



AMERICAN BENEFITS COUNCIL

October 26, 2007

AMERICAN BENEFITS COUNCIL COMMENTS ON THE TECHNICAL CORRECTIONS BILLS

The American Benefits Council (the “Council”) very much appreciates the opportunity to comment on H.R. 3361 and S. 1974, which propose technical corrections to the Pension Protection Act of 2006 (the “PPA”). The Council has previously submitted lists of technical corrections that are needed with respect to the PPA. Certain of those technical corrections were included in the technical corrections bills noted above. We very much appreciate the inclusion of those items and appreciate the great work that went into the preparation of those bills.

A number of critical technical corrections, however, were not included in the bills. In this document, we highlight our top priorities among those items that were not addressed. We continue to support all the technical corrections included in our prior lists, but the following are our highest priorities, listed in order of priority.

Also set forth at the end of this document is one comment with respect to a provision included in the bills.

Priority Items Not Included in the Technical Corrections Bills.

Asset Smoothing (PPA sections 102 and 112, Code section 430(g)(3) and ERISA section 303(g)(3)). Our top priority is clarifying that asset smoothing is permitted for purposes of the defined benefit plan funding rules. It is our understanding that guidance from Treasury may well not permit any smoothing of assets. The PPA used the term “averaging” with respect to asset valuation. Even though the PPA legislative history clarifies that “averaging” was intended to refer smoothing, we understand that the guidance may well state that averaging is not the same as smoothing, but rather is something very different. The unexpected form of averaging under consideration by Treasury would systematically undervalue assets by a very significant amount, thus artificially inflating funding obligations. To avoid such artificially large obligations, companies would generally be compelled to not use asset averaging. In general, companies would be effectively forced to use the other available asset valuation methodology, i.e., spot valuations. Spot valuations would, of course, give rise to tremendous unpredictability.

In general, Treasury’s possible interpretation would thus effectively eliminate asset smoothing. We urge you to clarify that asset smoothing is permitted.

Amortization of Gains (PPA sections 101 and 111, ERISA section 303(c)(5)(A) and Code section 430(c)(5)(A)). The legislation provides that if a defined benefit plan's assets equal or exceed the phased-in funding target (after subtraction of new credit balances), the shortfall amortization base is zero. This rule can be read to preclude the amortization of a gain in such a situation. If the rule were read in this way, 100% funded plans would be treated in a materially harsher fashion than plans that are less well-funded, which cannot have been intended. The provision should be revised to make it elective as to whether the shortfall amortization base is treated as zero, which would conform the rule to the apparent intent.

Rollovers to Roth IRAs (PPA section 824, Code section 408A(c)(3)(B)).

Before the enactment of the PPA, a qualified plan distribution could not be rolled over directly to a Roth IRA, subject to one exception described below. Instead, qualified plan distributions could be rolled over to a traditional IRA, which could then be converted to a Roth IRA, subject to the rule precluding conversions by taxpayers with AGI over \$100,000 or by married individuals filing a separate return. (The \$100,000 rule and the separate return rule cease to apply starting in 2010.) Section 824 of the PPA modified these rules by permitting direct rollovers from all qualified plans to Roth IRAs, subject to the \$100,000 limitation and the separate return rule.

The problem arises with respect to rollovers of Roth 401(k) or 403(b) amounts to Roth IRAs. Because such rollovers do not involve the conversion of pre-tax money to Roth money, such rollovers were not subject to the \$100,000 limitation or the separate return rule prior to the PPA. However, a conforming change in PPA section 824 inadvertently applied the \$100,000 rule and the separate return rule to direct rollovers from Roth 401(k) and 403(b) plans to Roth IRAs. Not only is this inconsistent with prior law, but since Roth 401(k) and 403(b) plan distributions can only be rolled over to other Roth arrangements, application of the \$100,000 rule and the separate return rule can make compliance with the automatic rollover rules impossible in certain circumstances.

The \$100,000 rule and the separate return rule should be made inapplicable to rollovers from Roth 401(k) and 403(b) plans to Roth IRAs.

Benefit Statements (PPA section 508 and ERISA section 105(a)). Section 105(a)(2)(A)(ii) of ERISA requires an explanation related to permitted disparity or a floor-offset arrangement. This should be modified so that it applies only to defined benefit plans. The provision does not make sense for a defined contribution plan that (a) has an employer contribution formula integrated with Social Security pursuant to Code section 401(l) or (b) is the offset piece of a floor-offset arrangement. The point of the provision is to inform participants in defined benefit plans that the accrued benefits described on their statement could be affected by the value of Social Security benefits or the annuity value of the defined contribution offset, neither of which can be determined exactly until benefits commence. An explanation on a defined contribution statement would only confuse participants. Alternatively, the benefit statement could simply be required to cross reference the summary plan description for a summary of the plan's contribution formula.

Restrictions on Lump Sums (PPA sections 103 and 113, Code section 436(d) and ERISA section 206(g)(3)). Very generally, the PPA prohibits or restricts underfunded defined benefit plans from paying lump sum distributions or other prohibited payments. This prohibition or restriction on prohibited payments should not apply to social security level-income options. The law excludes social security supplements from the definition of a prohibited payment. Economically, social security supplements and social security level-income options are identical; the only difference is that the former is an unprotected “ancillary benefit,” while the latter is a protected part of an accrued benefit. There is thus no reason for treating the two types of payments differently for purposes of the prohibited payment rules. Both types of payments should be excluded from the definition of a prohibited payment.

Diversification Notice (PPA section 507 and ERISA section 101(m)). The requirement that a notice be provided 30 days in advance of the right to diversify is impossible to satisfy in many situations. For example, the requirement is impossible to meet if an employment offer is made less than 30 days before a start date and the employer offers immediate eligibility to participate in a plan with daily trading. In addition, where a beneficiary “inherits” the diversification rights upon the death of the participant, the 30-day rule cannot be complied with.

Section 507 needs to be amended to provide that in situations in which it is not administratively practicable to provide 30 days advance notice, such notice must be provided within an administratively reasonable period. For this purpose, if there is a reasonable delay attributable to finding a beneficiary, this should be taken into account in determining what is an administratively reasonable period.

Comment on Blackout Period Provision in the Bills.

Under current law, a plan loses ERISA section 404(c) protection during any blackout period where participants’ investment rights are suspended. However, this rule does not apply if the plan fiduciary satisfies its fiduciary duties with respect to the blackout period, including the applicable notice rules. For this purpose, a “blackout period” is defined, as under the notice rules, only to include a suspension that is longer than three consecutive business days.

Section 7(d)(1) of the technical correction bills would extend all of these current-law rules so that they apply to any suspension of investment rights regardless of its length. So, for example, a plan would lose section 404(c) protection for a suspension that lasts less than a day unless the extensive blackout period notice rules are satisfied.

It does not make sense to indirectly apply the elaborate blackout period notice regime to a de minimis suspension of investment rights. The technical correction should be modified to permit section 404(c) protection to continue during a suspension of three consecutive days or less if the plan fiduciary satisfies its fiduciary duties with respect to such a suspension. In appropriate circumstances, such duties may include advance notice to participate of the suspension, but not necessarily advance notice that meets the extensive requirements applicable to actual blackout periods involving longer suspensions.