



AMERICAN BENEFITS
COUNCIL

December 3, 2007

CC:PA:LPD:PR (REG-11389-07)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Dear Sir or Madam:

I am writing on behalf of the American Benefits Council (the "Council") with comments on the proposed regulations regarding benefit restrictions applicable to underfunded defined benefit plans ("Proposed Regulations").

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.

As discussed in more detail below, we urge Treasury and the Service to make the following modifications to the rules.

- It is critical that Treasury and the Internal Revenue Service issue guidance very promptly stating that, until plan years beginning at least six months after the issuance of final regulations, good faith compliance with a reasonable interpretation of either the statute or the Proposed Regulations will constitute compliance with the benefit restriction rules.
- The Proposed Regulations create a complicated and burdensome set of rules applicable when a participant's elected distribution option is restricted. We urge adoption of the simple rules currently applicable to the analogous "top 25" rule.

- Under the Proposed Regulations, it could, in some circumstances, be quite unclear as to when a certification occurs. Below, we request rules that we believe would make this clearer.
- The Proposed Regulations should be revised to permit valuations based on roll forwards of liabilities, which would make the rules far more administrable without any material loss of accuracy. At a minimum, range certifications should be permitted with respect to the “10/1” certification.
- Any employer participating in a multiple employer plan subject to Code section 413(c)(4)(A) should be subject to benefit restrictions only if both the plan as a whole and the portion of the plan attributable to the employer are below the particular funding threshold.

Good Faith Standard

We strongly urge Treasury and the Internal Revenue Service (the “Service”) to issue guidance very promptly stating that, until plan years beginning at least six months after finalization of these regulations, good faith compliance with a reasonable interpretation of either the statute or the Proposed Regulations will constitute compliance with the benefit restriction rules. Currently, the Proposed Regulations function effectively like temporary regulations: a plan must either comply with the final regulations - - which, of course, are unknowable at this time - - or with the Proposed Regulations. Under this structure, plans have little choice but to comply with the Proposed Regulations, which in turn means that the Proposed Regulations are effectively functioning as temporary regulations.

The Proposed Regulations establish an elaborate compliance system with respect to rules that are entirely new. It is inevitable that significant issues will arise as plans begin to administer the rules in the Proposed Regulations. In this context, it is critical that plans be permitted to cure those problems through good faith compliance with a reasonable interpretation of the statute.

Although some may argue that a good faith standard with respect to a statutory provision is not appropriate where participants’ rights are affected by such provision, this argument is inappropriate for more than one reason. First, use of a good faith compliance standard has been commonplace in the retirement plan area, yet every rule in this area has an effect on participants’ rights or benefits. Second, the benefit restriction rules are not an area where there is an inherent tension between employers’ interests and participants’ interests. On the contrary, for employee relations reasons, there will often be a commonality of interests that could well be frustrated by unintended glitches in the Proposed Regulations.

As a matter of prudent administration of the tax laws, it is essential that a good faith standard be promptly announced so that the Proposed Regulations do not function effectively as temporary regulations.

Simplify Distribution Elections.

If a participant's elected distribution option is restricted, the Proposed Regulations require a burdensome set of options to be provided, including options to defer the distribution or to bifurcate the distribution into a restricted portion and an unrestricted portion. We urge you to eliminate this complexity and adopt rules similar to the very simple rules that already exist with respect to the analogous "top 25" rule in Regulation § 1.401(a)(4)-5(b). Under this simplified approach, the plan would calculate the maximum that can be paid in the accelerated form elected. That payment would be permitted. The remainder would be payable each year in the form elected up to a limit equal to the payments that would be made under a single life annuity (plus a social security supplement if available under the plan). Any amounts not paid by reason of the limit would accumulate with interest for payment in a subsequent year.

This alternative system is simple, complies with the statute, and automatically provides employees with the distribution form closest to the form that they elected. We urge you to adopt this system.

Definition of "Certification".

Under the Proposed Regulations, the date of a certification is critical, as it triggers the application of the benefit restrictions. Yet we envision substantial uncertainty regarding when a certification occurs. The Proposed Regulations simply require that the certification (1) be "in writing", (2) be "provided to the plan administrator", and (3) "certify the plan's [AFTAP]". Assume that an actuary provides, by e-mail, a plan administrator with advance notice that the plan's AFTAP will be certified to be 79%. Is that a certification? What if the advance notice is provided orally? By voice mail? Under the system established by the Proposed Regulations, advance notice of a certification can be necessary; without advance notice, a plan administrator cannot be ready to apply an applicable benefit restriction. Yet the rules make it uncertain as to whether such advance notice could constitute a certification.

We urge you to provide that in order to constitute a certification, a communication must explicitly state that it is a certification. This will simplify the rules and eliminate an unnecessary source of confusion and uncertainty.

Roll Forwards/Range Certifications.

Under the statute, Treasury and the Service have significant discretion regarding the nature of the certification required for the benefit restriction rules. The Proposed

Regulations generally appear to require that certifications reflect a full valuation. The only alternative - - which is only during the first nine months of a plan year - - is a range certification.

We urge you to permit valuations to be permitted based on a roll forward of liabilities with adjustments for any significant events. In other words, for example, the AFTAP for January 1, 2010 would be based on (1) the asset valuation as of January 1, 2010, and (2) the sum of the plan liability plus the normal cost as of January 1, 2009, projected forward actuarially to January 1, 2010 based on the 2009 effective interest rate. Such amount would be adjusted to take into account (1) the segment rates and mortality tables for the 2010 plan year, (2) any significant events affecting liabilities that occur between January 1, 2009, and January 1, 2010, and (3) contributions and distributions between January 1, 2009 and January 1, 2010, adjusted by the effective interest rate for 2009. Very simply, this system will make the rules far more administrable without any material loss of accuracy.

The purpose of Treasury regulations is to effectuate Congressional intent. In the Pension Protection Act, Congress never spoke to the type of valuation needed for purposes of the benefit restrictions. So this was left to the discretion of Treasury and the Service. In exercising that discretion, the right answer seems clear: a simple administrable valuation system without risks of material inaccuracy is clearly preferable to a very burdensome system whose only virtue is that it eliminates insignificant inaccuracies.

The system established in the Proposed Regulations will lead to enormous problems and constant errors. The data needed to complete full valuations will, in a great number of cases, not be ready by April 1. This will force plans to do one of two things. First, a plan can use a range certification. But that will be unworkable in many cases. What if the actuary expects the AFTAP to be 81%, but the range would be 79%-83%. Some companies will decide that they must, in that situation, let the presumptions operate to impose a restriction that is in all likelihood unnecessary. This is clearly contrary to Congressional intent and can easily lead to lawsuits and potential liabilities. Other companies will decide that regardless of the cost or burdens, they must have a full valuation by April 1. Such rushed valuations will inevitably have errors. Building a system that creates incentives for rushed and flawed valuations is not the right answer.

The need for roll forwards is even more acute with respect to the restrictions that can be cured by a contribution for the current year. For example, if a plan amendment takes effect on the first day of the plan year, the applicable benefit restriction can be avoided by making a contribution based on one of two formulas, both of which require current-year valuations. Obviously, current-year valuations cannot be ready on the first day of the plan year. Roll forwards must be permitted in order to make these rules workable.

In short, we urge you to permit roll forwards of liabilities, as has been permitted without express statutory authorization with respect to the variable rate premium payable to the PBGC.

If you do not fully accept our recommendation here, we urge you at a minimum to permit range certifications for purposes of the "October 1" valuations (i.e., the first day of the 10th month of the year). There is no policy or statutory reason not to permit this. For example, if an actuary can certify as of October 1 that a plan's AFTAP is between 85% and 90%, but cannot certify a specific number, why should the plan be deemed to be less than 60% funded? There is no reason for such a result. Permitting range certifications for purposes of the October 1 valuation avoids this bizarre and unintended result.

Multiple Employer Plan Issues.

In the case of a multiple employer plan to which section 413(c)(4)(A) applies, the Proposed Regulations provide that the benefit restriction rules apply separately to each participating employer as if each such employer maintained a separate plan. We understand the reasoning underlying this position, but we urge you to consider the policy ramifications of this treatment.

The multiple employer plan rules under section 413(c)(4)(A) are structured in a somewhat odd manner. Assume, for example, that a multiple employer plan is 90% funded. At first blush, that would not appear to be plan to which the benefit restrictions would apply. But the benefit restrictions could easily apply to certain employers within the plan. Under section 413(c)(7)(B), plan assets are credited among the employers based on an ERISA section 4044 allocation. Under such an allocation, it is very possible that some employers will be 100% funded, while other employers have much lower funding levels, perhaps some below 80%.

Assume, for example, that as of January 1, 2010 a company participating in the above plan has liabilities of \$100 and assets of \$75 attributable to it, for a funded ratio of 75%. Such a company would be precluded from paying full lump sum distributions in 2010. To avoid this result, the company makes a \$5 contribution attributable to 2009. This, on its face, would seem sufficient to avoid the benefit restrictions. But there is a good chance that under an ERISA section 4044 allocation, some or even most of that \$5 contribution for 2009 is allocated to other companies as of January 1, 2010, leaving the company's funded ratio below 80% for 2010. In fact, this could conceivably happen even if the company contributed the full \$25 of underfunding. And this same pattern could apply year after year.

This result does not make sense. In light of the structure of Code section 413(c), the only way to arrive at a sensible result is to apply the benefit restriction rules first on

a plan-wide basis. Congress never intended plans that were at least 80% funded to be subject to the benefit restriction rules, nor did Congress intend for some companies to have to fund other companies' liabilities in order to avoid the application of the benefit restrictions. But that can easily be the result under the Proposed Regulations. If the entire plan is below the 80% level, then benefit restrictions would apply to participating employers that have funded levels below the applicable thresholds.

Future Comments.

As noted above, after companies begin applying these benefit restriction rules, we anticipate learning far more about issues and concerns related to these Proposed Regulations. Accordingly, we would like to reserve the right to file additional comments, as needed, over the next 12 months.

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
Retirement Policy Legal Counsel
American Benefits Council