



THE PROFIT SHARING AND 401(k) ADVOCATE ♦ SHARING THE COMMITMENT SINCE 1947

500 Eighth Street, NW, Suite 210, Washington, DC 20004 ♦ 202.863 7272♦

ferrigno@401k.org

Edward Ferrigno
Vice President, Washington Affairs

**COMMENTS ON PROPOSED RULE ON THE SUSPENSION OR REDUCTION OF SAFE HARBOR
NONELECTIVE CONTRIBUTIONS**

August 14, 2009

Internal Revenue Service
Washington, DC
(delivered electronically)

RE: IRS REG-115699-09
Proposed Rule on the Suspension or Reduction of Safe Harbor Nonelective Contributions

Thank you for considering my comments on behalf of the Profit Sharing / 401k Council of America (PSCA). PSCA is a 60-year old non-profit association representing companies that sponsor profit sharing and 401(k) plans. PSCA speaks for over 1,200 companies who employ approximately 5 million plan participants throughout the United States. PSCA's members range in size from very small firms to conglomerates with hundreds of thousands of employees. All regard their profit sharing or 401(k) plans as vital factors in their business success.

The proposed rule will provide significant relief to plan sponsors facing extraordinary economic stress. Most importantly, it will help prevent the termination of retirement plans, an event that will be harmful to the retirement security of American workers. PSCA commends the Service for its timely response to this emergency, including the ability to rely on the proposed rule pending the issuance of a final rule, even if the final rule is more restrictive.

Substantial Business Hardship

The proposed rule permits the suspension or reduction of a safe harbor nonelective contribution if the current requirements in 1.401(k)-3(g) and 401(m)-3(h), that apply only to the suspension or reduction of safe harbor matching contributions, are generally met. Notably, a major difference is that, only in relation to nonelective contributions, a suspension or reduction is permitted only if "the employer incurs a substantial business hardship (comparable to a substantial business hardship described in section 412(c))." Section 412(c) provides that four factors must be taken into account in determining a business hardship; operating at an economic loss, substantial unemployment or underemployment in the trade or business and industry concerned, depressed or declining sales and profits in the industry, and that it is reasonable to expect that the plan will be continued only if the waiver is granted.

PSCA is, frankly, unable to understand why this additional requirement was added, given the apparent position of the Service that public policy does not require a substantial business hardship as a condition of

eliminating or reducing a safe harbor matching contribution. We are not aware of how this requirement will prevent any abusive behavior by employers. Determining if the factors of a business hardship are satisfied is a complex and costly activity, particularly for a small business. For example, many small business owners have very little insight into the overall economic situation of their industry. They only know the condition of their own business. For all businesses, the overall condition of their industry is irrelevant to their ability to make a nonelective safe harbor contribution. **We urge the Service to amend the final regulation to eliminate the requirement for a substantial business hardship in order to reduce or suspend a nonelective safe harbor contribution.**

Permission to Change From Current-Year to Prior-Year Testing

Under the proposed regulations in section 1.401(k)-3(g)(1), if a plan wishes to suspend or reduce either safe harbor matching contributions or safe harbor nonelective contributions, the plan must be tested on a current-year basis for the year in which the change occurs.

Under Treas. Reg. §1.401(k)-2(c)(1), if a plan is using the current-year testing method, it can only change the prior-year testing method if it satisfies the requirements of that regulation. In effect, the regulations require that the current-year method must be used for at least five years before a change to the prior-year method is permitted.

While it is entirely reasonable for the proposed regulations to require that the current-year taxing method be applied in the year in which the safe harbor contributions are suspended or reduced, it does not follow that a plan suspending or reducing safe harbor contributions should be locked into the current year testing method for five years.

The prior-year testing method is widely used by section 401(k) plans because of the administrative ease and cost savings that it provides in complying with the ADP and ACP tests. The five-year requirement (described above) is designed to prevent an abuse in which an employer switches back and forth between prior-year and current-year testing to improve the ADP and ACP testing results. Given the situation in which an employer is suspending or reducing its safe harbor contributions, the anti-abuse rule envisioned by the five-year requirement is not presented and the employer should be allowed (after the year in which the reduction or suspension occurs) to change to the prior-year testing method without having to wait five years.

It is very likely that an employer undergoing a suspension or reduction of safe harbor contributions will be economically distressed. If the employer is further required to use the more expensive current-year testing method going forward, that will further increase the likelihood that the employer may terminate the section 401(k) plan rather than undergo the expense and administrative difficulty of current-year testing. **In this limited situation, it would be appropriate and in the best interest of participants if an exception were created under Treas. Reg. §1.401(k)-2(c)(1) to allow the employer to change to prior-year testing method after the year in which the suspension or reduction occurs without regard to the five-year rule.**

Thank you for considering our comments. If you have any questions or if I can be of any assistance, please do not hesitate to contact me.

Sincerely

Edward Ferrigno