING A BARRIER TO AN INNOVATIVE APPROACH

We wanted to call to your attention an approach being contemplated with respect to student loan matching contributions. In some cases, plans provide matching contributions with respect to after-tax contributions. This presents an opportunity to facilitate matching contributions on student loan repayments in the following manner.

Employees wishing to receive a matching contribution on a student loan repayment would make an after-tax contribution to the plan equal to or greater than the amount of the student loan payment. The employee would then request a withdrawal from the plan of that after-tax contribution and request that it be forwarded to the student loan creditor. This after-tax contribution would be matched, thus facilitating a matching contribution of a student loan repayment in a very administrable manner.

We ask for guidance that this structure does not pose any technical problems. Specifically, we ask that the after-tax contribution be respected as an after-tax contribution for all purposes, so that the matching contribution would be a true matching contribution for all purposes, thus solving many thorny testing issues that would apply if the matching contribution were treated as a nonelective contribution. The contribution was validly made to the plan. The fact it is withdrawn does not undo its status as a valid after-tax contribution.

We recognize that there are some old rulings that call into question employees' ability to withdraw contributions that are matched. See Rev. Rul. 72-275 (employee contributions cannot be immediately withdrawn if they are the basis for employer contributions, since that "would permit manipulation of the allocation and contravene the requirement in section 1.401-1(b)(1)(ii) of the regulations for a definite predetermined allocation formula"); Rev. Rul. 74-55; Rev. Rul. 72-367 (concluded that a plan would not be disqualified if the withdrawal of employee contributions also required the forfeiture of employer contributions that were geared to the withdrawn employee contributions, as evidence of financial need); Rev. Rul. 74-56.

We question the current applicability of such rulings in light of today's plan practices and arrangements. We ask that guidance clarify that such rulings would not apply to the above contemplated arrangement, either because (1) the rulings are no longer valid, or (2) there is no reason to prohibit matching after-tax contributions that are used to repay student loans, since it is permissible to match student loan repayments.

We further ask for guidance permitting the distribution of the after-tax contributions used to pay for the student loan debt to be treated as all basis. In general, if there is income in the separate contract containing the after-tax contributions under section 72(d), then distributions from that contract are pro rata income and basis. But in this case, the plan is effectively just a conduit between the participant and the student loan creditor, so there is no reason to attach any income to the plan passing on an after-tax contribution in this capacity.

ACCOMMODATING INNOVATION

Employers are actively exploring new ways to help their employees with student debt. For example, some employers may want to "match" their employees' student loan repayments by making additional student loan repayments, if the employee elects such employer repayments in lieu of being eligible in whole or in part for a matching contribution to the plan. We ask you to consider how best to encourage this and similar types of innovation. We look forward to continued dialogue regarding how this might be done, including (1) not treating the employee election as a cash or deferred election, and (2) through ensuring that such programs do not have adverse effects on retirement plan nondiscrimination testing.

CONCLUSION

Even if legislation is still needed to solve all the challenges faced by student loan repayment programs, the guidance requested above would enable far more employers to help employees burdened with student loans to save for retirement.

Thank you for considering the issues addressed in this letter. We look forward to discussing these issues with you further.

Sincerely,

Lynn D Dudley

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