



AMERICAN BENEFITS
COUNCIL

July 11, 2008

CC:PA:LPD:PR (REG-108508-08)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Dear Sir or Madam:

This letter is submitted on behalf of the American Benefits Council (the "Council") with respect to the proposed regulations regarding the determination of minimum required contributions for purposes of the single employer plan funding rules. We very much appreciate the opportunity to comment on this important topic.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

With respect to the proposed regulations, we request a public hearing and we request the opportunity to testify at that hearing. Kent Mason, a partner with the lawfirm of Davis & Harman, LLP will testify for the Council. Set forth below is an outline of the topics we will address (with the time devoted to each topic).

- I. Reasonable interpretation standard (1 minute)
- II. Use of funding balances to make quarterly contributions (4 minutes)
- III. Prefunding balance issue (2 minutes)
- IV. 2007 lookback year (3 minutes)

Reasonable interpretation standard.

The regulations are proposed to be effective for plan years beginning on or after January 1, 2009. IRS Notice 2008-21 states that the IRS “will not challenge a reasonable interpretation of an applicable statutory provision under § 430 or § 436 for plan years beginning during 2008.” On its face, the above quoted statement in the Notice appears to apply to the issues addressed by the proposed regulations. However, since Notice 2008-21 was issued before the proposed regulations, and since the preamble to the proposed regulations does not refer to the Notice, it would be helpful if the final regulations could confirm that the “reasonable interpretation” standard applies during 2008 plan years. Without a reasonable interpretation standard, the proposed regulations would function effectively as temporary regulations since they would provide the only clearly acceptable means of compliance before the issuance of final regulations.

Use of funding balances to satisfy quarterly contribution requirements.

Under the proposed regulations, in order to satisfy an obligation to make a quarterly contribution through the use of a plan’s prefunding balance or funding standard carryover balance, it appears that the plan sponsor must make an election to do so by the due date of the quarterly contribution. We have two concerns about this proposed rule.

Our first concern relates to the 2008 plan years. The proposed regulations were issued on April 11, 2008 and were published in the Federal Register on April 15, 2008. For a calendar year plan, the first quarterly contribution was due on April 15, 2008, just four days after issuance of the proposed regulations and on the same date as the publication in the Federal Register. Certainly, the proposed rule cannot have any application to quarterly contributions due April 15, 2008. Plan sponsors were not aware of any requirement to make such an election by April 15, 2008, as this has never been the law and the Pension Protection Act did not impose such a requirement. Accordingly, it is our understanding many plan sponsors made irreversible plans to use their funding balances to satisfy their April 15, 2008 quarterly contribution obligation, but did not make any election as of such date.

We urge you to clarify that, under the reasonable interpretation standard, a plan sponsor may make an election to use a funding balance to satisfy a quarterly contribution obligation for a plan year at any time on or before the due date (with extensions) of the Form 5500 with respect to the plan year.

On a prospective basis, we urge the Treasury and the Service to adopt a rule discussed in the preamble. Under that rule, “a plan sponsor is deemed to make an election to use a funding balance to the extent it is available to avoid a failure to make any required quarterly installment”. This rule would work very effectively as long as

the deeming process is performed after the amount of any required quarterly contributions is determined with certainty, *i.e.*, when the year's funding obligation is determined. Any requirement that the deeming process apply earlier would not work, since the amount of any required quarterly contribution, in many circumstances, can only be estimated prior to the determination of the year's funding obligations.

This prospective rule would also work very well for the 2008 plan year. So if this rule is adopted, the preamble to the final regulations should indicate that use of this rule for 2008 is also permitted.

Prefunding balance issue.

The funding balance issue discussed above also highlights a critical issue arising under another proposed funding regulation. Under Proposed Regulation § 1.430(f)-1(b)(1)(ii), a plan sponsor may elect to increase the plan's prefunding balance by an amount that does not exceed the interest-adjusted excess of (1) the present value of employer contributions for the prior year, over (2) the minimum required contribution for the prior year (unreduced by funding balances used to offset such minimum contribution). The rule under which the minimum required contribution is not reduced by funding balances used to offset it is in conflict with the statute and does not make conceptual sense.

The statute is clear. For the above purpose, the minimum required contribution for the prior year is reduced by the funding balance used to offset such minimum. Code section 430(f)(6)(B)(i)(II) states that the excess is determined based on "minimum required contribution." This should be interpreted in accordance with Code section 430(f)(3)(A), which provides that "the minimum required contribution for the plan year shall be reduced... by the amount so credited". And this result is the only one that makes conceptual sense.

For example, assume that the minimum contribution for the preceding year was \$1,000. Assume further that the employer had a funding balance available as of the first day of the year. The employer uses \$450 of that funding balance to satisfy the obligation to make the first two quarterly contributions. Subsequently, the employer makes an \$800 contribution. That \$800 is \$250 more than is required since a \$550 contribution plus the use of \$450 of funding balance would have satisfied the minimum contribution requirement for the year. Thus, conceptually, \$250 should be added to the prefunding balance. Under the statute, that is the result, but under the regulations, nothing would be added to the prefunding balance. It is important that the regulations be conformed to the statute—and the conceptually right answer—in this regard.

2007 lookback year.

Under Code section 430(j), the quarterly contribution requirement only applies with respect to a plan for a plan year if the plan has a “funding shortfall” for the preceding plan year. The problem is that the term “funding shortfall” is not a defined term for the 2007 plan year, which is the preceding plan year for the 2008 plan year.

As noted in the preamble to the proposed regulations, the pending technical correction bills would authorize Treasury to establish rules for determining the “funding shortfall” for 2007. The preamble goes on to describe a specific rule being considered by Treasury and the IRS. The main problem with the rule described in the preamble is the same problem that would arise with respect to any specific rule: it is too late to establish a specific rule. The due date for the first quarterly contribution has passed. Any specific rule regarding the definition of a funding shortfall would thus have retroactive application. And the preamble discussion was too late to put companies on notice regarding the rule being considered.

We strongly urge Treasury and the IRS to apply the reasonable interpretation standard to the definition of a funding shortfall for the 2007 plan year. We further urge that the preamble to the final regulations confirm that it was reasonable not to subtract funding balances for this purpose. The natural meaning of “funding shortfall” for 2007 is the excess of current liability (under the law in effect for 2007) over the value of plan assets (under the law in effect for 2007). For this purpose, prior to 2008, funding balances were never subtracted in the initial determination of whether a plan had attained a threshold funding level.

If the decision is made to subtract funding balances for this purpose – which we strongly oppose – it is critical that employers be permitted sufficient time to reduce their funding balances retroactively for purposes of the 2007 plan year. It would be unfair to (1) impose a retroactive rule regarding subtraction of funding balances, and (2) not permit a retroactive means of solving a problem created by the subtraction.

We thank you for your consideration of our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson