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August 14, 2009

**Sent Electronically**

Internal Revenue Service  
CC:PA:LPD:PR  
1111 Constitution Avenue, NW.  
Washington, DC 20224

Re: Proposed Regulations on Suspension or Reduction of Safe Harbor Nonelective Contributions (REG-115699-09)

Dear Sir or Madam:

The Investment Company Institute<sup>1</sup> is pleased to submit this comment letter in support of the Internal Revenue Service's proposal to permit employers making safe harbor nonelective contributions to a qualified plan to suspend those contributions because of a substantial business hardship. This proposal will provide flexibility to employers facing financial difficulties that need to suspend employer contributions. We have one suggestion for the final regulation, described below.

The safe harbor rules in Code sections 401(k) and 401(m) allow employers sponsoring 401(k) plans to avoid the numerical non-discrimination (ADP and ACP) tests for a plan year if the plan provides during the year for employer matching or nonelective contributions meeting certain requirements. Although contributions generally must be in place for the entire plan year, current IRS regulations allow a plan making qualified matching contributions to reduce or suspend contributions in the middle of a plan year and revert to running ADP and ACP tests, if certain conditions are met. These conditions require, among other things, that participants are given notice of the change and a reasonable opportunity prior to the reduction or suspension to change their own contribution election. The current regulations do not provide this same opportunity for employers making qualified nonelective employer contributions.

IRS proposes to allow employers using the safe harbor for qualified nonelective contributions to reduce or suspend the nonelective contribution during a plan year. The conditions are similar to the conditions for a reduction or suspension of qualified matching contributions, except that only employers that have incurred a "substantial business hardship" may reduce or suspend qualified

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<sup>1</sup> The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$10.5 trillion and serve over 93 million shareholders.

nonelective contributions. Substantial business hardship is defined as being comparable to a substantial business hardship described in Code section 412(c).

ICI supports this proposal, which will give flexibility to plan sponsors in a time of economic challenges. In our view, employers reduce or suspend their employer contributions to a 401(k) plan reluctantly, typically to avoid layoffs and ensure the continued viability of the business. The proposal incorporates the protections that exist under the regulations for suspension of matching contributions, including that the plan calculate and meet the ADP and ACP tests and provide notice to employees. We also support that the IRS allows plans to rely on the proposed regulations pending issuance of final regulations.

We have one suggestion. Many ICI members or their partners use master and prototype (M&P) and volume submitter (VS) programs and have obtained pre-approval of their plan documents under these programs. Depending on the plan's terms, the plan document may need to be amended to allow for suspension of nonelective contributions. We suggest IRS consider issuing, as part of the final regulations, sample or model language that sponsors of M&P and VS programs can use in amending their plan documents.

If you have any questions, please contact the undersigned at 202-326-5810 or Mary Podesta at 202-326-5826.

Sincerely,

/s/ Michael Hadley

Michael Hadley  
Associate Counsel – Pension Regulation