



AMERICAN BENEFITS  
COUNCIL

June 19, 2008

CC:PA:LPD:PR (REG-110136-07)  
Room 5203  
Internal Revenue Service  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 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 advance notice of plan amendments significantly reducing the rate of future benefit accrual. 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.

Before commenting on the proposed regulation, we want to applaud the Treasury Department ("Treasury") and the Internal Revenue Service (the "Service") for the tremendous amount of needed guidance that has been issued with respect to the Pension Protection Act of 2006 (the "PPA"). The guidance has been very helpful as our members have modified their plan operations to comply with the PPA requirements.

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 law firm of Davis & Harman LLP and our outside counsel, 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. Avoiding duplicative notices (3 minutes)
- II. Amendments under PPA section 1107 (7 minutes)

**Avoiding duplicative notices.** We commend Treasury and the Service for certain excellent aspects of the proposed regulation. We are especially pleased about the proposed rule under which satisfaction of certain other notice requirements will be treated as satisfying the section 204(h) requirements. That proposed rule will prevent duplicative notices. Duplicative notices (1) can be very confusing to participants, and (2) waste scarce resources that could be better spent on participants' benefits.

With respect to the specifics of the proposed rule, we would ask for certain clarifications. First, with respect to amendments made to comply with the Code section 436 benefit limitations, it should be clarified that a plan that is never required to provide a notice under ERISA section 101(j) (or is not required to do so for a period of time) nevertheless is not treated as failing to satisfy ERISA section 204(h) or Code section 4980F solely by reason of the fact that a section 101(j) notice has not been required and thus has not been provided. This should be the case even though a section 204(h) notice was not sent when the plan adopted general conditional language authorizing the benefit restrictions, if they ever are triggered. Second, the regulations should be modified to provide that in the case of an amendment subject to one of the notice requirements listed in Proposed Regulation § 54.4980F-1, Q/A-9(g)(3)(ii), section 204(h) does not apply. This would be different from the provision in the proposed regulations, which states that section 204(h) is deemed to be satisfied by the provision of one of the listed notices. A key difference is that under the rule set forth in the proposed regulations, in the case of any failure to comply with one of the listed notice requirements, there is arguably the potential for the application of two penalties - - the penalty for failure to comply with the listed requirement and the penalty for failing to comply with ERISA section 204(h) or Code section 4980F. This is clearly not appropriate; the only penalty should be the penalty applicable with respect to the listed requirement.

It would also be clearer if the reference to section 432(e)(8)(C) were moved from Q/A-11(a)(7) to Q/A-9(g)(3)(ii). We recognize that compliance with the timing rules of section 432(e)(8)(C) would ensure compliance with the timing rules of section 204(h), so deeming the timing rules of section 204(h) to be satisfied is not necessary, as explained in the preamble. But the preamble explanation is not in the regulation itself, leaving future readers of the regulation uncertain regarding the rationale for the different treatment of notices under section 432(e)(8)(C).

Finally it would be helpful if the regulations included references to both the Code and ERISA provisions, where applicable, instead of just one of the parallel provisions.

**Section 417(e) assumptions.** We also strongly support the rule under which an amendment to conform to the new PPA assumptions under Code section 417(e) does not trigger a section 204(h) notice requirement. That is an eminently sensible rule that

will again conserve scarce resources; it would make little sense to require notices with respect to plan amendments that simply correspond to new legal standards.

It would be helpful in this regard for the regulations to be clarified so that a section 204(h) notice is not required without regard to whether an amendment fully or partially adopts the new Code section 417(e) assumptions and without regard to the effective date of such amendment. Many plan sponsors may not increase their interest rate to the maximum extent permitted with respect to a plan year. For example, a plan sponsor might adopt an amendment to apply the 2008 statutory phase-in level (i.e., 20% based on the PPA interest rate and 80% based on the pre-PPA interest rate) for purposes of determining the amount of lump sum distributions in 2008 and 2009; such amendment may also provide that the “regular” PPA phase-in levels and interest rates apply for 2010 and later years<sup>1</sup>. The proposed regulations should clarify that a section 204(h) notice is not required with respect to such an amendment.

**Notice to contributing employers.** It would be helpful if the regulation were clarified so that a section 204(h) notice to contributing employers is not required in the case of a single employer plan. This could be achieved by deleting “to the plan” at the end of the first sentence of Q/A-10(a) and inserting “to a multiemployer plan”. Otherwise, the regulations would require a meaningless notice that will generally involve an employer (or its employees) notifying itself. This would create a trap for the unwary who fail to perform the meaningless act.

**Amendments permitted by reason of PPA section 1107.** The proposed regulations would require section 204(h) notices with respect to amendments that would be prohibited by Code section 411(d)(6) but for PPA section 1107. We have concerns about this rule both prospectively and retroactively. On a prospective basis, we question why a section 204(h) notice is required with respect to such an amendment to the extent that it is required by law. Required amendments are simply implementing Congressional intent and should not give rise to a burdensome notice regime.

We are also quite concerned about the pre-effective date period. More specifically, we are concerned by the absence of an explicit indication that the prospective rule is a change in the law. Under Regulation § 54.4980F-1, Q/A-7(b), a section 204(h) notice is not required with respect to “a section 411(d)(6) protected benefit that [is] eliminated or reduced as permitted under § 1.411(d)-3 or § 1.411(d)-4 Q&A-2(a), or (b) of this chapter.” Regulation §1.411(d)-4 Q/A-2(b)(2)(i) provides as follows:

A plan may be amended to eliminate or reduce a section 411(d)(6) protected amendment if the following three

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<sup>1</sup> We interpret IRS Notice 2008-30 to permit such an amendment to be adopted before July 1, 2008 or, if it is the first amendment implementing the PPA changes to section 417(e), after June 30, 2008 (but within the period permitted for PPA amendments).

requirements are met: the amendment constitutes timely compliance with a change in law affecting plan qualification; there is an exercise of section 7805(b) relief by the Commissioner; and the elimination or reduction is made only to the extent necessary to enable the plan to continue to satisfy the requirements for qualified plans.

For purposes of illustration, we assume that prior to January 1, 2008, a cash balance plan credited interest at 15%. We assume further that as of January 1, 2008, the plan reduced its crediting rate to the third segment rate. The question is whether a section 204(h) notice was required with respect to that amendment. We strongly believe that such a notice was not required. The amendment fits perfectly within the above quoted regulatory provision, except that relief from section 411(d)(6) is based on PPA section 1107 instead of section 7805(b) relief from the Commissioner. That is a difference without any substance. In appropriate circumstances, either Congress or the Commissioner grants relief from section 411(d)(6). It is hard to believe that the applicability of section 204(h) turns on whether Congress or the Commissioner first recognizes the exact same need for relief from section 411(d)(6). Accordingly, we strongly urge you to clarify that with respect to amendments that are effective prior to July 1, 2008, no section 204(h) notice was required with respect to a plan amendment that is described in Regulation §1.411(d)-4, Q/A-2(b)(2)(i) but for the fact that the relief from section 411(d)(6) was granted by the PPA, instead of by the Commissioner.<sup>2</sup>

**Overall principles.** It would be helpful for the regulations under section 204(h) to set forth overall principles with respect to the circumstances under which a section 204(h) notice is required. The amendment-by-amendment approach in the proposed regulations are very helpful with respect to issues that plans face currently, but an articulation of general principles would be quite useful as new issues arise in the future.

Thank you for this opportunity to present our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson", written in a cursive style.

Jan Jacobson

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<sup>2</sup> Because of IRS Notice 2007-6, a December 22, 2006 date could be substituted for July 1, 2008 with respect to amendments to eliminate whipsaw provisions.