



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF THE CHIEF COUNSEL

September 22, 2016

Number: **2016-0073**
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CC:TEGE:EB:QP4:
CONEX-126527-16

UIL: 401.29-00, 401.29-01

Dear _____ :

I am responding to a letter you sent to Senator Ron Wyden on August 10, 2016, about a check your husband received from his 401(k) plan. Senator Wyden asked that we respond directly to you on the subject.

You explained a letter accompanying the check provided information about IRS requirements for testing plans annually to ensure all participants benefit on a non-discriminatory basis. You also explained your husband's 401(k) plan returned a portion of his contributions to him in order to pass this year's test. You asked why your husband received this check.

I am sorry for the confusion and frustration you experienced because of this matter. The non-discrimination rule you referred to is in section 401(k)(3)(A) of the Internal Revenue Code (Code). The section sets a limit on how much more highly compensated employees can defer versus non-highly compensated employees. Section 414(q)(1) of the Code describes a "highly compensated employee" as an employee who is a 5-percent owner of the employer maintaining the plan or an employee who earns more than a certain amount in compensation from the employer (the amount was \$120,000 for 2015).

Under section 401(k)(8) of the Code, if highly compensated employees exceed the limits in section 401(k)(3)(A) for a year, the plan must distribute the excess contributions before the end of the next year in order to keep its tax-qualified status.

Most likely, the check your husband received was a distribution of excess contributions under section 401(k)(8).

I hope this information is helpful. If you have questions, please call
at .

Sincerely,

Victoria A. Judson
Associate Chief Counsel
Tax Exempt and Government Entities

cc: The Honorable Ron Wyden