July 18, 2007

By U.S. Mail

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Office of Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC

Re: Application of the Anti-backloading Rules under Internal Revenue Code Section 411

Dear Mr. Reeder:

Thank you for arranging the meeting with you and your staff and representatives of the Internal Revenue Service ("IRS") to discuss issues that have arisen regarding how to apply the anti-backloading rules of section 411 of the Internal Revenue Code (the "Code"), particularly to cash balance plans. We are writing in response to your request for concrete proposals to address the application of the anti-backloading rules to "greater of" formulas used in cash balance conversions.

Since our meeting, we understand that a number of agents are still advocating the IRS' current position on "greater of" formulas and have scheduled conferences of right with plan sponsors as a prelude to disqualifying their cash balance plans. We request that, while the Treasury Department and the IRS are reviewing this issue, the IRS suspend its efforts to disqualify plans and not force plan sponsors to incur tremendous legal and actuarial costs to determine how to modify their benefits to comply with the IRS' new and, for the reasons expressed below, questionable position. If the IRS does not suspend its efforts, many plans are likely to freeze benefits and some plans may have no choice but to incur disqualification with the attendant consequences to both the plan and participants.

The "Greater of" Issue

Some plan sponsors converted their traditional defined benefit plans to cash balance plans and provided especially generous transition relief to participants in the traditional plan. Under this approach, those participants continue to earn benefits under the traditional formula after the conversion and are given the "greater of" the benefits under that formula and the new cash balance formula. This "greater of" transition could be limited to a period of years after the conversion or could apply for the remainder of the participant's service with the plan sponsor. Plan sponsors adopted the "greater of" approach for the benefit of their employees and in the belief that the law permits it. In fact, many policy proponents and employee groups who were concerned about cash balance conversions advocated the use of the "greater of" approach in conversions. Ironically, even the Treasury Department and IRS did so.

Now, however, in the determination letter process for traditional defined benefit plans that were converted to cash balance plans, the IRS has begun challenging plans that use the "greater of" approach. The IRS has taken the position that, when both formulas are combined and accumulated, some participants experience a temporary dip in their accrual rate when one formula overtakes the other as the winning formula. This pattern can occur either when the traditional formula applies for only a limited period, or when both formulas apply permanently but one formula wins out in the early years only to be overtaken by the other formula later on.

The IRS recognizes that in these circumstances each formula individually satisfies the anti-backloading rules, and that even when both formulas are combined and accumulated, the resulting pattern of accruals is more *frontloaded* than the later winning formula provides on its own. Indeed, the IRS has approved literally thousands of "greater of" formulas over the past 30 years where the formulas individually satisfy the anti-backloading rules. Yet the IRS now proposes to alter its position and to disqualify defined benefit plans with "greater of" formulas despite the *frontloading* of benefit accruals that results from the interaction of the two formulas. In fact, the IRS has already begun taking steps to disqualify several of these plans unless their benefit formulas are changed. Because those changes would in many cases lead to the elimination of future benefit accruals under one of the two formulas, we believe the proposed IRS position is contrary to federal law and certainly not in the best interests of plan participants.

It is important to note that this issue applies not just to cash balance plans with alternative "greater of" formulas. Plans other than cash balance plans commonly provide "greater of" formulas, such as union plans and plans that emerge from mergers and acquisitions, to name but two examples. The IRS' current interpretation of the anti-backloading rules regarding "greater of" formulas would place many of these plans at risk — if this interpretation were to become the rule. The alternative interpretation of the anti-backloading rules we suggest below should apply equally to these plans, too.

IRS Enforcement History

The IRS has informally asserted that it has a long-standing position that, in instances where a plan provides the greater of the benefits determined under two or more formulas, all the formulas must be combined and accumulated to determine whether the plan satisfies the anti-backloading rules. The IRS points to Treasury Regulation section 1.411(b)-1(a) which states that "[a] defined benefit plan may provide that accrued benefits for participants are determined under more than one plan formula. In such a case, the accrued benefits under all such formulas must be aggregated in order to determine whether or not the accrued benefits under the plan for participants satisfy one of the alternative methods." The IRS contends that this regulation requires that "greater of" formulas be combined and accumulated to test them for backloading. While the regulations provide numerous examples applying these anti-backloading rules to different benefit formulas, there are no examples in these regulations that address "greater of" formulas, however.

Moreover, the IRS' current interpretation is at odds with its application of the regulation for at least 30 years and cannot be squared with Congress' insistence that the anti-backloading rules permit unlimited frontloading. In stark contrast to the IRS' claimed long-standing interpretation, enormous numbers of plans, including both cash balance and traditional plans, with "greater of" formulas have received favorable determination letters from the IRS. Thus, as discussed further below, it is our view that the regulation cited by the IRS is better read in a different way which is consistent with its statutory underpinning.

We understand that the IRS raised this anti-backloading issue in its answer to a declaratory judgment action filed in Tax Court against the same plan that was the subject of *Eaton v. Onan Corp.,* 117 F. Supp. 2d 812 (S.D. Ind. 2000). In that case, the Onan plan did not continue the prior final average pay formula after the conversion, but instead provided the greatest of three new formulas, including two indexed career average pay formulas and a cash balance formula. We understand that the case was settled pursuant to a closing agreement, and that the closing agreement is not available to the public. We suggest that the issues involved in the *Onan* case. and the process by which those issues were resolved, severely limit the case's value in alerting taxpayers to any position the IRS may take in the future in processing determination letter requests. And, significantly, that was just one case, compared to the large numbers of favorable determination letters issued to all types of plans with "greater of" formulas, both before and after the *Onan* case.

Furthermore, in many circumstances, both Congress and the Treasury Department have required or encouraged the use of "greater of" formulas, such as:

- Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, § 2004(d)(2), 88 Stat. 829, 987 (1974) - permitting pre-ERISA defined benefit plans to provide the greater of (a) post-ERISA benefit formula subject to § 415(b) limits and (b) pre-ERISA benefit formula applied to all years of service but not subject to § 415(b) limits;
- Treas. Reg. § 1.415-4(b)(2), *obsoleted by* T.D. 9319 - same as above;
- ERISA § 204(h)(6)(A) -in case of certain failures to provide section 204(h) notice, participants must receive greater of benefits determined under pre-amendment terms of plan and post-amendment terms of plan;
- Treas. Reg. § 54.4980F-1, Q&A-14(a)(1) & Q&A-11(a)(4)(ii) - same as above, with specific rules for cash balance conversions;
- Treas. Reg. § 1.401(a)(4)-3(b)(6)(xi) - plans that provide "greater of" formulas satisfy nondiscrimination safe harbors as long as each formula individually satisfies a safe harbor;
- Treas. Reg. § 1.401(a)(4)-13(c)(4)(iii) - providing nondiscrimination transition relief for plans that provide greater of (a) new benefit formula applied to all years of service and (b) sum of prior benefit formula applied to prior years of service and new benefit formula applied to new years of service;
- Treas. Reg. § 1.401(a)(17)-1(e)(3) - same as above; and
- Notice 88-131, 1988-2 C.B. 546 (Alternative IID) - permitting nonhighly compensated employees to accrue greater of benefits under pre-TRA'86 formula and post-TRA'86 formula during 1989 plan year.

The IRS has not taken the position that a plan would be deemed to violate the anti-backloading rules merely because it observed these provisions in the statute and regulations. Moreover, Congress itself mandated the use of "greater of" formulas in the *anti-backloading* rules themselves. Code section 411(b)(1)(D) requires pre-ERISA defined benefit plans to provide participants with the greater of their accrued benefit determined under the plan's pre-ERISA formula without regard to the anti-backloading rules and one-half the accrued benefit the plan would have provided for pre-ERISA years of participation had the anti-backloading rules been in effect during those years. The Treasury's anti-backloading regulation implements this requirement. Treas. Reg. § 1.411(b)-1(c).

The issue of "greater of" formulas in cash balance conversions is now being raised by the IRS because the moratorium on consideration of determination letters that commenced September 15, 1999 (1999 Field Directive and Announcement 2003-1) has ended (Notice 2007-6). During the moratorium, the IRS did not address any issues regarding cash balance conversions that were submitted for a determination letter. This means that the IRS did not have the opportunity to review any of the cash balance conversions that used "greater of" formulas or to raise concerns about whether they complied with its current interpretation of the anti-backloading regulations. During that period, however, the IRS never publicly set forth its interpretation nor did it raise this issue with respect to the large number of non-hybrid plans that contain "greater-of" formulas.

On the contrary, in 2002, the Treasury Department and the IRS proposed regulations regarding the application of Code section 411(b)(1)(H) to cash balance plans.[1] Those proposed regulations actually *encouraged* the use of "greater of" formulas in conversions by conditioning certain favorable treatment under Code section 411(b)(1)(H) on their use (among other alternatives). Moreover, the preamble to those proposed regulations never indicated or implied that it was the IRS' position that use of "greater of" formulas would have violated the anti-backloading rules that appear in the very same subsection and paragraph of the Code. Similarly, the Treasury Department proposed legislation in 2004 regarding cash balance plans that would have mandated the use of "greater of" formulas (or their actuarial equivalent) in all future cash balance conversions during the five-year period following the conversion. The proposal did not provide that the anti-backloading rules needed to be changed in order to permit "greater of" formulas. It seems axiomatic that such a change would have been required if that was the Treasury Department's view of then existing law.

A More Reasonable Interpretation of the Anti-Backloading Regulations

We believe that the IRS can and should take a different position with regard to the application of the anti-backloading rules to "greater of" formulas. The IRS should permit "greater of" formulas as long as each formula individually satisfies the anti-backloading rules. In addition, the IRS should permit plan sponsors to elect to apply the 133⅓-percent rule on an accrued-to-date basis. Either approach would avoid penalizing plan sponsors that included "greater of" formulas in their plans in reliance on long standing

[1] The proposed regulations were later withdrawn for reasons unrelated to the "greater of" issue.

interpretations by the government and for entirely benign reasons (and in good faith reliance on existing standards), not only in the cash balance conversion context but in numerous other settings as well, including collective bargaining and mergers and acquisitions, usually for the sole purpose of protecting employee expectations. Our recommended approaches have direct parallels in the nondiscrimination rules and are consistent with the language of the statute and regulations; moreover, unlike the IRS' current position, our recommended approaches target actual backloading, as opposed to penalizing plans for *frontloading* benefit accruals, contrary to the letter and spirit of the rules enacted by Congress in ERISA.

We believe that the first approach – individual testing of each formula – is appropriate and simple and can be applied promptly to address the urgent need for guidance and resolution in this area. The second approach – accrued-to-date – is, in some respects, a broader approach that addresses this issue well with respect to all types of plans, including plans with only a single formula. On the other hand, there are critical details that would need to be elaborated so as to ensure that the accrued-to-date method works appropriately and as intended and without unnecessary administrative burdens or costs imposed on plan sponsors. Accordingly, while we urge you to adopt the individual testing method promptly, we ask that you also work with us to refine the accrued-to-date method to meet the objectives of the anti-backloading rules. For example, for cash balance conversions, the accrued-to-date method should be applied with reference to a plan's ongoing pay credits and not with reference to any opening balance or transition credits. These refinements do not require regulatory modifications, but do require greater specificity in additional guidance.

These interpretations are discussed further in the paragraphs below:

Alternative "Greater of" Formulas. As noted above, the current regulations provide that plans may include more than one benefit formula, but the accrued benefits under all such formulas must be "aggregated" to determine whether the plan satisfies the anti-backloading rules. Treas. Reg. § 1.411(b)-1(a). In the case of a plan with additive formulas, it is simple to determine how to "aggregate" the accrued benefits under the plan's benefit formulas — you just add them up. How to "aggregate" the accrued benefits in a plan with alternative "greater of" formulas, however, is far from straightforward. This is because, even though the plan includes multiple formulas, each participant will have his or her accrued benefit determined under only one formula, namely, the one that produces the greatest benefit. As a result, it is not possible to "aggregate" the accrued benefits under the plan's formulas by adding them up. "Aggregate" necessarily means something different from simple addition in this case.

The IRS currently interprets the term "aggregate" in the case of alternative "greater of" formulas to require that the accrued benefits under all the plan's formulas be combined and accumulated. Under this interpretation, a determination is made for each plan year as to which formula produces the greatest accrued benefit for the participant as of the end of that year. The results for all relevant plan years are then plugged into the particular anti-backloading test being applied. This interpretation is not the only possible interpretation, nor is it the appropriate one and it suffers from two serious drawbacks.

First, the interpretation is at odds with the IRS' long-standing practice of approving thousands of defined benefit plans of all types with alternative "greater of" formulas. Under its current interpretation, the IRS has, wittingly or unwittingly, countenanced a massive circumvention of one of ERISA's most fundamental requirements, since the majority of large- and medium-sized defined benefit plans include alternative "greater of" formulas of one type or another.

Second, the IRS' interpretation cannot be squared with Congress' insistence that the anti-backloading rules permit unlimited *frontloading* of benefit accruals. The effect of the IRS' "combine and accumulate" approach is to label plans as backloaded merely because they frontload benefit accruals. Take, for example, a plan that provides a benefit equal to the greater of (1) the benefit produced by a 1% career average pay formula or (2) a minimum benefit equal to 10% of final five-year average pay accrued immediately. Although the 1% career average pay formula complies with the 133⅓-percent test, the addition of the 10% final average pay formula, according to the IRS' current interpretation, causes the plan to violate the 133⅓-percent test. This is so because, under the "combine and accumulate" approach, the accrual rates under the plan are 10% in year 1, 0% in years 2 through 10, and 1% in each subsequent year. Calculated in this way, the 1% rate in the years following year 10 does not fall within the 33⅓-percent margin permitted by the 133⅓-percent test in relation to the accruals in years 2 through 10. This is an extraordinary result. The 1% final pay formula satisfies the 133⅓-percent test. But, according to the IRS' current interpretation, the addition of the 10% formula, a *frontloaded* formula, causes the plan to become impermissibly *backloaded*.

We believe that the IRS can and should adopt an interpretation of the term "aggregate" that is consistent with its long-standing practice of approving plans with alternative "greater of" formulas, and that comports with Congressional intent by not disqualifying plans as backloaded merely because they frontload benefit accruals. Under our proposed interpretation, a plan with alternative "greater of" formulas would satisfy the anti-backloading rules as long as all the formulas individually satisfy the anti-backloading rules. Under this interpretation, the accrued benefits under all the plan's formulas would be "aggregated" by requiring that *all the formulas* satisfy the anti-backloading requirements. This is a reasonable interpretation given the special character of "greater of" formulas. Contrary to the IRS' current interpretation, it is not necessary to combine and accumulate benefits under "all" the plan's formulas, since a participant's benefit ultimately will be determined under only *one* of those formulas. However, because participants in the aggregate might have their accrued benefits determined under *any* of the plan's alternative formulas, each of those formulas must individually satisfy the anti-backloading rules.

This approach directly parallels the treatment of "greater of" formulas in the nondiscrimination safe harbors for defined benefits plans. Under Treasury Regulation § 1.401(a)(4)-3(b)(6)(xi), defined benefit plans that provide alternative "greater of" formulas satisfy the nondiscrimination safe harbors as long as each formula individually satisfies a safe harbor. The approach is also similar to the interpretation the IRS adopted in Revenue Ruling 76-259, 1976-2 C.B. 111, which explained how the anti-backloading rules apply to defined benefit plans that are part of a floor-offset arrangement. Like defined benefit plans with alternative formulas, floor-offset arrangements provide participants with the greater of the benefits determined under more than one formula — specifically, the benefit formula under a defined benefit plan and the allocation formula under a related defined contribution plan. Also like plans with alternative formulas, floor-offset arrangements are guaranteed to provide a benefit that is at least as front-loaded as the benefit formula under the defined benefit plan would provide on its own. Not surprisingly, the IRS ruled that the benefit formula under the defined benefit plan could be tested under the anti-backloading rules *without* taking into account the alternative formula under the defined contribution plan. The IRS reached this conclusion even though, tested on a combined and cumulative basis, the defined benefit plan was unlikely to provide *any* accruals to participants until late in their careers.

As further support for our proposed interpretation, the employees who benefit under each formula could be treated as different categories of employees. The regulation states that "[a] plan may satisfy different methods with respect to different classifications of employees, or separately satisfy one method with respect to the accrued benefits for each such classification, provided that such classifications are not so structured as to evade the accrued benefit requirements of section 411(b) and this section." Treas. Reg. § 1.411(b)-1(a)(1). Since each participant only receives benefits from one formula, the group of participants who benefit under each separate formula would be considered a separate classification. As long as each separate formula satisfied the anti-backloading rules on its own, the plan as a whole would satisfy the anti-backloading rules.

Where each formula individually satisfies the anti-backloading rules, the participant is guaranteed to receive an accrued benefit that satisfies the anti-backloading rules. Even if the formula that produces the greatest accrued benefit shifts during the participant's career, the resulting pattern of accruals is mathematically certain to be more frontloaded than one of the formulas which indisputably satisfies the anti-backloading rules. Because ERISA permits and encourages plans to frontload benefit accruals without limit, the IRS can easily and more appropriately should interpret the statute and existing regulations to find that such plans satisfy the anti-backloading rules, as it has for over three decades since the passage of ERISA.

Accrued-to-Date Method. The annual accrual rate for purposes of the 133⅓-percent rule can be determined in a manner consistent with the nondiscrimination regulations under Code section 401(a)(4). Those regulations permit an employer to elect to measure an employee's annual accrual rate on an "accrued-to-date" basis, *i.e.,* by dividing the employee's total accrued benefit by his or her total years of benefit accrual service, both measured as of the plan year in question.

The 133⅓-percent rule requires a plan to compare benefits earned in any earlier year (a "base year") to benefits earned in each subsequent year (a "later comparison year"), beginning with the current plan year and ending with the year in which the participant would reach normal retirement age. Under our proposal, the rate of benefit accrual for each base year would be determined under the accrued-to-date method and then would be compared to the annual accrual rate for each later comparison year determined under the annual method.[2]

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[2] If the IRS wishes, it could require the annual accrual rate for each later comparison year to be determined as the greater of the accrual rate calculated under the annual method or the accrued-to-date method. Furthermore, because the 133⅓-percent rule is forward-looking, a participant's accrued-to-date benefit should be determined as if the current plan formulas had always been in effect and on the basis of the participant's current level of compensation. These assumptions are consistent with the language of the statute.

Consider, for example, a plan that provides the greater of (1) 1% of pay per year of service, or (2) a minimum benefit of 5% of pay. The annual accrual pattern under this plan measured under the annual method is: 5%, 0%, 0%, 0%, 0%, 1%, 1%, etc. There is no true backloading in this example; on the contrary, the first five years of accruals have simply been frontloaded into the first year.

The accrued-to-date method accurately reflects the true nature of this benefit formula. Under the accrued-to-date method, the rate of accrual for each year under this formula is as follows: 5%, 2.5% (*i.e.,* 5% divided by 2), 1.67% (5% divided by 3), 1.25% (5% divided by 4), 1% (5% divided by 5), 1%, 1% etc. This rate is then compared to the accrual rate in any later year. If any later comparison year's accrual rate determined under the annual method is more than 133⅓% of the annual rate in any earlier base year determined under the accrued-to-date method, the plan formula would fail the 133⅓%-percent test. In this example, the test clearly is satisfied.

This test reflects the true economics of the arrangement in our example; *i.e.,* benefits are first frontloaded, then provided ratably. What this test does is mathematically ensure that a participant cannot earn, in any later year, more than 133⅓% of his or her annual benefit accrual in earlier years determined on an accrued-to-date basis. Unlike the IRS' current position regarding the application of the anti-backloading rules (which penalizes frontloading), this test very accurately achieves the purpose of the anti-backloading rules.[3]

We believe that our accrued-to-date proposal is consistent with the anti-backloading statute and regulations. The key phrase under the regulations is the "annual rate at which any individual . . . can accrue . . . retirement benefits." Treas. Reg. § 1.411(b)-1(b)(2)(i)(B). Does this reference to "annual rate" preclude use of the accrued-to-date method? The answer is clearly no. The accrued-to-date method is used under the Code section 401(a)(4) regulations to determine the "normal accrual rate for an employee *for a plan year*" and the "most valuable accrual rate for an employee *for a plan year.*" Treas. Reg. § 1.401(a)(4)-3(d)(1)(i), (ii) (emphasis added). Conceptually, there is no reason why the accrued-to-date method can be used to measure annual accruals for purposes of Code section 401(a)(4) - - without any explicit statutory authorization - - but not for purposes of the anti-backloading rules.

Frontloaded Benefit Accruals. When it enacted the anti-backloading rules as part of ERISA, Congress was emphatic that plans are permitted to *frontload* benefit accruals. The ERISA Conference Report said this three times. First, the Conference Report made the following statement about the 3% test: "This test is to be applied on a cumulative basis (i.e., *any amount of 'front loading' is permitted).*"[4] The Conference Report also made a similar statement about the 133-1/3% test: "Under this alternative, the plan is to qualify if the accrual rate for any participant for any later year is not more

[3] For purposes of the 133⅓% test, "all relevant factors used to compute benefits . . . are treated as remaining constant as of the beginning of the current plan year for all subsequent plan years." Treas. Reg. § 1.411(b)-1(b)(2)(ii)(D). With respect to a participant's compensation, this rule requires that the participant's compensation used in the plan's benefit formula be treated as remaining constant. Thus, for example, in a career average pay plan, the compensation held constant would be the participant's average compensation under the career average pay formula.

[4] H.R. (Conf.) Rep. No. 1280, 93d Cong., 2d Sess. 273 (1974) (emphasis added).

than 133-1/3 percent of his accrual rate for the current year. Thus, (unlike the House bill) the conference substitute *permits an unlimited amount of 'front loading'* under this test."[5] The Conference Report made this point a third time in connection with the fractional rule: "This test is cumulative in the sense that *unlimited front loading is permitted.*"[6]

Congress was clearly emphatic about this point. Nor is it surprising that Congress sought to permit frontloading. The anti-backloading rules were designed to restrict the extent to which a plan may *defer* the accrual of benefits until late in a participant's career, thereby thwarting the objectives of ERISA's vesting standards. The *acceleration* of benefit accruals — through frontloading — advances the objectives Congress sought to achieve in enacting the anti-backloading rules: the accrual of pension rights *early* in a participant's career.

The IRS' proposed position would penalize plans for frontloading benefit accruals — contrary to the intention of Congress and contrary to the objective of the anti-backloading rules: to restrict plans' ability to *defer* the accrual of benefits. Although the anti-backloading rules were designed to limit backloading and to permit *unlimited* frontloading, the IRS' current position would apply the anti-backloading rules to penalize frontloading.

It has been suggested by some at the IRS that Congress's support for frontloading was restricted to benefit formulas that accelerated accruals from years occurring at *the end* of a participant's career to years occurring at the beginning of his career, and that Congress did not authorize the acceleration of accruals from *mid-career years* to earlier years. We are not aware of any evidence to substantiate this theory. Certainly there is no support for it in the ERISA conference report. Nor is it evident why Congress would have intended to impose a restriction that *postpones* benefit accruals. The theory is completely inconsistent with Congress's intent to permit unlimited frontloading.

Reconciliation with Regulation Example. The final issue is how to reconcile the accrued-to-date method with Treas. Reg. section 1.411(b)-1(b)(2)(iii), Ex. (3). In our view, Example 3 is simply an illustration of how the 133⅓-percent rule works under one scenario, *i.e.*, where the employer does not elect to apply the accrued-to-date method of determining annual accrual rates.

Regulatory examples are fact-specific. On the facts of Example (3), where there is no election to use the accrued-to-date method, the 133⅓-percent rule is violated. There is nothing precluding Treasury and IRS from clarifying in non-regulatory guidance that this result can be avoided through an election to use the accrued-to-date method.

Preferred Method of Articulating IRS Position

The manner in which (and the timing of) the IRS' position is articulated is important. While amending the Code section 411(b) regulation to clarify our recommended interpretation of the application of the anti-backloading rules to "greater-

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[5] Id. at 274 (emphasis added).

[6] Id. at 274 (emphasis added).

of" formulas might be desirable, we understand the time constraints under which the Treasury Department and the IRS currently are operating. However, since this issue has been raised, there needs to be some affirmative declaration by the IRS that "greater of" formulas do not raise anti-backloading issues. The IRS could issue a field memorandum or directive recommending that agents reviewing these plans apply the anti-backloading rules using the interpretations suggested above. As an alternative, a revenue ruling that addresses the "greater of" issue and determines, using either of the analyses posited above, that the "greater of" formula will not violate the anti-backloading rules would help address our concerns. At the least, an affirmative declaration that a plan with a "greater of" formula satisfies the anti-backloading rules in the determination letter for the plan would be helpful.

Other Concerns

The changes to the rules regarding conversions to hybrid plans added by the Pension Protection Act of 2006 ("PPA") requiring a minimum transition benefit in a conversion to a hybrid plan formula will not stop plan sponsors from wanting to use "greater of" formulas in future cash balance conversions. Plan sponsors may, for example, offer the greater of the old formula and the new PPA-required transition benefit, so the anti-backloading issues are still relevant on an ongoing basis. For this and many other reasons, an interpretation of the application of the anti-backloading rules that applies solely to conversions that have already occurred would not be desirable.

As mentioned before, the IRS agents who are reviewing cash balance plan determination letter requests are requiring plan sponsors that thought they were providing a participant-friendly transition benefit by using "greater of" formulas are now being required by the IRS to provide extensive (and expensive) actuarial studies to show that the benefit formulas, when combined and accumulated, meet the anti-backloading rules. In those instances where they are not able to convince the IRS agent that they meet this new standard, plan sponsors will need to modify benefits (perhaps retroactively, at tremendous expense) under the plan or face receiving an adverse determination letter. We request that, while you are considering the issues that we have raised in our meeting and in this letter, the IRS suspend its efforts in enforcing its current position and let plan sponsors know of this suspension. Otherwise, plan sponsors may be incurring unnecessary expenses if you adopt the positions advanced in this letter. Further we are concerned that the proposed IRS interpretation, unless corrected, will contrary to Congress' clear intent, have a chilling effect on the creation of cash balance plans.

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We thank you for your consideration of our resolution of the issues raised in this letter. If you have any questions or would like to discuss the issues raised here further, please feel free to contact us directly, or through William Sweetnam at the Groom Law Group, Chartered (202-861-5427), Richard Shea at Covington & Burling (202-662-5599), or Kent Mason at Davis & Harman, LLP (202-662-2288).

Sincerely,

American Benefits Council

ERISA Industry Committee

American Society of Pension Professionals and Actuaries

The Coalition to Preserve the Defined Benefit System

cc: Nancy Marks
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