AMERICAN BENEFITS COUNCIL

August 18, 2014

Submitted electronically

J. Mark Iwry
Senior Advisor to the Secretary
Deputy Assistant Secretary
(Retirement & Health Policy)
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Victoria Judson
Division Counsel/Associate Chief Counsel
Tax Exempt & Government Entities
Internal Revenue Service
1111 Constitution Avenue, NW
4306 IR
Washington, DC 20224

Robert Choi
Director, Employee Plans
Internal Revenue Service
1111 Constitution Avenue, NW
NCA 614
Washington, DC 20224

Dear Mark, Vicki, and Robert:

On behalf of the American Benefits Council (the "Council"), I am writing to request critically needed guidance regarding the funding stabilization provision contained in the recently enacted "Highway and Transportation Funding Act of 2014" (the "Act").

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.

Guidance on implementation of the Act is very much needed. Since September contains the deadlines for calendar year plans for 2013 contributions and 2014

certifications of the plans' adjusted funding target attainment percentage ("AFTAP"), guidance on implementation of the Act is needed as soon as possible.

Fortunately, we all faced a very similar situation two years ago. In 2012, Treasury and the Service issued IRS Notice 2012-61, which contained very helpful guidance on how to implement the funding changes contained in MAP-21. Except where circumstances require otherwise (such as the application of the Act to a prior year), we are not asking for any changes to the approach taken in that Notice, so we see the Notice as an excellent starting point for guidance on the Act. Accordingly, except as noted, we ask Treasury and the Service to apply the same rules under the Act as were applied in the Notice. The differences between MAP-21 and the Act that merit additional consideration and different rules are discussed below.

APPLICATION OF THE ACT TO 2013 IN GENERAL

Unlike in MAP-21, subject to a contrary election by the plan sponsor, the Act modifies the segment rates for a year prior to the year of enactment. In our view, this difference is very significant and requires a different approach to guidance for 2013. The core point here is that Congress intended for employers to be able to fully use the modified segment rates for 2013, despite the fact that we are now well into 2014. So Congressional intent is clear; any deadlines or rules that would prevent an employer from fully using the modified segment rates for 2013 should not apply. For this reason, we are asking below for rules that were not in the Notice because they were not needed.

TRANSITION ISSUES REGARDING 2013

For purposes of the discussion below, please assume that a plan sponsor chooses to have the Act apply to 2013, at least for all purposes other than benefit restrictions.

Prior elections to use or reduce funding balances with respect to 2013.

A plan sponsor may have elected to use or reduce the plan's pre-funding balance and/or funding standard carryover balance (hereinafter referred to collectively as "funding balances") for 2013. For example, this use may have been attributable to the satisfaction of an obligation to make quarterly contributions for 2013. The guidance should permit the plan sponsor to reverse any such election to the extent that the use of the funding balance exceeded the amount required to be contributed, as recalculated pursuant to the Act.

Alternatively, a reduction of funding balances may have been triggered by an election or a requirement to reduce funding balances to (1) avoid a benefit restriction (where the plan sponsor elects to apply the Act for benefit restriction purposes for

2013), (2) reach a specified funding threshold to avoid at-risk status, (3) avoid quarterly contribution requirements, or (4) enable the sponsor to apply its funding balance toward required contributions. The guidance should permit the plan sponsor to reverse such reductions of funding balances to the extent the reduction exceeded the amount needed to avoid the benefit restriction or reach the specified funding threshold, as recalculated pursuant to the Act (provided the reversal would not trigger benefit restrictions, in a case where the sponsor chooses to have the Act apply for all purposes except benefit restrictions).

There may also be cases where application of the revised rates to 2013 may have brought a key threshold (such as the 80% threshold for determining at-risk status) within reach, but where an election to reduce or further reduce funding balances as of the beginning of 2013 would be necessary. The deadline for reducing 2013 funding balances should be extended to December 31, 2014 to accommodate this type of situation.

Prior section 436 contributions for 2013.

Assume that for the 2013 plan year a section 436 contribution was made with respect to a plan to avoid the application of a benefit restriction. Assume further that the plan sponsor chooses to have the Act apply for 2013 for all purposes and that under the Act, a section 436 contribution was not needed to avoid the benefit restriction. In such a case, the plan sponsor should be permitted to treat the section 436 contribution as a non-section 436 contribution for 2013.

To address this issue, we ask that Treasury and the Service adopt the following rules. For the 2013 plan year, in the case of a plan sponsor that requests an updated retroactive AFTAP certification, any AFTAP change shall be treated as retroactive to the effective date of the certification otherwise in effect. (Please see the discussion below with respect to prospective AFTAP certifications for the 2013 or 2014 plan year.) In addition, in the case of a retroactive AFTAP change, any section 436 contribution shall be treated as a non-section 436 contribution to the extent that such section 436 contribution was in fact unnecessary. Thus, in the above example, if the plan sponsor requests and obtains an updated 2013 AFTAP certification, the section 436 contribution would be a non-section 436 contribution attributable to 2013.

2013 AND 2014: UPDATED CERTIFICATIONS THAT WOULD CREATE A "MATERIAL CHANGE"

Assume, for example, that a plan has been certified as having an AFTAP of 70% for 2014 based on pre-Act law. Accordingly, the payment of lump sum distributions (and other prohibited payments) under the plan has been restricted. Under the Act, assume that the plan has an AFTAP of 82% for 2014.

Unlike MAP-21's treatment of 2012, the Act does not permit a plan sponsor to choose not to apply the Act for 2014. Thus, a plan sponsor cannot choose to simply wait until 2015 to lift the restriction on prohibited payments. However, Notice 2012-61 provides a workable framework for how the Act can apply to 2014 for purposes of the benefit restrictions. In the Notice, Q&A T-3(c) provides guidance for plan sponsors that elect to apply MAP-21 for 2012 for benefit restriction purposes. Such plan sponsors are given the choice of (1) applying MAP-21 prospectively during 2012 under the rules set forth in Q&A T-3(d), or (2) applying MAP-21 retroactively during 2012 under Q&A T-3(e).

The above structure (including the "immaterial change" rules) from the 2012 Notice would work well for purposes of applying the Act for 2014 for purposes of the benefit restrictions. Not permitting prospective application during 2014 would (1) be inconsistent with the Notice, (2) adversely affect plans that had been operating in compliance with the law, and (3) penalize plans that are certified early in 2014, as compared to plans that are not certified until closer to the September 30, 2014 deadline.

Two additional points merit mentioning here. First, the option described above to apply the Act prospectively during 2014 for benefit restriction purposes should be permitted without regard to whether the plan sponsor elects to have the Act apply for benefit restriction purposes for 2013. For example, a plan sponsor may have avoided benefit restrictions in 2013 by reducing its funding balance but may have applied the benefit restrictions in 2014. In that case, the plan sponsor may wish to apply the Act for 2013 for benefit restrictions (in order to restore its funding balance) but only apply the Act prospectively in 2014 for such purposes.

Second, the option to apply the Act prospectively for benefit restriction purposes should also be available for 2013 plan years. For example, in the case of a plan year starting on December 1, 2013, a plan sponsor may want to apply the Act prospectively to avoid having to continue applying the benefit restrictions for the entire plan year.

Of course, the above requests apply equally to all benefit restrictions, not just the restrictions on prohibited payments.

FLEXIBILITY TO MODIFY YEAR FOR WHICH CONTRIBUTIONS ARE MADE

The 2012 Notice permitted contributions made for 2011 to be redesignated as 2012 contributions, even if the 2011 SB had already been filed, provided that the contributions were made after the end of the 2011 plan year but on or before September 30, 2012. Similar flexibility is needed with respect to (1) redesignating 2013 contributions as 2014 contributions, (2) redesignating 2012 contributions as 2013

contributions, and (3) redesignating 2013 contributions as 2012 contributions. Congress made the Act retroactive to the 2013 year; if employers had known of the Act as of the beginning of the 2013, all of these options would have been available. Accordingly, in order to effectuate Congress' full intent, such options should be available now.

2014: Option Not to Reduce Minimum Funding Obligations

Many employers have already completed their valuations for 2014 and do not feel a need to redo those valuations to reduce the minimum funding obligation. Such employers may have business reasons to fund their plans at a certain level, and are not interested in either reducing those contributions or increasing their funding balance. For such employers, there seems no policy reason to require them to redo their valuation to take the Act into account. This would simply increase their administrative costs for 2014 without any benefit to employees or the plan. Thus, for the 2014 plan year, employers should be permitted to apply all rules other than the benefit restrictions without regard to the Act.

Option Not to Reduce Minimum Funding Obligations Permanently

Some employers, in fact, would find it helpful to be able to elect not to apply the Act for non-benefit restriction purposes indefinitely. We see no reason not to permit such an option and ask you to consider it.

Elections Not to Apply Funding Stabilization/Reversing Prior Elections

With respect to the 2013 plan year, the Act permits plan sponsors to elect not to apply funding stabilization for (1) any purpose, or (2) solely for purposes of determining the plan's AFTAP in applying the benefit restrictions. We, of course, need guidance as to how and when such elections are to be made.

We also need guidance on how and when the other elections discussed in this letter are to be made, including, for example, the reversal of elections to use or reduce funding balances, the election as to whether to apply the Act prospectively or retroactively for benefit restriction purposes for 2013 or 2014, and the option not to apply the Act for non-benefit restriction purposes for 2014.

We believe that the approaches taken on these issues in the Notice would work well for these purposes, except that no elections with respect to the 2013 plan year should be required prior to December 31, 2014.

Guidance should also make it clear that even if the 2013 Form 5500 has been filed, it may be refiled to reflect any of the options available to a sponsor who has not yet filed. In other cases, it may be difficult to change the 2013 Form 5500 in a timely manner. In those cases, it would be very helpful to be able to report changes to the 2013 Schedule SB in the 2014 filing. As discussed above, there may also be a need to modify the 2012 Schedule SB. Plans should be permitted to report changes to the 2012 Schedule SB in the 2014 filing.

OTHER ELECTION ISSUES

The Act was enacted slightly later in the year than MAP-21, putting even more timing pressure on plan sponsors. In this context, we ask for an extension of the deadline for elections to add to a plan's pre-funding balance for the 2014 plan year, so that the deadline is no earlier than December 31, 2014. Plan sponsors will need the additional time to assess the issues and the upcoming guidance, and make appropriate elections in light of the Act.

Similarly, a plan sponsor may have chosen not to increase its 2013 funding balance for additional contributions made for the 2012 plan year; this decision may have been attributable to the fact that a larger pre-funding balance would have triggered benefit restrictions for the 2013 plan year. In many such cases, if the Act is applied to the 2013 plan year for benefit restriction purposes, the plan would not have been subject to the benefit restrictions, even if the additional contributions for 2012 had been added to the pre-funding balance. In this context, the plan sponsor should be able to increase its 2013 pre-funding balance by the additional 2012 contributions, even though the deadline for electing such an increase has passed (September 15, 2013 for calendar year plans). In such cases, the plan sponsor should have the ability to increase the pre-funding balance for 2013 by a deadline that is no earlier than December 31, 2014. Otherwise, Congress' intent to have the Act effective for 2013 would not be fully implemented.

On a different point, some employers may have continued to use the full yield curve because the smoothing provided by MAP-21 was phased out so quickly by the expansion of the corridor. Since the MAP-21 smoothing is extended for a significant period by the Act, such employers may wish now to revoke their election of the full yield curve. We ask that this be permitted under rules like those in the Notice, as of either the 2013 or 2014 plan years, without the approval of the Secretary of the Treasury. We recognize that in 2012, there was a special statutory provision authorizing such revocations. However, even without such a statutory provision, Treasury and the Service have the discretion to permit such revocations to reflect the fact that the law on which the original election was based has been changed very significantly.

AUTOMATIC APPROVAL OF CHANGE IN ENROLLED ACTUARY

Under IRS Announcement 2010-3, under certain conditions, automatic approval is provided for a change of both the enrolled actuary and the business organization providing actuarial services to a plan. Among the conditions is a requirement that the new actuary's determination of the funding target, normal cost, and actuarial value of assets each be within the 5% of the value determined by the prior actuary for the preceding year. The Act raises seemingly unintended problems in complying with these conditions.

For example, assume the enrolled actuary was changed for the 2014 plan year. The new actuary matched the 2013 valuation results presented in the prior actuary's 2013 valuation report by using MAP-21 stabilized segment rates (the 2013 Schedule SB has not yet been filed), and the plan sponsor expected the change to be automatically approved in accordance with Announcement 2010-3. The plan sponsor would like to apply the Act for all purposes for the 2013 plan year and would like for the new actuary to perform the requisite work. But in order to qualify for automatic approval of the change in actuary, technically either (i) the prior actuary, who no longer has any relationship with the plan, would need to redo the 2013 calculations for the plan based on the Act and the new actuary would have to match these results to meet the conditions for automatic approval for 2014, or (ii) the new actuary would have to collect 2012 valuation data and match the prior actuary's 2012 results reported on the 2012 Schedule SB, making the automatically approved change effective for 2013 rather than 2014. Neither approach is workable.

For actuary changes for 2013 and 2014, automatic approval should be provided if the new actuary replicates within 5% the prior actuary's results without regard to the Act — contained in either a filed Schedule SB or signed valuation report — for either the current or prior plan year. (It is assumed here and below that the other conditions for automatic approval under Announcement 2010-3 are met.) That is a workable solution that is consistent with the purpose of the current rule and does not require the prior actuary to continue working on a plan with which he or she has no relationship or require the new actuary to perform additional work to match earlier-year results.

In some cases, it may be simpler for the new actuary to test his or her results for 2014 against the determinations of the prior actuary. So we would also ask for automatic approval for an actuary change for 2013 if the new actuary's determinations for 2014 without regard to the Act are within 5% of the determinations of the prior actuary that are contained in a 2014 valuation report.

While some of the same issues were present when MAP-21 was passed, a much larger number of plans are affected this time because of the time elapsed between the first valuation affected by the change in rates, and the date that the rules have changed.

Expanding this automatic approval will avoid either having the sponsor re-engage the prior actuary or having the Service swamped with trivial method change approval requests.

STANDARD TERMINATIONS

In the case of a plan with a standard termination date during 2013 or 2014, ERISA requires the plan to be fully funded when assets are distributed. Since no purpose is served by reducing the required contributions in this situation, we ask that the guidance permit the sponsor to allow all 2013 and 2014 annual valuation and 2014 benefit restriction calculations to stand as they have been certified or otherwise documented prior to the date of enactment of the Act, either in a valuation report or on the Schedule SB. Current guidance also states that the AFTAP certified on or before the plan termination date continues in effect. Guidance that this rule applies for certifications prior to the date of enactment of the Act, even if 2013 or 2014 valuation work is revised for other purposes, is also desirable. Finally, as these plans are in their final stages of the their life, and moving toward a full distribution for participants, we would request that no portion of this law be applied for plans with a termination date before the date of enactment of the law, regardless of when any valuation or certification occurs.

TIMING

As in 2012, guidance is needed extremely quickly because of the upcoming deadlines in September. In 2012, Treasury and the Service did an amazing job of issuing a large amount of very helpful guidance in a very timely manner. We are committed to helping in any way we can with respect to the upcoming guidance. A fallback approach would be to permit reasonable compliance with the statute and a reasonable application of the rules of the Notice 2012-61. This would not be nearly as helpful as the type of guidance that is described in this letter, but it would be very much needed if the timing for more complete guidance is just too tight.

Guidance on the new provision for bankrupt plan sponsors will also be needed soon, but this guidance is not needed as soon as the other guidance described in this letter.

* * * * *

We thank you for your consideration of the issues addressed in this letter. We look forward to discussing these issues with you further.

Sincerely,

Lynn Dudley
Senior Vice President, Policy

cc:
George Bostick
Kyle Brown
Dominic DeMatties
William Evans
Lauson Green
Tonya Manning
Neil Sandhu
Harlan Weller
Carol Zimmerman