October 31, 2006

PENSION PROTECTION ACT
TECHNICAL CORRECTIONS OR AGENCY GUIDANCE NEEDED WITH RESPECT TO DEFINED CONTRIBUTION PLANS

Overall: Pending the issuance of administrative guidance on the defined contribution issues of the Act, employers should be permitted to rely on a reasonable, good faith interpretation of the statutory provisions.

Immediate or 2007 Effective Date

1. Section 507 – Notice of Right to Divest Employer Stock

See separate attached document.

2. Section 901 – Diversification Requirements

See separate attached document.

3. Section 508 – Benefit Statements and Notices for DC Plans

- Need delayed effective date until 60 days after the issuance of guidance and a model notice. It will be extremely difficult to provide the new statements for the first quarter of 2007. It would be even more burdensome for companies to be required to subsequently reprogram to conform to guidance issued later. [Technical correction or administrative guidance.]
- Need the following system with respect to the quarterly benefit statement rule. Once a year, a notice is provided that notifies participants and beneficiaries how to access their benefit statement on-line. This notice may be provided electronically under rules similar to Treasury Regulation section 1.401(a)-21. This notice would also inform participants and beneficiaries of their right to elect to receive a quarterly paper statement. Only participants who so elect would receive a paper statement for that year. [Administrative guidance.]

- Need to clarify that, in the case of self-directed defined contribution plans, the required description of investment restrictions is limited to those imposed by the plan and does not apply to restrictions imposed by the issuer of the investment or agreed to by the issuer and a service provider (effectively, still issuer-imposed). Such issuer-imposed restrictions are communicated in a variety of other more appropriate ways, such as through a prospectus. It would be very burdensome to repeat all of this information in the benefit statement. [Technical correction or administrative guidance.]
- Need to make clear that the "one entity" language in the 20 percent warning applies only to individual stocks or similar investments. At the very least, the warning should not apply to any investment vehicle made up of numerous investments, such as a mutual fund, ETF, or collective trust. It should be made clear that the warning language is not necessary in the case of a plan that limits investments to those that cannot trigger a warning (such as a plan with only mutual funds). [Technical correction or administrative guidance.]
- Need clarification that the information in the benefit statement may be (1) current as of the last day of the preceding quarter, (2) current as of the current day, or (3) current as of any day in between the dates described in "(1)" and "(2)". A plan providing quarterly paper statements may use "(1)". A plan providing on-line access at all times may use "(2)". A plan providing a paper statement on request may print out the current day's information and mail it (thus using "(3)"). [Administrative guidance.]
- Need clarification that the required information in the benefit statements is not treated as a fiduciary communication. For example, if an employee diversifies out of employer securities based on the benefit statements warning and it turns out that the employee would have been far better off not diversifying, the plan administrator should not be subject to suit based on the provision of a required statement. [Technical correction or administrative guidance.]
- Need clarification that the benefit statements can be provided in two or more parts. For example, if a participant has a brokerage window, the participant may receive two benefit statements - - one from the brokerage firm and one from the plan - - that together satisfy the statutory requirements. This two-part approach also arises in other contexts such as unbundled administrative services where a recordkeeper and a third party administrator are both providing services to a plan, and each possesses some, but not all, of the information required to be included in benefit statements. Another example is a section 403(b) plan with multiple providers, each of which only is aware of its own part of the plan. It would be very burdensome and expensive to produce integrated statements. [Administrative guidance.]

- It would be very helpful if the explanation of the use of permitted disparity or a floor offset arrangement could be provided through a cross-reference to the SPD, which explains the benefit formula. Repeating the benefit formula in the benefit statement would serve no apparent purpose. And explaining the intricacies of imputed permitted disparity would not be meaningful. [Technical correction or administrative guidance.]
- Similarly, it should be permitted to provide vesting information by means of a cross-reference to the SPD, which provides the plan's vesting schedule and service crediting rules. This information is sufficient "to enable a participant or beneficiary to determine their nonforfeitable vested benefits", as required by the statute. [Administrative guidance.]
- Need to clarify that the quarterly benefit statements may be provided within a reasonable period of time after the end of each quarter. [Administrative guidance.]
- In some cases, it is not clear whether participants have the right to direct investments for purposes of this provision. For example, in some plans, the employer controls the plan investments, but the participants have the right to direct that part of their account be invested in life insurance. A plan with this very limited form of direction should not be subject to the rules applicable to participant-directed plans. The diversification discussion would, for example, be meaningless for these participants. [Administrative guidance.]
- For purposes of the "every three year" rule applicable to defined benefit plans, the first benefit statement should be provided with respect to the third year the provision is effective, i.e., 2009 for non-collectively bargained plans. [Administrative guidance.]
- To the extent that a benefit statement is required for 2007 with respect to a defined benefit plan, it should be clarified that the first benefit statement would be with respect to the 2007 plan year and thus would not be due until the valuation of the plan as of the end of the 2007 plan year is complete. [Administrative guidance.]
- With respect to the delay for collectively bargained plans, see the separate attached document regarding employer stock diversification, which includes comments on a similar provision.

4. Section 822 – Rollover of After-Tax Amounts

- Need updated section 402(f) notice (for this provision and other provisions). And need clarification that plans can continue to provide the current 402(f) notice (not revised to reflect the new requirements) until January 1, 2007. [Administrative guidance.]

5. Section 829 – Rollovers by Nonspouse Beneficiaries

- Need clarification of whether this applies to non-spousal alternate payees under a QDRO. [Technical correction or administrative guidance.]
- Need clarification that 20 percent withholding does not apply if amounts are not rolled over. [Technical correction or administrative guidance.]
- Need clarification regarding whether provision of the section 402(f) notice to nonspouse beneficiaries is required. If so, need the safe harbor 402(f) notice updated in this regard. [Administrative guidance.]
- Need clarification whether plans are required to offer this rollover opportunity by reason of Code section 401(a)(31). [Technical correction or administrative guidance.]

6. Section 601 – Investment Advice

- ERISA section 408(g)(10)(B) provides guidance regarding a plan sponsor's fiduciary duties in choosing and monitoring a fiduciary adviser under the exemption. The rule described in this guidance is the same rule that applies under current law to any situation where the plan sponsor chooses an investment adviser with respect to the plan. Some might infer that the specific articulation of the rule in the context of the exemption creates a negative inference with respect to the continued vitality of the rule outside the context of the exemption. This could not have been intended, since it would create a very powerful incentive for employers to choose "conflicted" advice over "non-conflicted" advice. It should be clarified that the rule in ERISA section 408(g)(10)(B) applies with equal force outside the exemption. [Technical correction or administrative guidance.]
- Need clarification that automatic rebalancing can be used under the computer model if such rebalancing is authorized upfront by the participant or beneficiary. [Technical correction or administrative guidance.]
- Reference on page 479 to "(b)(14)(B)(ii)" should be to "(b)(14)(A)(ii)"; reference on page 496 to "(b)(14)(B)(ii)" should be to "(d)(17)(A)(ii)". [Technical correction]
- Need clarification regarding the person to whom the fee-leveling requirement applies. The Council will be submitting a supplemental document on this issue. [Technical correction or administrative guidance.]
- The statute needs to be revised to cover managed accounts (in addition to "non-managed" accounts). In light of the strong trend in the market toward managed accounts, the provision would be much more effective in promoting investment advice if it were extended to managed accounts. [Technical correction.]

- Need clarification that the legislation does not affect the provision of advice under any pre-existing rules, including any applicable advisory opinions. [Administrative guidance.]
- Need guidance on the required credentials for the independent third party reviewer. [Administrative guidance.]
- Fiduciary status should not apply to designers of a computer model if such designers have no direct relationship to the plan. [Technical correction or administrative guidance.]
- With respect to the requirement that the computer model "take into account all investment options under the plan", it should be clarified that:
    - Brokerage windows and investments in employer securities can be disregarded. Alternatively, at the participant's election, the computer can take the participant's brokerage window and employer security investments into account in counter-balancing the remainder of the account.
    - Life-cycle funds, targeted-retirement-date funds, or similar funds can be disregarded since such funds are not static, but rather are themselves modified over time like a computer model.
    - In the context of section 403(b) plans, one provider need not take into account investments administered by other providers.
    - The computer model would be permitted to screen out plan investment options that do not meet the model's criteria (e.g., insufficient history).

  (The above exclusions could be identified and accompanied by an explanation that they do not reflect a substantive judgment against investing in the excluded items.)

  Another way to reach the above result is to rely on the statutory language that the computer model is to take into account the participant's "preferences as to certain types of investments". This would allow the computer model, for example, to accept, as a given, the participant's desire to invest X% of his or her account in employer securities. [Technical correction or administrative guidance.]

- The statute permits a participant to ask for advice outside the model. Clarification of the treatment of that advice would be helpful. [Administrative guidance.]
- There is no apparent reason that an IRA with a limited menu of options should not be permitted to use a computer model starting in 2007. [Technical correction or administrative guidance.]
- Non-ERISA Keogh plans should be subject to the same rules as IRAs. [Technical correction or administrative guidance.]

- Need statutory clarification that any IRA class exemption need not require fee-leveling or other rules not deemed necessary by the DOL. [Technical correction or administrative guidance.]
- Need clarification that the certifications and audits under the exemption need not be based on extensive "field testing" but can be based on the design of the programs (including appropriate internal safeguards and monitoring systems) and representations of the provider of the program. [Administrative guidance.]

7. Section 624 – Default Investments

- Should apply to non-ERISA 403(b) plans and non-electing church plans so that if the DOL default investments are used, participants are deemed to have exercised control over the assets for purposes of State fiduciary rules. [Technical correction.]
- Comments on the proposed default investment regulations will be submitted to DOL by the comment deadline.

8. Section 902 – Automatic Enrollment and ERISA Preemption

- ERISA preemption should apply without regard to whether a plan satisfies any requirements. This is how ERISA preemption applies in all other contexts. Under the current rule, any technical failure with respect to default investments, notices (including the timing of notices), or uniform default contribution rates would result in a loss of preemption. If companies become concerned about this very real technical point, this could potentially restrain the growth of auto enrollment. [Technical correction.]
- Preemption should also apply to ERISA plans that require employees to contribute to a plan as a condition of employment. [Technical correction or administrative guidance.]
- State law should be preempted to the same extent with respect to non-ERISA 403(b) plans and non-electing church plans. [Technical correction.]

9. Section 611 – Prohibited Transaction Rules

The Council will be submitting a separate document on these issues.

10. Section 803– Combined Plan Limit

See the American Benefits Council's paper on defined benefit plan issues.

11. Section 827 – Withdrawals for Military Personnel

- The transition rule needs to be clarified – the two-year repayment period (not ending until two years after enactment) does not match up with the extended refund period (one year after enactment). [Technical correction or administrative guidance.]
- Need clarification of the meaning of "amounts attributable to elective deferrals", specifically with respect to earnings, losses, and matching contributions. [Administrative guidance.]
- Need clarification whether a participant called to active duty before December 31, 2007 is entitled to make a withdrawal at any time thereafter as long as he or she is still on active duty. [Technical correction or administrative guidance.]

12. Section 904 – Faster Vesting of Nonelective Contributions

- Need clarification of the requirements applicable when a plan switches from, for example, 5-year cliff vesting to 6-year graded vesting. Specifically, issues arise under Code sections 411(d)(6) and 411(a)(10). [Administrative guidance.]
- With respect to the delay for collectively bargained plans, see the separate attached document regarding employer stock diversification, which includes comments on a similar provision.

13. Section 1102 – Notice and Consent Period

- Both defined benefit plans and defined contribution plans need guidance with respect to the requirement that participants be given a description of the consequences of failing to defer receipt of a distribution. [Administrative guidance.]
- Need clarification that the new rules do not apply to notices provided before the 2007 plan year, even if the annuity starting date with respect to which the notice is given occurs during the 2007 plan year. [Technical correction or administrative guidance.]

14. Section 1107 – Plan Amendments

- Need to know as soon as possible what areas will not have cutback relief. [Administrative guidance.]

<u>2008 Effective Date</u>

1. Section 621 – Mapping

- Notice timing was coordinated with the notices for blackout periods under the Sarbanes-Oxley but without the corresponding exceptions. Need same exceptions (e.g., regarding unforeseeability) that apply under the blackout period rules. [Technical correction or administrative guidance.]
- An earlier effective date would very helpful. [Technical correction]
- Need flexible definition of "reasonably similar characteristics" including risk and rate of return. [Administrative guidance.]
- Need clarification of mapping rules when eliminating an option (such as employer stock) and not replacing it with a similar option. Recommend optional use of default fund (section 624) instead of (or in addition to) fund with similar characteristics. [Administrative guidance.]
- Need clarification that the participant can be deemed to have exercised control under the default fund rules or through previous use of mapping. [Technical correction or administrative guidance.]

2. Section 902 – Automatic enrollment

- For the safe harbor, automatic acceleration should not be limited to 10 percent. The 10 percent limit sends a message that deferrals in excess of 10 percent are not appropriate. [Technical correction.]
- The safe harbor should allow use of "base pay" or other reasonable definitions of compensation without regard to whether such definitions satisfy the nondiscrimination test under section 414(s). [Technical correction or administrative guidance.]
- Clarify that combined notices with respect to automatic enrollment and default investment are permitted. [Administrative guidance.]
- A number of issues arise related to the 90-day window for permitted withdrawals:
    - How should these distributions be reported?
    - Can these distributions be offset by investment losses and/or expenses?
    - What is the deadline for making the distributions? A reasonable period after the expiration of the 90-day period should be permitted.
    - When does the 90-day period begin (e.g., the withholding date or the deposit date)? [Administrative guidance.]
- A number of issues arise with respect to gap period income.
    - Unless there is a change, plans will be forced to reprogram for 2006 to distribute gap period income and then reprogram again for 2008 not to distribute gap period income. Plans should be permitted not to distribute gap period income, effective for the 2006 plan year. Plans that start distributing gap period income for 2006 should be

permitted to continue making those distributions after 2007. [Technical correction or administrative guidance.]
    - It should be clarified that gap period income need not be distributed in any circumstances, including instances where the excise tax applies. [Administrative guidance.]
- Clarification with respect to the following nondiscrimination safe harbor issues:
    - The permissibility of participant elections to have auto increases apply beyond the 10% level.
    - The permissibility of providing the matching contributions or nonelective contributions only to employees who have a year of service, even though employees are immediately eligible to defer. This would work at least under a separate testing of excludables approach.
    - The permissibility of limiting employer contributions to employees who remain employed at the end of the quarter or year.
    - Who has to receive the required notices?
    - Under what circumstances will an existing participant be treated as having made an election not to participate?
    - Need clarification that safe harbor would allow plans to require minimum participant contributions in excess of 1 percent.
    - Need clarification of interaction of requirement that participants have a reasonable period of time to opt out of automatic enrollment with the requirement that notices be provided within a reasonable period of time before the beginning of each plan year. Confirm that notices are also required with respect to newly eligible participants. [Administrative guidance.]
- Need clarification of safe harbor requirements if plan is dual qualified in U.S. and Puerto Rico (allowing for non-inclusion of Puerto Rican employees). [Technical correction or administrative guidance.]

3. Section 504 – Electronic Display of Annual Report Information

- Need clarification of what must be posted under this provision. [Administrative guidance.]

4. Section 622 –Maximum Bond Amount

- The reference to employer securities should exclude employer stock held in mutual funds and similar products, such as ETFs. [Administrative guidance.]

5. Section 824 – Direct Rollovers to Roth IRAs

- An additional Roth IRA rollover issue needs to be addressed. Under current law, if an involuntary distribution exceeds $1,000 and the participant does not make a direct rollover or cash distribution election, the distribution must be directly rolled over. The purpose of the $1,000 requirement was to avoid forcing direct rollovers of small amounts. To effectuate that intent, it should be clarified that the $1,000 rule applies separately to pre-tax amounts and Roth 401(k)/403(b) amounts; otherwise, the rules could force separate direct rollovers of less than $1,000. For example, a participant with $700 of pre-tax assets and $400 of Roth 401(k) assets would currently have to have two under-$1,000 rollovers made on his or her behalf, since pre-tax assets and Roth 401(k) assets have to be rolled over to separate arrangements. [[Technical correction or administrative guidance.]
- Under the proposed Roth 401(k) regulations, hardship withdrawals would be treated as pro rata distributions of basis and income, even though the distribution is limited to the contributions themselves, which are all basis. It should be clarified that a hardship distribution of Roth 401(k) contributions is simply a return of basis. [Administrative guidance.]
- An earlier effective date would be helpful. [Technical correction.]
- Need clarification of reporting responsibilities. [Administrative guidance.]
- Clarify whether Roth IRAs can be used for automatic enrollment rollovers. [Administrative guidance.]

2009 or Later Effective Date

1. Section 410 – Missing Participants.

- Need conforming change to 401(a)(34) that transfer to PBGC does not cause the plan to be disqualified. [Technical correction.]
- Need clarification that any charges imposed by the PBGC for accepting a transferred account would be applied against the transferred account, not against the plan. [Technical correction or administrative guidance.]
- Transfers should be treated like automatic rollovers for fiduciary purposes. [Technical correction or administrative guidance.]

2. Section 1001 – QDROs

- Need clarification that the provision is to be applied prospectively only and does not permit post-death QDROs. [Technical correction or administrative guidance.]