AMERICAN RETIREMENT ASSOCIATION
Working for America's Retirement
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April 28, 2016

CC:PA:LPD:PR (REG– 125761-14)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Nondiscrimination Relief for Closed Defined Benefit Pension Plans and Additional Changes to the Retirement Plan Nondiscrimination Requirements [REG– 125761-14]
RIN 1545-BM58

Dear Sir or Madam:

The American Retirement Association ("ARA") appreciates this opportunity to comment on the proposed regulation regarding Nondiscrimination Relief for Closed Defined Benefit Pension Plans and Additional Changes to the Retirement Plan nondiscrimination Requirements [REG – 125761-14].

The ARA is a national organization of more than 20,000 members who provide consulting and administrative services to retirement plans covering millions of American workers. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-deferred Savings Association ("NTSA") and the ASPPA College of Pension Actuaries ("ACOPA"). ARA members are diverse but united in a common dedication to America's private retirement system.

SUMMARY

The ARA appreciates the effort the Service has made to address the difficulties faced by closed defined benefit plans as the covered group matures, and to provide more flexibility for defined benefit plan sponsors in situations where the "primarily DB" or "broadly available" criteria of §1.401(a)(4)-9(b)(2)(v)(B) or (C) are not met, and the minimum allocation gateways of §1.401(a)(4)-9(b)(2)(v)(D) apply. Notice 2014-5 had requested comments on these matters, and laid the groundwork for these aspects of the proposed rule. The ARA was troubled by the inclusion of the proposed modification to §1.401(a)(4)-2(c)(3)(ii) and §1.401(a)(4)-3(c)(2) in the original proposal that would have imposed a "reasonable classification" criteria on the benefit or contribution formula for highly compensated employees ("HCEs") in rate groups utilizing the average benefits test. This proposal would have forced many small business owners who are

already meeting the gateway requirements to contribute substantially more, incur the costs of plan redesign and restatement, or both. The ARA welcomed Announcement 2016-16 withdrawing this portion of the rule.

With regard to the remainder of the proposed rule, ARA recommends that:

- Relief under §401(a)(26) be provided for closed plans, similar to relief offered for §401(a)(4).
- More detail be provided regarding the use of the average contribution percentage ("ACP") to meet a portion of the minimum gateway allocation.

DISCUSSION

I. Closed plans should be provided relief under §401(a)(26)

As a closed plan ages, the plan will eventually run afoul of the participation requirements of §401(a)(26), which requires that the plan cover the lesser of 50 employees, or the greater of 40% of non-excludable employees or 2 employees (1 if there is only 1 employee). For larger plans, it could take decades for the plan to cover fewer than 50 employees, but for a smaller plan, a §401(a)(26) failure could occur within a few years. In any event, unless the plan terminates altogether, there will eventually be a problem with §401(a)(26) that should be addressed. Recall that the abuse addressed by §401(a)(26) was the establishment of one-participant plans with separate asset pools. The situation with a closed plan does not present the same issue. Notice 2014-5 mentioned consideration of possible changes to the regulations under §401(a)(26), and requested comments, but no relief under §401(a)(26) is included in the proposed rule.

The ARA recommends that the §401(a)(26) regulations be amended to allow the continued accrual of benefits for closed DB plans. Permitting closed plans that are tested on the basis of benefits to include NHCE's receiving gateway contributions under the defined contribution plan as benefitting under the defined benefit plan for purposes of §401(a)(26) would be a reasonable approach. This relief could be limited to plans that passed §401(a)(26) for a period of years after the date of closure, under rules similar to those adopted in the final rule for purposes of §401(a)(4). Plans with no further benefit accruals should also be deemed to pass §401(a)(26) provided the plan complied in the last year benefits were accrued, regardless of whether the plan was or is covered by PBGC or is top heavy.

II. More detail should be provided on the use of the ACP for meeting gateway requirements

The proposed rule would permit the lesser of 3% or the average of employer matching contributions for eligible employees to be applied toward satisfying the minimum gateway allocation. The average matching contribution percentage is the actual contribution percentage (ACP) "(within the meaning of §1.401(m)-5) for that group, determined without taking into account any employee contributions". The definition of ACP in §1.401(m)-5 refers to §1.401(m)-2(a)(2)(i), which in turn refers to the average of the average contribution ratios (ACRs) which are determined under §1.401(m)-2(a)(3). There is no reference to §1.401(m)-2(a)(2)(ii), which relates

to the use of current or prior year ACP for testing purposes. Presumably this is intentional, and the ACP applied toward the gateway allocation must be the ACP for the current year. There also is no direct reference to §1.401(m)-2(a)(5), which describes "disproportionate matching contributions" that are to be excluded from the "ACP test". The limit on averaging of rates for NHCE's for non-elective contributions in §1.401(a)(4)-9(b)(2)(v)(D)(3) implies that disproportionate matching contributions are to be disregarded when determining the ACP for purposes of the proposed rule, but since the reference in §1.401(m)-2(a)(5) is to the "ACP test", not simply the "ACP", it is not clear.

The ARA recommends that a final rule clarify the following for purposes of determining the average matching contribution percentage under §1.401(a)(4)-9(b)(2)(v)(D)(4):

a. Must the ACP be determined for the current year, even if prior year is used for the ACP test? If prior year may be used (if it is used for the ACP test), final regulations should also address how the 3% ACP rule for the initial plan year applies in this context.
b. Does the ACP determined for this purpose include disproportionate matching contributions as described in §1.401(m)-2(a)(5)?
c. If qualified matching contributions (QMACs) are used to satisfy the ADP test for the plan, can the QMACs be included in the ACP determined for this purpose?
d. If the §401(a)(4) testing group includes more than one defined contribution plan with matching contributions, is a weighted average of the defined contribution plans used to determine the ACP for all plans in the testing group? Are the ACP's re-determined for the group of 401(m) participants as a whole? Or does the ACP of each plan apply to that plan's participants? Similarly, if statutory exclusions are disaggregated for § 401(a)(4) testing, is the ACP for this purpose an aggregate percentage? Or would each group have its own ACP?

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These comments were prepared by the ARA's Government Affairs Committee. Please contact Craig P. Hoffman, Esq., APM, General Counsel and Directory of Regulatory Affairs, at (703) 516-9300 if you have any comments or questions on the matters discussed above.

Thank you for your time and consideration.

Sincerely,

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Executive Director/CEO
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