The ERISA Industry Committee
1400 L Street, N.W., Suite 350
Washington, D.C. 20005
www.eric.org

The Profit Sharing/401(k) Council of America
20 N. Wacker Drive, Suite 3700
Chicago, IL 60606
www.psca.org

February 4, 2005

By Hand

Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Attn: CC:PA:LPD:RU (Notice 2005-1)
Room 5203

Re: Extension of March 15th Deadline for Spill-Over Plans

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC")[1] and The Profit-Sharing/401(k) Council of America ("PSCA")[2] urgently ask the Treasury and the Service to modify Notice 2005-1 (the "Notice") as soon as possible to extend the period that the Notice now gives to defined contribution mirror and excess plans ("spill-over plans") to meet the requirements of Code § 409A(a)(4)(B), governing the timing of deferral elections.

Q&A-21 of the Notice grants temporary relief from the requirements of § 409A(a)(4)(B), but only for deferral elections made on or before March 15, 2005. Although we very much appreciate the relief granted by Q&A-21, the March 15th deadline does not provide sufficient time for major employers to revise their plans, plan procedures, and plan communications materials, and for plan participants to educate themselves and make new deferral elections, in

[1] ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

[2] PSCA is a non-profit national association of employers who sponsor defined contribution retirement plans for their workers. For over fifty-five years, PSCA has identified and shared best practices with its members, represented their interests in Washington, and provided analysis and reportage on the latest regulatory changes. PSCA members range in size from very small independent businesses to firms with hundreds of thousands of employees. Our members believe that profit sharing, 401(k), and related savings and incentive programs strengthen the free-enterprise system, empower and motivate the workforce, improve domestic and international competitiveness, and provide a vital source of retirement income.

accordance with the new requirements imposed by § 409A(a)(4)(B). ***We urge that the March 15th deadline in Q&A-21 be extended until December 31, 2005.***

In general, effective January 1, 2005, § 409A(a)(4)(B) requires an election to defer the receipt of compensation to be made before the start of the calendar year in which the related services are performed *or at such other time as provided in regulations.* Section 885(f)(2) of the American Jobs Creation Act also authorizes the Treasury to issue guidance providing a limited period during which a deferred compensation plan adopted before December 31, 2004, may be amended to conform to the requirements of § 409A with respect to post-2004 deferrals.

Pursuant to § 409A(a)(4)(B) and § 885(f)(2), Q&A-21 gives participants until March 15, 2005, to make initial deferral elections (or to increase prior deferral elections) for their 2005 compensation, provided that (1) the deferral election applies to amounts that have not been paid or become payable at the time of the election, (2) the plan was in existence on or before December 31, 2004, (3) the deferral election is in accordance with the terms of the plan in effect by the end of 2005, and (4) the plan is otherwise operated and amended in accordance with § 409A and the Notice.

The requirements of § 409A(a)(4)(B) create special problems for spill-over plans. Although spill-over plans take various forms, they are generally designed to permit participants to defer the receipt of contributions that the employer's qualified defined contribution plan (such as a § 401(k) plan) may not accept because of an applicable Internal Revenue Code ("IRC") limit, such as the dollar limit on § 401(k) contributions, the § 401(a)(17) compensation limit, or the dollar limit on annual additions under § 415(c).

Many spill-over plans permit participants to change their deferral elections after the year starts. In addition, many qualified plans allow participants to change their § 401(k) elections (or their after-tax contribution elections) after the year starts -- which can *indirectly* affect the deferrals under the related spill-over plan. For example, an increase in a participant's deferrals under a § 401(k) plan can have the effect of increasing the participant's deferrals under the related spill-over plan because the additional § 401(k) deferrals accelerate the date the participant reaches a qualified plan limit and starts deferring under the spill-over plan.

The Notice provides relief for *decreases* in deferrals during 2005. Under Q&A-20, all or part of a deferral election may be canceled during 2005 as long as the canceled deferral is includible in the participant's income in 2005 (or if later when earned and vested).

Q&A-21 provides relief for *increases* in deferrals during 2005 only until March 15th. This is in stark contrast to Q&A-20's provision of relief until December 31, 2005, for *decreases* in deferrals and to Q&A-23's provision of relief until December 31, 2005, for nonqualified plan *payments* that are linked to payment elections under a qualified plan.

Because the Notice was not issued until December 20th, Q&A-21 does not give employers and employees the time they need to conform the operation of their spill-over plans to the requirements of § 409A(a)(4)(B). A period of less than three months is not sufficient for major employers and their advisers to digest the requirements of the Notice, to analyze the application of the Notice to their plans, to redesign their spill-over plans, and to communicate the changes to plan

participants, *and* for plan participants to study and understand the changes and to make new elections under their plans.

In order to give employers and employees the time they need to adjust the operation of their spill-over plans, the March 15th deadline in Q&A-21 should be extended until December 31, 2005. This can be achieved simply by substituting December 31st for March 15th in Q&A-21. However, if the Treasury and the Service wish to provide more limited relief, the extension of the March 15th deadline could apply only to increases in deferrals under spill-over plans that are triggered by increases in deferrals under related qualified plans (following an approach similar to that taken in Q&A-23).

Similar issues are raised by arrangements under which participants initially defer their compensation only under a nonqualified plan and, late in the year, some or all of their deferrals are transferred to a qualified plan to the extent the IRC limits allow. This design raises issues under both § 409A(a)(4)(B) (because the deferrals that will remain under the nonqualified plan are not fixed at the beginning of the year) and § 409A(a)(2) & (3) (because the transfer from the nonqualified plan to the qualified plan might be viewed as violating the rules against premature and accelerated distributions). We urge that relief be provided for these plans as well.

We also are developing proposals for a *long-term* solution to the problems we have identified: a solution that applies to deferrals in 2006 and subsequent years. We intend to submit our proposals to you in the near future.

Please feel free to call us if you have any questions about this request or if you would like to discuss any aspect of this request.

Respectfully submitted,

Mark J. Ugoretz
President
The ERISA Industry Committee

David L. Wray
President
The Profit Sharing/401(k) Council of America

cc: William F. Sweetnam, Jr. (Treasury)
Daniel Hogans (Treasury)
Nancy J. Marks (IRS)
Alan N. Tawshunsky (IRS)
Catherine L. Fernandez (IRS)
Catherine Livingston (IRS)
Robert B. Misner (IRS)
Stephen B. Tackney (IRS)