



November 5, 2007

CC:PA:LPD:PR (REG-142695-05)
Room 5203
Internal Revenue Service
POB 7604
Ben Franklin Station
Washington, D.C. 20044

Re: **Comments on Proposed Regulations under Section 125 of the Internal Revenue Code (Cafeteria Plans)**

Dear Sirs/Madams:

I am writing on behalf of the American Benefits Council ("the Council") regarding the proposed cafeteria plan regulations interpreting Section 125 of the Internal Revenue Code ("Code"). 72 Fed. Reg. 43938 (August 6, 2007).

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 applauds the efforts of the Internal Revenue Service ("IRS") to expand and clarify the rules in the new proposed cafeteria plan regulations, and appreciates the opportunity to offer comments on how the rules could be further improved.

Almost all of the Council's members either currently offer a cafeteria plan, or provide services to employers to assist with cafeteria plan administration. Our members view the cafeteria plan as a valuable tool that allows them to provide employees an array of benefit options in a cost effective manner.

Although many of the rules in the proposed cafeteria plan regulations are helpful clarifications, employers and service providers are concerned about several aspects of the rules, including the IRS' position that any mistake in the plan document, or any mistake in administering the plan, will result in adverse tax consequences that impact all cafeteria plan participants. For an employer with thousands of employees, this

could result in a significant tax liability. We believe that certain aspects of these regulations, particularly the nondiscrimination rules which establish a new complex testing regimen, should be further clarified and modified prior to being published as a final regulation. As a result, we are requesting that the nondiscrimination rules be re-proposed after changes are made, so that we have another opportunity to review and provide feedback on the revisions made following the close of this comment period.

Plan Document Errors

We recommend that the IRS adopt an exception to the broad rule that any cafeteria plan document omission causes a plan to fail to be a cafeteria plan. The final regulations should provide that where an employer in good faith adopts and maintains a cafeteria plan and corrects a plan document error within a reasonable time of discovery, the plan remains a cafeteria plan and will continue to be considered a cafeteria plan.

Under the new regulations, the IRS takes the position that any error in the written terms of the plan document will result in the cafeteria plan not being considered a cafeteria plan (Prop. Treas. Reg. § 1.125-1(a)(1)). The new proposed regulations provide no exceptions to this rule, even for employers that have substantially complied with the written plan requirements under the regulations. We realize that it may be appropriate under certain circumstances for the IRS to invalidate a cafeteria plan for all participants where an employer has completely disregarded the rules applicable to cafeteria plans. However, even the most diligent employers make inadvertent errors and omissions when drafting cafeteria plan documents. Invalidating a plan because of an inadvertent drafting error or omission is an unwarranted and harsh sanction for both employers and participants. Code § 125 does not address or prohibit this type of exception. As such, the IRS has the flexibility to provide that where an employer, in good faith, adopts and maintains a cafeteria plan and promptly corrects a plan document error or omission within a reasonable period of time of discovery, no adverse tax consequences will result. The cafeteria plan rules should not operate to unduly punish participants for inadvertent employer drafting mistakes, or to subject employers who substantially comply with the cafeteria plan rules to additional employment taxes, penalties, and interest or the burden of providing amended Forms W-2 (and the burden on employee participants of having to file amended tax returns).

Operational Errors/De Minimis Exception

The regulations should provide an exception for *de minimis* operational errors, and should impose adverse tax consequences associated with more significant operational failures only upon affected participants.

Under the new proposed cafeteria plan regulations, the IRS takes the position that any operational error, including errors relating to the timing of benefit payments, the administration of employee elections, and substantiation of expenses will result in the

cafeteria plan not being considered a cafeteria plan, resulting in significant adverse tax consequences for both participants and employers. Most large employers carefully administer their cafeteria plans; however, even the most diligent employers may make some mistakes. Code § 125 does not address or prohibit *de minimis* exceptions. Thus, the IRS has the flexibility to create such an exception in the final regulations. Allowing employers an exception for such minor errors would be advantageous to employees who have little control over plan administration, and on employers who have likely devoted significant resources to complying with the cafeteria plan regulations.

When an operational violation impacts a number of employees, or is not corrected within a reasonable time, we agree that treatment as a *de minimis* violation may not be appropriate. Under the Employee Plans Compliance Resolution System ("EPCRS"), the factors considered in determining whether an operational failure is insignificant include the number of participants affected relative to the total number of participants in the plan and whether correction was made within a reasonable time after discovery of the failure. (See Rev. Proc. 2006-27 § 8.02.) In our view, a similar guideline could be used to determine whether an operational error is *de minimis*, or a more significant violation. Even where a more significant operational failure occurs, we believe that the IRS should provide a limited period to retroactively correct cafeteria plan administrative mistakes. If the correction is not made within that time frame, we agree that it would be appropriate to impose tax consequences but we do not believe that the tax consequences should be imposed upon all cafeteria plan participants. Rather, in our view, the plan should fail to be a cafeteria plan only with respect to the particular employees who are affected rather than all employees under the plan. The amount of income that is required to be included in wages at that point should be no greater than the level of pre-tax benefits actually elected by affected employees.

Retroactive Amendments

We recommend that the IRS revise Prop. Reg. § 1.125-1(c)(5) to state that retroactive plan amendments are a permissible method of correction for cafeteria plans.

The new proposed regulations provide that plan amendments are only effective for periods after the later of the adoption date or the effective date of the amendment. Thus, the new rules eliminate an important method of correction by way of retroactive amendment. In certain situations, employers need the flexibility to retroactively amend plan documents during the plan year. These situations include correcting plan documents when an error is discovered, or retroactively amending a plan in order to allow the employees of a newly acquired company the opportunity to participate in the existing plan as of the date of the acquisition. Code § 125 does not address the issue of retroactive cafeteria plan amendments. Accordingly, we encourage the IRS to adopt a provision similar to the qualified plan rules, where retroactive amendments are permissible. (See Code § 401(b); Treas. Reg. § 1.401(b)-1.) Retroactive plan amendments are also permissible methods of correction under EPCRS. For instance, where hardship

distributions are made to employees under a qualified plan that does not provide for hardship distributions, the employer may amend the plan retroactively to provide for the hardship distributions that were made available. (*See Rev. Proc. 2006-27.*) That flexibility would be equally helpful in the cafeteria plan context. Further, a number of employers utilize administrative service providers to assist them in meeting their plan document and compliance obligations. The need for the ability to do retroactive amendments in certain circumstances is particularly important from the service provider perspective, where preparing and disseminating amendments to a large group of clients can be a resource-intensive undertaking.

Voluntary Compliance Correction Program

We recommend that the IRS expand the Voluntary Correction Program (VCP) available under EPCRS in the qualified plan context for significant violations of Code § 125, the regulations or the cafeteria plan document, or create a similar voluntary correction program that cafeteria plan sponsors can use.

The new proposed regulations do not include methods of correction for more significant violations of the plan document, Code § 125 or the cafeteria plan regulations. Code § 125 does not prohibit or proscribe methods of correction applicable to cafeteria plans. As such, the IRS has flexibility to implement correction procedures as an alternative to invalidating a cafeteria plan. The EPCRS is a valuable system that allows employers the opportunity to correct inadvertent errors as an alternative to disqualification. The VCP is the second level of the EPCRS three-tiered system that permits employers to receive approval from the IRS for a correction at any time before audit so long as certain requirements under the program are satisfied. (*See Rev. Proc. 2007-26.*) The VCP is used by employers and plan sponsors to correct more significant qualified plan failures that may not be remedied through the tier-one Self Correction Program under EPCRS.

We encourage the IRS to adopt a similar voluntary program to provide employers with an alternative to cafeteria plan invalidation for more significant violations of the plan document, Code § 125 or the cafeteria plan regulations in order to soften the application of broad cafeteria plan invalidation. Allowing employers an opportunity to correct inadvertent but significant errors will advance IRS' ultimate goal of increased compliance, and will help participants retain tax-favored benefits.

Nondiscrimination Rules

Below, we offer our recommendations for changes that should be made to the nondiscrimination Section of the regulations. Given the number of changes that are needed with respect to this Section and the complexity of the rules, we urge the Service to re-propose this Section to give us the opportunity to comment on the revised regulations.

A. Definition of Highly Compensated Individuals

We recommend that the IRS revise the following definitions to conform with the qualified plan rules:

- The definition of "officer" should be revised to include the Code § 416(i)(1)(A) limit on the number of officers an employer is deemed to have.
- The definition of a "highly compensated individual" should be revised to exclude the current year rule for new hires.
- The definition of "key employee" should be revised to apply for the current plan year as under Code § 416(i)(1)(A).

To a large extent, the rules used for determining who is a highly compensated individual under the Code § 125 and the regulations are similar to the rules used for determining who is a highly compensated employee under the tax-qualified plan nondiscrimination rules. However, certain definitions are not the same, and these differences will require employers to separately track those who constitute a highly compensated employee for qualified plan nondiscrimination testing purposes and those who constitute a highly compensated individual for cafeteria plan nondiscrimination testing purposes.

Code § 125 does not define an officer for purposes of the cafeteria plan nondiscrimination rules. Thus, the IRS has the ability to revise the definition in the new proposed regulations to mirror the qualified plan definition of officer. The qualified plan rules limit the number of officers that may be taken into account for purposes of the nondiscrimination rules. (*See* Code § 416(i)(1)(A).) Specifically, the number of officers that may be considered cannot exceed the greater of three employees or ten-percent of all employees, not to exceed 50 employees.

In addition, Code § 125 does not define a highly compensated employee for purposes of the cafeteria plan nondiscrimination rules. Thus, the IRS has the flexibility to revise the definition in the new proposed regulations. The qualified plan rules do not include someone as highly compensated in their first year of employment. Whether an employee is highly compensated is generally based on compensation from the employer for the preceding plan year. (*See* Code § 414(q).) Because a new hire does not have compensation from the employer for the preceding year, a new hire is generally not considered highly compensated for his or her first year of employment.

Finally, the definition of key employee under Prop. Treas. Reg. § 1.125-7(a) is slightly different than under Section 416(i)(1) because of its focus on the preceding year. There does not appear to be any legal basis for this distinction. Accordingly, this rule should be changed so that the key employee determination is made with respect to the current year.

To the extent the cafeteria plan definitions are not the same as their counterparts under the qualified plan rules, employers and service providers will be faced with the costly administrative burden of undertaking systems and programming changes to establish duplicative tracking efforts for purposes of nondiscrimination testing. The cafeteria plan definitions must be revised to mirror the qualified plan rules, so as to reduce the potential for confusion and increased error in administration by employers, plan sponsors and service providers.

B. Expansion of Safe Harbor Test for Premium Only Plans

We recommend that the IRS make clear that the premium only plan safe harbor applies to the premium only portion of a cafeteria plan, whether or not the cafeteria plan provides more than one health benefit option, or additional benefits. We also recommend that the IRS clarify that the premium only plan safe harbor includes premium only plans that are self-insured as well as insured. Most large employers offer some benefits through self-insured arrangements, and we urge the IRS to recognize that the relief that is available with respect to insured arrangements should extend in the same way to self-insured arrangements. Finally, we recommend that the IRS expand the premium only plan safe harbor to include disability and life insurance benefits. There does not seem to be any legal basis for limiting the new safe harbor to accident or health benefits, and we therefore urge the IRS to expand the new rule to include all of the arrangements that are typically purchased through the premium only portion of the cafeteria plan.

Large employers generally offer multiple health plans and multiple levels of employer premium subsidies within those plans. The IRS should expand and clarify the premium only plan safe harbor, providing examples to illustrate that an employer with these options can take advantage of the premium only plan safe harbor. Also, large employers generally offer a "premium only plan" component as part of the cafeteria plan, but also offer other benefits such as a health FSA, dependent care FSA, or HSA option. It seems in that circumstance, the safe harbor should apply to the portion of the cafeteria plan that constitutes the premium only plan. The IRS should issue guidance that confirms this. Finally, there does not appear to be any legal basis for creating a safe harbor that is available for insured plans, but not self insured plans, or for specifying that a premium only plan is one that provides accident or health insurance coverage only. Accordingly, we urge the IRS to revise these rules.

C. Clarification of General Safe Harbor Test

We recommend that the IRS establish a design-based safe harbor for health benefits offered through a cafeteria plan, which specifies that all of the nondiscrimination tests under Code § 125 will be met if all employees are subject to the same eligibility requirements for health benefits, and if the employer provides an equal or greater health

benefit subsidy for non-highly compensated employees than for highly compensated employees. We also urge the Service to develop a safe harbor that can be relied upon when a health savings account option is offered.

The proposed regulations include the statutory safe harbor for health benefits, but do not explain how this safe harbor applies when an employer offers multiple health benefit options to employees that can be purchased on a pre-tax basis, and provides varying employer subsidies to employees for these health benefit options. Congress clearly intended to provide employers with the ability to offer health benefits under a cafeteria plan in a manner that would be deemed to satisfy the nondiscrimination rules. Code § 125(g)(2) sets forth a safe harbor that appears to apply in circumstances in which an employer is making a significant contribution toward the cost of health benefits. In order to be useful, however, this safe harbor exception needs to be clarified and updated to reflect the manner in which employers offer health benefits through their cafeteria plans today.

A common plan design for a large employer is to offer varying levels of employer subsidies within a health plan that has multiple options, and to allow all eligible employees to elect and pay for their share of the cost of coverage on a pre-tax basis. Under this design, the nondiscrimination rules should be deemed satisfied if all employees are subject to the same eligibility rules and if the employer subsidizes an equal to or greater portion of the cost of the health care coverage for non-highly compensated employees than for highly compensated employees. This type of design-based safe harbor would allow employers who are subsidizing the cost of employees' health coverage to continue to offer a variety of health benefit options through the cafeteria plan with confidence that the nondiscrimination tests would be satisfied. This level of certainty is critical for employers with thousands of employees who cannot reasonably predict in advance which employees are likely to elect health coverage for a particular year. In addition, from a health policy perspective, this rule will encourage employers to continue to subsidize health coverage for the employees who can least afford it.

More recently, employers have started offering and contributing to health savings accounts as part of their array of health benefit offerings. To encourage employers to continue to offer consumer-directed health options such as HSAs, it is critical for the nondiscrimination tests to apply in a manner that does not impede an employer's ability to contribute to an HSA, or impede an employer's ability to allow an employee to contribute to an HSA with pre-tax dollars. In our view, the best approach would be to develop a safe harbor that makes clear that, as long as an employer is not contributing more to the HSA of a highly compensated employee than it is contributing to the HSA of a non-highly compensated employee, and as long as all employees have the ability to contribute pre-tax salary reduction dollars up to the limit under Code § 223, there is no nondiscrimination.

D. Disaggregation

The IRS should clarify and expand the disaggregation rules to allow employers who have multiple health plans with varying benefits and multiple premium only plans to disaggregate plans for nondiscrimination testing purposes without regard to the length of service of particular employees.

The proposed regulations set forth new rules suggesting that the employer has some flexibility to disaggregate cafeteria plans in performing cafeteria plan testing, but these rules are limited to grouping plans based upon benefits that are provided to employees who have completed three years of employment versus employees who have not completed three years of employment. The proposed regulations appear to only allow one form of disaggregation — between employees who have less than three years of service and employees who have more than three years of service. However, large employers often offer different health plans for different job codes, employee locations, etc., and may use one premium only arrangement as the premium payment vehicle for all of those plans or several premium only arrangements for those plans. Further, a three-year service requirement is seldom used, which makes this an unhelpful dividing point for disaggregation. The IRS should expand the disaggregation rules to allow the employer flexibility to provide differing health plans, premium subsidies, waiting periods, etc. for employees based on different job codes or locations without violating the nondiscrimination rules. These rules should include relevant examples. Similarly, examples should be added to the aggregation section of the regulation to illustrate the circumstances under which aggregation is permitted.

If this change is made, we also recommend that the IRS specify which of the nondiscrimination tests set forth in the final regulations can be satisfied through plan restructuring, such as the availability requirement that is described in the contributions and benefits test. Applying the plan restructuring concept to that test, it should be possible for an employer to make different benefits available to different groups of employees, or to make different employer contributions available to different groups of employees, as long as each restructured plan could satisfy the eligibility test under the final regulations.

E. Additional Clarification and Examples

In addition to the above recommendations regarding the cafeteria plan nondiscrimination rules, we urge the IRS to modify the nondiscrimination section of the proposed regulations to provide additional clarification and complex, real life examples with respect to how the rules apply to specific benefits, as follows:

- Provide additional examples and explanations illustrating how the nondiscrimination test with respect to contributions and benefits should be

applied in the cafeteria plan context, including whether there are one or two tests under that rule and how to value benefits for purposes of the test

- Provide additional examples and explanations with respect to how the reasonable classification test applies.
- Define "uniform opportunity to elect qualified benefits" (Prop. Treas. Reg. § 1.125-7(c)(2)).
- Define "aggregate qualified benefits" (Prop. Treas. Reg. § 1.125-7(c)(2)).
- Clarify whether the Code § 414(q) exclusions can be used when applying the top-paid group limitation.
- Clarify whether stock attribution should be considered in determining highly compensated individual status.
- Clarify who would be taxed if a cafeteria plan is discriminatory (Treas. Reg. § 1.125-7(m)(2)). Based on the current definition of a highly compensated participant, this could mean that the tax applies to someone who is eligible for, but not participating in, the plan. Clarification is needed as to whether the phrase "participating in a discriminatory cafeteria plan" applies only to "key employee" or also to "highly compensated participant" in the first sentence in this section.
- Prop. Treas. Reg. § 1.125-7(b)(2) permits conditions for participation that are not related to completion of a requisite length of employment. Clarify whether a cafeteria plan would be permitted to exclude part-time employees (however that may be defined) under this provision.

Retroactive Election

The proposed regulations allow employers to offer "new hires" a 30-day period to enroll in the plan following the date of hire, with coverage retroactive to the date of hire. Many systems operate on a 31 day period, so changing the period from 30 to 31 days would be helpful. In addition, for employers with waiting periods, the final regulations should allow an enrollment period that is related to the effective date of coverage rather than based on the date of hire (for example, allow the employee to enroll within the 31-day period following the end of the waiting period) with coverage retroactive to the first day of eligibility.

Uniformity Requirement

The proposed regulations provide that the terms of a Section 125 plan must apply uniformly to all participants. It is not clear why this requirement is needed, or how it impacts differences in eligibility for benefits (e.g., due to compliance with state law requirements such as those in Massachusetts, which require that certain benefits be extended to employees and funded through a Section 125 plan). Clarification that this requirement is not intended to require employers to provide identical eligibility rules or benefits would be helpful.

Exclusive Means

The IRS should clarify in Prop. Treas. Reg. § 1.125-1(b) that Code § 125 is the exclusive means by which an employer can offer employees an election among two or more benefits consisting of cash and qualified benefits as defined by Section 125 or another Code section, rather than an election between any taxable and nontaxable benefits, unless another Code section applies. As described in the preamble to the regulations, "except for an election made through a cafeteria plan that satisfies Section 125 or another specific Code section (such as Section 132(f)(4)), any opportunity to elect among taxable and nontaxable benefits results in inclusion of the taxable benefit regardless of what benefit is elected and when the election is made." (72 Fed. Reg. 43939). This same "or another code section" concept should be carried over to Prop. Treas. Reg. § 1.125-1(b) of the regulations to encompass other nontaxable elections, such as those permitted under Section 132(f)(4).

Coverage for Non-Spouse/Non-Dependent

The IRS should clarify what the IRS considers an acceptable measure of fair market value, such as the COBRA individual rate that would be charged for continued participation in a health plan. Also, the IRS should specifically identify that this guidance applies to a domestic partner. Finally, the IRS should clarify that the method identified in the guidance for imputing income (*i.e.*, having the employee first pay for all coverage on a pre-tax basis, and then having the employer impute the fair market value of coverage to the employee) is not the exclusive means for properly imputing income.

Payment or Reimbursement of Individual Accident and Health Plan Premiums

The IRS should update the individual coverage section of the regulation to make the following clarifications:

- Provide that electronic fund transfers are an acceptable method of employer reimbursement.

- Provide that the cost of a family policy that an employee obtains on his/her own can be reimbursed through the cafeteria plan; and
- Provide that the cost of individual or family coverage obtained by an employee's spouse or dependent can be reimbursed through the employer's cafeteria plan.
- Provide that health coverage purchased through a state entity is a qualified benefit for purposes of receiving reimbursement through the cafeteria plan.

Although we agree that health insurance coverage purchased through a state entity is a qualified benefit for purposes of receiving reimbursement through the cafeteria plan, we do not believe that such individual coverage is a group health plan where the employer has no intent to create a group health plan by allowing deductions through the cafeteria plan for these state plans (such as under Massachusetts healthcare reform). Employers have significant concerns regarding such an interpretation, given the potential for subjecting the employer to COBRA and HIPAA obligations for coverage over which they have no control.

Salary Reduction

The IRS should expand the new severance payment rule to include other types of payments provided to former employees, such as long-term disability benefits, which could similarly be reduced to purchase qualified benefits on a pre-tax basis.

Deferred Compensation

The IRS should expand the new orthodontia rule to include any type of medical expense for which payment in advance of service is either required (*e.g.*, fertility treatments), or where a discount is offered for payment in advance of service.

In addition, the IRS should clarify that the provision of the following features by self-funded plans as well as insured plans do not constitute prohibited deferred compensation: credit toward the deductible for unreimbursed covered expenses incurred in prior periods; a reasonable lifetime maximum limit on benefits; coverage for a specific accidental injury; coverage for a specified injury or illness; and payment of a fixed amount per day (or other period) of hospitalization. Furthermore, the regulations should clarify that if the employer is providing short-term disability benefits for a maximum of six months, the cafeteria plan should not be treated as having provided prohibited deferred compensation merely because the employee becomes disabled

toward the end of one calendar year and short-term disability benefits continue to be paid into the following calendar year for up to the maximum benefit duration.

Non-Qualified Benefits.

The IRS should clarify that non-qualified benefits can be described in a cafeteria plan document for purposes of administrative convenience, as long as the document identifies which benefits are and are not considered part of the cafeteria plan. The IRS should clarify that Prop. Treas. Reg. § 1.125-1(q)(viii) does not prohibit a situation where the cafeteria plan is a premium only plan for premiums of a health plan that includes as an option an HRA that permits a carryover of unused employer contribution amounts into the following year.

Mistake Exception

The IRS regulations should be modified to permit a plan administrator to allow an election to be made, changed, or revoked after an applicable deadline upon a showing of clear and convincing evidence of a mistake.

Flexible Spending Accounts

The IRS should modify the regulations to specifically allow an employer to collect salary reduction contributions from a terminated employee's last paycheck, if permitted under state law, and to eliminate the requirement that an employer needs to reimburse a participant for salary reduction amounts collected prior to the date of termination if coverage is provided for that period.

Adoption Expenses

The final regulations should make it clear that any expenses that are incurred and directly related to an eligible adoption are available for reimbursement through the plan as long as there has been appropriate third-party substantiation of the expense, regardless of whether the services related to the expense have been rendered, as long as there is no right or possibility of repayment by the service provider after the payment is made.

The Code and the proposed regulations make it clear that adoption assistance expenses may be reimbursed through a cafeteria plan. The proposed regulations also indicate what substantiation is required in order to be eligible for reimbursement under the plan. However, unlike medical, child care and similar expenses, it is not always clear when services are rendered regarding adoption assistance. For example:

- The law allows for the reimbursement of adoption costs, court costs, legal fees and other expenses (*e.g.*, travel) directly related to and for the principal purpose of a legal adoption of an eligible child (defined in the statute).

However, the proposed regulations do not clarify exactly when the services are considered rendered.

- Adoption expenses may span several years and obviously be incurred in years prior to any final adoption.
- Also, some costs (e.g., legal retainer fees paid in advance of services in order to receive the services) may be incurred prior to the rendition of the actual services.

The final regulations should therefore make it clear that any expenses that are incurred and directly related to an eligible adoption are available for reimbursement through the plan regardless of whether the services related to the expense have been rendered as long as: (i) there has been appropriate third party substantiation of the expense; and (ii) there is no right or possibility of repayment by the service provider if the services are never rendered because the adoption is cancelled or for some other legitimate reason. This treatment would be consistent with the treatment of orthodontia expenses under a medical cafeteria plan reimbursement arrangement when the employee must make the payment in advance in order to receive the services.

Dependent Care Assistance Plans.

The IRS should allow additional flexibility concerning timing of dependent care assistance plan reimbursements to allow an individual to receive reimbursement for services not yet provided, where the daycare facility requires advance payment.

Debit or Stored Value Cards.

The IRS should remove the debit card rules from the final regulations or make such rules more general so that the rules can be promptly updated as technology evolves.

Effective Date of Final Regulations

It will be critical for employers and the service providers who provide plan documents and administrative services to employers to have a sufficient amount of time to come into compliance with the final regulations. As such, we recommend that the IRS adopt an effective date of plan years beginning two years after the publication date of final regulations.

This is consistent with the IRS timeline given employer plan sponsors who utilize a pre-approved qualified retirement plan document to execute an EGTRRA restatement. Similarly, the newly-finalized 403(b) regulations allow a 1½-year time frame to come into compliance.

There is much in the proposed regulations that is either new or definitively stated for the first time. Employers will need to re-execute plan documents to bring their plans into compliance in form. In many instances, service providers will need to engage in a restatement effort to move their entire client base to plan documents that comply in form with the requirements of the final regulations. Employers and service providers will need to review existing compliance-related programs and related materials and reprogram or redraft them, as applicable. In some cases, new compliance-related programs may have to be developed for the first time. Plan sponsors will need to be educated on the new requirements. Forcing the community of cafeteria plan employer sponsors and service providers to come into compliance with final Code § 125 regulations any more quickly is likely to lead to massive document and operational noncompliance.

Thank you for consideration of our comments and recommendations. If we can be of additional assistance, you may contact me or Chris Keller, Groom Law Group, who assisted in preparing this comment letter.

A handwritten signature in black ink that reads "Kathryn Wilber". The signature is written in a cursive, flowing style.

Sincerely,
Kathryn Wilber
American Benefits Council
Health Policy Legal Counsel