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Comments on Benefit Restrictions for Underfunded Pension Plans

November 28, 2007

Department of Treasury
Internal Revenue Service
26 CFR Part 1
[REG-113891-07]

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the proposed regulations regarding the use of certain funding balances maintained for defined benefit pension plans and benefit restrictions for certain underfunded defined benefit pension plans as issued by the IRS and Treasury on August 28, 2007 (REG -113891-07) (Proposed Regulations).

ASPPA is a national organization of more than 6,000 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

While the Proposed Regulations are a welcome step for practitioners who must implement and administer defined benefit pension plans, ASPPA requests clarification on several issues addressed in the Proposed Regulations, as well as guidance for additional issues not covered. Issuing timely guidance will allow plan sponsors to implement and administer the benefit restriction requirements and help them to achieve compliance in plan operation.

This comment letter was prepared jointly by ASPPA and the College of Pension Actuaries (COPA) working cooperatively together. Accordingly, both ASPPA and COPA are submitting identical comment letters. In addition, ASPPA requests that the IRS hold a public hearing on this proposed rule, *Benefit Restrictions for Underfunded Pension Plans*.

Should the IRS schedule a public hearing, we respectfully request the opportunity to testify on behalf of ASPPA and COPA at the hearing.

Summary of Recommendations

The following is a summary of ASPPA's recommendations. These are described in greater detail in the Discussion of Issues section.

1. Final regulations should provide that a presumed waiver of "credit balance" is adjusted based on the actual adjusted funding target attainment percentage ("AFTAP") for the plan year which reflect elections and contributions memorialized by the plan sponsor for the prior plan year. Therefore, presumed waivers could be reinstated once the prior year's final contributions are made and/or the current year's final AFTAP is certified.

2. Final regulations should coordinate Internal Revenue Code (IRC) §§430 and 436 such that the liability and IRC §436 contribution associated with any benefit increase be included in the plan's target liability and assets for the year containing the amendment and the presumed AFTAP for the next plan year.

3. Final regulations should allow the employer to make a "universal" election that all contributions in all years that are in excess of the minimum required contributions, other than those specifically designated as IRC §436 contributions, will automatically be added to the plan's prefunding balance.

4. Final regulations should provide that the benefit restrictions cease as of the date of plan termination for a plan that is not covered by PBGC or a plan that terminated in a PBGC "standard termination."

5. Final regulations should provide that for purposes of the limits in IRC §436(b) and (e), the prior year AFTAP is reduced 10% if it is at least 60% but less than 70%, and for purposes of the limits in (c) and (d), the prior year AFTAP is reduced 10% if it is at least 80% but less than 90%. The presumption for the first quarter of a plan year for years after the first effective date year should be described as being equal to the preceding year's AFTAP.

6. Final regulations should provide that the range certification continues until the final certification is completed.

7. Final regulations should provide that the actuary can certify a minimum AFTAP.

8. Final regulations should provide that if it is later determined than an amendment was treated as effective when it could not be effective, because the AFTAP was below 80%, then such amendment was not actually effective and that treating the

amendment as not effective does not result in an impermissible reduction in accrued benefits nor trigger the advance notification requirements of ERISA §204(h).

9. Final regulations should explicitly state whether security can be used to avoid a §436(d) restriction. Further, security should not be required to be posted in advance of the plan's valuation date.

10. Final regulations should indicate that restored benefit accruals can be tested for nondiscrimination in the year actually restored or the year for which the benefits are restored, if the restoration occurs within some reasonable period of time after the initial freeze. For long-term freezes, the benefit should be treated as accruing in the year of restoration, and be subject to Treas. Reg. §1.401(a)(4)-5(a), like any other plan amendment. Treasury should develop specific proposed rules for dealing with these changes in the context of coverage and nondiscrimination requirements.

11. Final regulations should address plan merger situations relative to the application of benefit restrictions and the application of the presumed AFTAP.

12. Final regulations with respect to accelerated payments should take an approach that is consistent with the approach taken in the IRC §401(a)(4) "high-25" provision. The proposed regulations should also specifically state whether these benefit restrictions supersede the regulations under Treas. Reg. §1.401(a)(4)-5(b).

13. Final regulations should conform the definition of annuity starting date under IRC §436 with the definition under IRC §417 and specifically accommodate the administrative timing of the existing IRC §417 rules.

14. Final regulations should provide that a plan may operate during the Pension Protection Act of 2006 (PPA) remedial amendment period as if it has an amendment to automatically restore benefits, provided the plan is indeed amended by the extended PPA amendment deadline to memorialize operations.

15. Final regulations should provide that automatic benefit increases such as those due to annual increases in the IRC §§415 and 401(a)(17) limits and certain other types of increases (*e.g.*, top-heavy minimums, COLAs) are not considered amendments for purposes of IRC §436(c).

16. Final regulations should provide that a new plan with a zero funding target is considered to have an AFTAP of 100%.

17. Final regulations should provide that a plan has the option to calculate the 2007 AFTAP under the new PPA rules for the 2008 presumed AFTAP.

18. Final regulations should allow substantial owners to adopt a benefit waiver solely for purposes of IRC §436 and provide that the benefits to non-substantial owners will not be restricted if recognition of a substantial owner's waiver would result in the plan's AFTAP exceeding 80% (or 60% as the case may be).

19. Final regulations should provide for a reasonable administrative delay between the date the plan administrator receives the AFTAP certification from the actuary and the effective date of any restriction.

20. Final regulations should provide relief in situations where there is a change of actuary.

Discussion of Issues

Issue #1: The Proposed Regulation requires that a plan permanently "burn" its credit balance based on the plan's presumed AFTAP. This provision is not mandated by the statute and produces an unnecessarily harsh and inequitable result. In addition, the requirement to apply the credit balance at the measurement dates used for the presumptions appears to conflict with the more general deadline of applying the credit balance by the end of the year to which it relates and with the option of making prior year contributions (which would normally not be due until 8 ½ months into the current plan year).

The statute requires that the credit balance be held in abeyance pending an actual AFTAP certification, even though this creates unfair disparities when comparing similar plan sponsors. However, the statute does not require that a presumed "burning" of the credit balance survives once the actual AFTAP is known. As demonstrated by the following example, this creates an inequitable result.

Example: Plan A's 2008 AFTAP is 81%; Plan B's AFTAP is 79%. Both plans offer lump sum distributions to participants. In the absence of an actual certification by April 1, 2009, Plan A's AFTAP under IRC §436(d) is presumed to be 71% and Plan B's AFTAP remains at 79%. At April 1, 2009, both plans will be deemed to waive enough 2009 "credit balance" to bring each presumed AFTAP to 80%. Assuming $5 million in assets (net of credit balances), Plan A will be deemed to waive approximately $634,000; Plan B will be deemed to waive approximately $63,000. Even if the eventual certification determines that both plans have a 2009 AFTAP in excess of 80%, the "credit balances" are gone **forever** under the approach used in the Proposed Regulation. The better funded plan (*i.e.*, Plan A) experiences a steeper penalty than Plan B in the form of a much larger "burned" credit balance.

While this example depicts the Proposed Regulation, we also note that Prop. Reg. §430(f)-1(f)(2) provides that an election to apply the credit balance can be made by the end of the year to which it relates. Is that the year for which the presumption is used (2009 in the example above) or the year to which it is calculated (2008 in this example)? Also, if the credit balance is not actually applied until the end of the year and application of the credit is optional, does the enrolled actuary assume it will be applied or not applied? The rule for contributions is that a contribution is not taken into account unless it is paid before the actuary provides certification. The comparable rule for the credit balance would be that an election to apply the credit must be made before the actuarial certification is rendered rather than at the end of the year.

Finally, we contrast the requirements to permanently “burn” the credit balance with the rule for contributions. For amounts contributed based on presumed AFTAPs, the proposal fairly calls for adjustments once actual AFTAPs are known.

Example: Consider a plan where the 2010 FTAP is 85%. The plan sponsor has already contributed the minimum required contribution for 2010. The sponsor is now considering an additional contribution, to be counted as a pre-funding balance in December 2010. If they do deposit the contribution in December 2010, they will lose a portion due to the April 1 presumption rule in situations where the certification for 2011 can’t be made before April 1. But, if they wait until after the certification for 2011 to make the contribution, the prefunding balance can be maintained. Therefore, a plan sponsor is best served by delaying any prior year funding that would generate a prefunding balance until after the current year certification is made. This would seem to run contrary to Congressional intent.

ASPPA recommends that the final regulations provide that a presumed waiver of “credit balance” is adjusted based on the actual AFTAP for the plan year based on elections and contributions memorialized by the plan sponsor no later than the last day of the plan year to which the limit applies (in our first example, December 31, 2009).

Issue #2: Prop. Reg. §1.430(f)-1 outlines “methods to avoid benefit limitations.” As written, if a plan makes a contribution for the current year to avoid a benefit restriction *(e.g.*, to allow for a benefit increase), the contribution and the increase in liability associated with the amendment are not included in the presumed AFTAP for the next year. In addition, it is not clear whether the amendment and associated contribution are included in IRC 430 target liability or normal cost for the year effective.

Example: A plan has a funding target of $1 million and assets of $750,000, with an AFTAP of 75%. The employer wants to adopt an amendment increasing benefits that will double liabilities. The minimum contribution to have this increase is $850,000. The funding target will then be $2 million and the assets would be $1.6 million. Under the Proposed Regulations, the presumed AFTAP for the next year will be 75% and not the 80% AFTAP for which the employer paid.

ASPPA recommends that the final regulations should coordinate IRC §§430 and 436 such that the liability and IRC §436 contribution associated with any benefit increase are included in the plan’s IRC §436 target liability and assets for the year containing the amendment and the presumed AFTAP for the next plan year if the plan sponsor funds up to enable the amendment. Thus, each time a contribution is made under IRC § 436, or a plan amendment takes effect, the FTAP and AFTAP are redetermined for all IRC §436 purposes reflecting both the additional contribution and the plan amendment.

Regulations proposed under IRC §430 should offer guidance on how mid-year amendments are reflected for a current year in a manner that avoids double-counting where the change is separately funded with an IRC §436 contribution.

Issue #3: Prop. Reg. §1.430(f)-1 describes the "effect of prefunding and funding standard carryover balance" on the funding requirements. Under the Proposed Regulations, if an employer fails to designate that a contribution is meant to be added to the prefunding balance, the amount is simply added to the plan assets. This election to have the excess contribution added to the prefunding balance appears to need to be made coincident with or after the contribution is actually contributed, but in no event later than the due date of Form 5500 (with extensions) for the plan year. This is very different from current law, which provides that the excess contributions automatically become part of the "credit balance."

ASPPA recommends that the final regulations specifically allow the employer to make a "universal" election that all contributions in all years that are in excess of the minimum required contributions, other than those specifically designated as IRC §436 contributions, will automatically be added to the prefunding balance.

Issue #4: The Proposed Regulations do not consider the scenario of a terminating plan that is subject to benefit restrictions at the time of plan termination. Specifically, the Proposed Regulations do not provide that the benefit restrictions end at plan termination. Thus, certain plans find themselves in a "catch 22" situation. The plans are not required to have an 80% AFTAP to terminate the plan, but as written, appear to be unable to distribute lump sums or to purchase annuities (*i.e.*, if AFTAP is less than 80%). These plans include non-PBGC covered plans, plans where majority owners elect to accept a lower benefit to allow all other benefit liabilities to be met, and other plans with an AFTAP less than 80% with assets in excess of termination liabilities (e.g., plans where the funding target exceeds termination liability and plans where sponsors agree to make contributions to terminate). These plans cannot terminate if they cannot distribute benefits.

ASPPA recommends that the final regulations specifically provide that the benefit restrictions cease as of the date of plan termination for a plan that is not covered by PBGC or a plan that terminates in a PBGC "standard termination."

Issue #5: The Proposed Regulation misinterprets the operation of the presumption applicable at the first day of the fourth month by ignoring the individual application to each subsection as clearly stated in the law. This is important because the proposed rule forces many plans currently subject to the 50% limit on prohibited payments down below the 60% AFTAP threshold so that all prohibited payments must be limited despite the clear language of the statute to the contrary. In addition, the proposed interpretation requires a reduction for purposes of the benefit amendment limit in IRC §436(c) contrary to the adjustment required in the statute.

IRC §436(h)(3) provides as follows:

> "Presumption of underfunding after 4th month for nearly underfunded plans. –In any case in which—
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> (A) a benefit limitation under subsection (b), (c), (d), or (e) did not apply to a plan with respect to the plan year preceding the current plan year, but the adjusted funding target attainment percentage of the plan for such preceding plan year was not more than 10 percentage points greater than the percentage which would have caused **such subsection** to apply to the plan with respect to such preceding plan year, and
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> (B) as of the first day of the 4th month of the current plan year, the enrolled actuary of the plan has not certified the actual adjusted funding target attainment percentage of the plan for the current plan year,
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> until the enrolled actuary so certifies, such first day shall be deemed, for purposes of **such subsection**, to be the valuation date of the plan for the current plan year and the adjusted funding target attainment percentage of the plan as of such first day shall, **for purposes of such subsection**, be presumed to be equal to 10 percentage points less than the adjusted funding target attainment percentage of the plan for such preceding plan year." [emphasis added]

Three references in this language use the singular form "such subsection." Thus the described adjustment is applied individually to the AFTAP for each subsection. As a result, a plan could very well have different AFTAPs for each of the specified groups of limits. We note that different AFTAPs could also exist where a plan sponsor chooses to make an IRC §436 contribution in that such a contribution is permitted for subsections (b), (c), and (e), but not (d).

Moreover, the introductory clause ["In any case in which—(A) a benefit limitation under subsection (b), (c), (d), or (e) did not apply to a plan with respect to the plan year preceding the current plan year…"], when applied individually to subsection (d), renders the adjustment inapplicable if the plan currently is subject to the first level, 50% limit on prohibited payments.

In addition, it appears that Treasury takes the view that "did not apply" in the introductory clause cited above is based solely on the plan's actual AFTAP for the preceding year without regard to whether an actual event occurred. While such a view might be reasonable in the context of a plan that provides shutdown benefits even if none were invoked in the prior year, and quite possibly might be reasonable in the context of the amendment rule whether or not an amendment was made in the prior year, given that the presumptions do not apply to the 100% bankruptcy rule, the bankruptcy limit should not be taken into account in assessing the presumption for (d)(1) and (3).

We also note that the statute is silent on what AFTAP applies where neither the prior year limit nor the 10% adjustment criteria apply. The de facto approach imbedded in the contribution rules included in the proposed regulations for (b), (c), and (e) presume that the prior figure carries over. In the interest of clarity, the final rule should simply state this as a presumption. A technical correction to make this clear would also be desirable.

ASPPA recommends that the description of the presumption rule in Prop. Reg. §1.436-1(h)(2) be modified to provide that for purposes of the limits in (b) and (e), the prior year AFTAP is reduced 10% if it is at least 60% but less than 70%, and for purposes of the limits in (c) and (d), the prior year AFTAP is reduced 10% if it is at least 80% but less than 90%. The presumption for the first quarter of a plan year for years after the first effective date year should be described as being equal to the preceding year's AFTAP.

Issue #6: Prop. Reg. § 1.436-1(h) outlines the provisions associated with "presumed underfunding for purposes of benefit limitations." The section describes special rules for certification within a range. The proposed regulations indicate that for plans that use a range certification, a final certification must be completed by the first day of the tenth month of the plan year. The proposed regulations state that the final certification must be a single AFTAP number using data of Schedule B quality. If a final certification is not rendered by the first day of the tenth month, the Proposed Regulations appear to provide that the initial range certification becomes invalid. The first day of the tenth month expiration for a range certification is not mandated by the statute and produces troublesome results.

Example: Consider a calendar year partnership—with a calendar year plan. It is not uncommon for the partners' income for the prior year to not be finalized until after September 30, as the firm's tax return is not due until October 15th. In this case, it would be impossible for a final AFTAP to be certified until after September 30th (assuming actual data is required). This means that, even if the actuary is certain that the plan is more than 100% funded, on October 1, the range certification will lapse and the plan will be deemed less than 60% funded, with accompanying restrictions. The proposed regulations also imply that the original range certification will become retroactively invalid on October 1, since the range certification requires a subsequent timely certification. Thus, the restriction could, in theory, apply retroactively.

ASPPA recommends the final regulations provide that the range certification continues until the final certification is completed. The regulations carry harsh penalties in the event that the range certification is wrong so there appears to be little risk in providing for the suggested change to the Proposed Regulations.

Issue #7: The proposed regulations require the range certification to classify the plan as being in one of three categories: between 60 -80% funded; between 80-100% funded; or at least 100% funded. The penalty for a range certification being different than the actual result is potential plan disqualification, because the plan will have applied benefit limitations to which it was not subject. This effectively eliminated the range certification as an option for plans near the end points of the certification ranges.

Example: The actuary may know that the AFTAP is over 60%, but it is so close to 80% that the actuary is not sure whether it is above or below 80%. The actuary cannot certify above 60% (and thus avoid restrictions on benefit accruals) without taking a potentially fatal position on the 80% issue.

ASPPA recommends the final regulations provide that the plan's actuary can certify a minimum AFTAP. For example, the actuary can certify that the AFTAP is at least 71%.

Issue #8: The proposed regulations do not address the effect of adopting an amendment when the AFTAP is less than 80% and an appropriate contribution is not made. This could happen when there is an error made in calculating the AFTAP or when the plan sponsor intends to make a contribution but is later unable to do so. In some situations, a plan may communicate and pay the increased benefits before realizing that the AFTAP was below 80%.

ASPPA recommends the final regulations provide that if it is later determined that an amendment was treated as effective when it could not be effective because the AFTAP was below 80%, then such amendment was not actually effective and treating the amendment as not effective does not result in an impermissible reduction in accrued benefits nor trigger the advance notification requirements of ERISA §204(h). EPCRS should be updated for an appropriate correction similar to those currently provided relative to overpayments to participants. Final regulations should also specify when the amendment becomes effective if a contribution sufficient to satisfy IRC §436(c) is not made (*e.g.*, when the plan's AFTAP subsequently improves to 80%).

Issue #9: PPA provides the ability to post security to avoid IRC §436 (b), (c), (d), and (e) restrictions. The Proposed Regulations, however, do not explicitly confirm that security may be posted for all the limits [as contrasted with the contribution option which is limited to just the (b), (c), and (e) restrictions]. The Proposed Regulations add a limitation to the security rule beyond that stated in the statute—that the security is only taken into account if provided by the plan's valuation date.

ASPPA recommends the final regulation explicitly address whether security is available for a (d) restriction. Further, the requirement to post security by the plan's valuation date should be eliminated.

Issue #10: Prop. Reg. §1.436-1 outlines the provisions pertaining to "limits on benefits and benefit accruals under single employer defined benefit plans." The Proposed Regulations allow for benefit accruals to be restored in the event an (e) restriction applies. The Proposed Regulation does not provide any guidance as to when these restored accruals are tested for nondiscrimination under IRC §401(a)(4). Similarly, disruptions in the availability of lump sums and other prohibited payments could raise concerns under the nondiscrimination requirements for benefits, rights and features.

The regulations must clearly address the issue of long term freezes followed by restorations, but must be simple enough to allow short-term freeze plans to be unaffected. Further, even a long term freeze, if followed by a restoration to all affected participants, should not impact a plan's claim to safe-harbor status.

Similarly, temporary restrictions on the payment of prohibited payments—particularly where participants are ultimately permitted to obtain unrestricted payments—should not create the need for special, costly testing.

ASPPA recommends the final regulations indicate that restored benefit accruals can be tested for nondiscrimination in the year actually restored or the year for which the benefits are restored, if the restoration occurs within some reasonable period of time after the initial freeze. For long term freezes, the benefit should be treated as accruing in the year of restoration, and be subject to 1.401(a)(4)-5(a), like any other plan amendment. Treasury should develop specific proposed rules for dealing with these changes in the context of coverage and nondiscrimination requirements.

Issue #11: The Proposed Regulations do not provide any guidance as to how the benefit restrictions are applied where there is a plan merger or how to determine AFTAP presumptions after a plan merger.

ASPPA recommends the final regulations address plan merger situations relative to the application of benefit restrictions and the application of the presumed AFTAP.

Issue #12: : For the IRC §436(d) benefit restriction, the Proposed Regulations state that a plan cannot offer accelerated payments during the restricted period if the present value exceeds a calculated threshold. The law states that the participant cannot be paid an accelerated payment. It does not strip the participant of the right to select the desired option. We contrast this approach with the "high-25" limits under the nondiscrimination regulations. Under those rules, the plan allows participants to select the lump sum option but only pays the life annuity amount until the lump sum (plus accruing interest) is either used up or the restriction falls away. At that time, the balance of the lump sum can be paid. It is not clear why the Proposed Regulations take a different approach. The Proposed Regulations unnecessarily take a position that deprives the participant of a valuable right while simultaneously complicating plan administration.

ASPPA recommends the final regulations take an approach that is consistent with the approach taken in the IRC §401(a)(4) "high-25" provision. The regulations should also state specifically whether the final regulations will supersede the rules under Treas. Reg. §1.401(a)(4)-5(b) in the case of "high 25" HCEs.

Issue #13: IRC §436(d) imposes limits on prohibited distributions for annuity starting dates that occur during a restricted period. The term "annuity starting date" is defined by the rules of IRC §417 and has long been established under existing rules as an "as of" date primarily constrained based on the timing of the delivery of the QJSA notice. The

Proposed Regulation adds a new constraint to the existing rules—just for purposes of IRC §436, that is, the actual signature date of the plan participant.

There is no indication in the new §436 rule that a change is contemplated on this score. Adding a different requirement for this rule that does not apply for other IRC §417 purposes will lead to administrative complexity and imposes limitations that have no basis in the statute.

ASPPA recommends that final regulations fully conform the definition of annuity starting date under IRC §436 with the definition under IRC §417 and specifically accommodate the administrative timing of the existing IRC §417 rules.

Issue #14: A plan may either provide that benefits are restored automatically when the plan's funded status increases or the plan may be silent on the issue in which case a plan amendment is required to restore benefits. The Proposed Regulations are unclear on whether during the PPA remedial amendment period a plan may operate as if it has language providing for automatic restoration.

ASPPA recommends the final regulations provide that a plan may operate during the PPA remedial amendment as if it had an amendment to automatically restore benefits, provided the plan is indeed amended by the extended PPA amendment deadline to memorialize operations. For example, a calendar year plan does not amend to insert automatic reinstatement language until December 31, 2009, but would operate as if such amendment were in place effective January 1, 2008. Thus, IRC §436(c) would not be triggered by a reinstatement of accruals limited by IRC §436(e) if the reinstatement is operationally effective within 12 months.

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Issue #15: For purposes of IRC §436(c), clarification is needed as to whether certain benefit increases based upon existing plan language are treated as amendments. For example, most plans automatically take into account increases in the §415(b) and §401(a)(17) limits. Further, a plan is required to have language providing top-heavy minimum benefits if a plan becomes top-heavy. Also, a plan may provide automatic cost-of-living increases.

While in the past the IRS has taken the position that for minimum funding and maximum deduction purposes, as well as for IRC §411 vesting (anticutback) purposes, increases in the IRC §415 limits are treated as plan amendments, it is not imperative that IRC §436 rules follow suit. The limits of §436 are not voluntary. A requirement to separately calculate and consider the need to pay for the increases in these benefits on a discreet and annual basis will be costly and disruptive to plan operations. We also note that the existing limit for "high 25" HCEs will inhibit the plan's ability to pay for many of these increases unless the higher funding threshold applicable under the nondiscrimination requirements is satisfied. Thus, additional effort to sort out liabilities for these changes should not be required for purposes of IRC 436(c).

ASPPA recommends the final regulations clarify that these types of benefit increases are not considered plan amendments for purposes of IRC §436(c).

Issue #16: The Proposed Regulations provide that if a plan's assets are zero, then the plan's AFTAP is zero. Since a new plan will have an AFTAP of zero, these plans will be unable to make accelerated distributions until the second year's valuation is completed, at the earliest.

ASPPA recommends the final regulations provide that a new plan with a zero funding target be considered to have an AFTAP of 100%.

Issue #17: The statute indicates that a plan has the option of calculating the 2007 AFTAP under the new rules. The Proposed Regulations do not extend this option and require a plan to use 2007 Current Liability values.

ASPPA recommends the final regulations explicitly provide that a plan has the option to calculate the 2007 AFTAP under the new rules (which would require the release of the yield curve for the prior year) for the 2008 presumed AFTAP. Most plans that are just barely restricted will benefit from this option.

Issue #18: The IRC §436(d) restriction is especially troublesome to small employer plans in that it may inadvertently restrict distributions to rank and file employees. Many small plan sponsors have no intention of restricting distributions to rank and file employees, but because of timing problems, restrictions will sometimes occur. This is a problem particularly in sole proprietorships, partnerships, and closely held corporations.

ASPPA recommends the final regulations allow substantial owners (whether or not PBGC covered) to adopt a benefit waiver solely for purposes of IRC §436, thereby permitting distributions to other participants if the substantial owner's waiver would result in the plan's AFTAP exceeding 80% (or 60% as the case may be).

Issue #19: The statute seems to indicate, and the Proposed Regulations clearly reflect, that any benefit restriction applies as of the date the actuary certifies the AFTAP. This clearly causes administrative problems since it is virtually impossible for these coordinated events (*i.e.*, AFTAP certification and benefit processing) to occur simultaneously.

ASPPA recommends final regulations provide for a reasonable administrative delay between the date the AFTAP certification is received by the plan administrator from the actuary and the effective date of any restriction. ASPPA also recommends that the certification be limited to a specific document identified as the AFTAP certification rather than any informal preliminary email or other correspondence.

Issue #20: If there is a change in actuaries during the year such that the actuary who originally certified the AFTAP is not the same actuary who signs a later certification or

Schedule B and there is a change in assumptions or data that causes a material change in the AFTAP, then under the Proposed Regulations the plan is disqualified.

ASPPA recommends that final regulations provide relief in situations where the actuary changes during the year.

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These comments were prepared by ASPPA's Defined Benefit subcommittee of the Government Affairs Committee in cooperation with COPA. ASPPA was represented by Charles J. Klose, FSPA, CPC, Marjorie R. Martin, MSPA, Karen Nowiejski, MSPA, and Thomas J. Finnegan, MSPA, CPC, QPA. Please contact us if you have any questions or comments regarding the matters discussed above. Thank you very much for your consideration of these comments.

Sincerely,

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