CC: PA:LPD:PR (REG-151135-07)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Comments on Proposed Regulations Relating to Multiemployer Plan Funding (REG-151135-07)

To Whom It May Concern:

This letter is submitted on behalf of the American Benefits Council, the U.S. Chamber of Commerce, and the Food Marketing Institute to provide comments on the proposed regulations issued by the IRS on March 18, 2008 under Section 432 of the Internal Revenue Code (the "Code"), relating to multiemployer plans in endangered or critical status. We appreciate the opportunity to comment on this very important topic.

The American Benefits Council (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, contribute to, or provide services to retirement and health plans that cover more than 100 million Americans.

The U.S. Chamber of Commerce (the "Chamber") is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. The Chamber is particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business - manufacturing, retailing, services, construction, wholesaling, and finance - is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

The Food Marketing Institute (FMI) conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 member companies - food retailers and wholesalers - in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores with a combined annual sales

volume of $340 billion - three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets, including both unionized and non-union companies. Its international membership includes 200 companies from more than 50 countries.

Introduction

The proposed regulations provide helpful clarifications with respect to some issues. For example, the regulations provide that amortization extensions granted under Code Section 412(e) as in effect for plan years beginning before 2008 are treated the same as amortization extensions granted under Code Section 431(d) as in effect for plan years beginning after 2007. However, as discussed below, we request that some aspects of the proposed regulations be clarified or modified.

Issues Under the Proposed Regulations

Determination of Endangered or Critical Status – Future Contributions

Projections of employer contributions for future years are relevant for purposes of various elements of determining whether a plan is in endangered or critical status. Some of the tests for critical status explicitly take expected future contributions into account. Expected future contributions also play an implicit role in other elements, for example, in the projection of the future value of plan assets or whether a funding deficiency is expected to occur. The proposed regulations provide two options as to the assumptions for future employer contributions: (1) that the terms of the collective bargaining agreements pursuant to which the plan is maintained for the current year continue in effect for future years, or (2) that the employer contributions for the most recent year will continue, but only if there are no significant demographic changes that would make this assumption unreasonable.

The proposed regulations include provisions that limit the use of either of the two options for some purposes. We do not believe the applicable statutory language must or should be read that narrowly. Rather, consistent with Code Section 432(b)(3)(B)(i), the statutory provisions should be interpreted to provide flexibility for the actuary's determinations to be based on reasonable actuarial estimates, assumptions and methods that offer the actuary's best estimate of anticipated experience under the plan. We ask that the regulations be revised to provide this flexibility.

As mentioned above, one option relating to future employer contributions assumes that the terms of the collective bargaining agreements pursuant to which the plan is maintained for the current year continue in effect for future years. A collective bargaining agreement in effect for the current year could provide for increased employer contributions in a future year. We ask that the regulations clarify that, in such a case, future bargained contribution increases that are reflected in the terms of the collective bargaining agreement, can be taken into account in projecting contributions for future years, including years after the term of the current collective bargaining agreement.

Emergence from critical status

Revolving door

Under Code Section 432, a plan is in critical status if it meets any of four descriptions. One of the relevant factors for critical status is whether a plan has, or is projected to have within a certain period, an accumulated funding deficiency. If a plan is in critical status, the plan sponsor must adopt a rehabilitation plan to enable the plan to cease being in critical status by the end of the rehabilitation period, which is generally ten years. The rehabilitation period ends, and the plan emerges from critical status, if the plan actuary certifies that the plan is not projected to have an accumulated funding deficiency for the current plan year or any of the nine succeeding plan years.

For purposes of determining whether a plan is in critical status, amortization extensions are not taken into account. However, for purposes of determining whether a plan has emerged from critical status, amortization extensions are taken into account. This inconsistency has caused uncertainty as to whether a plan with an amortization extension could enter critical status (because it faces an imminent funding deficiency ignoring the amortization extension), immediately emerge (because it does not have a projected funding deficiency within the next 10 years, taking the amortization extension into account), and then immediately re-enter critical status because the basis for its critical status still applies. This inconsistency has been referred to as the "revolving door" issue.

The proposed regulations provide that a plan is in critical status for a plan year if it meets any of the four statutory descriptions or if the plan was in critical status for the immediately preceding plan year and the plan actuary certifies that the plan is projected to have an accumulated funding deficiency for the current plan year or any of the nine succeeding plan years, taking into account amortization extensions. The regulations thus indicate that, even if a plan meets the criterion for emergence from critical status (i.e., it is not projected to have an accumulated funding deficiency for the current plan year or any of the nine succeeding plan years, taking into account amortization extensions), it nonetheless remains in, and does not emerge from, critical status if it meets any of the four statutory descriptions. However, given the uncertainty over the revolving door issue, we ask that the regulations specifically state that this is the case.

Status for entire plan year

Under Code Section 432 and the proposed regulations, a plan is in critical status if it meets one of several descriptions as of the beginning of the plan year. We ask that the regulations clarify that, if a plan is determined to be in critical status as of the beginning of a plan year, it remains in critical status for the entire plan year, even if the circumstances causing critical status change during the year. Thus, emergence from critical status occurs as of the next plan year.

Notice Requirements

The rules under Code Section 432 for plans in critical status contain several provisions relating to plan benefits and notice requirements.

Code Section 432(e)(8) allows certain benefits ("adjustable benefits") under a plan in critical status to be reduced, subject to certain notice requirements. First, under Section 432(e)(8)(C), benefits can be reduced only if a notice explaining the reductions is provided to participants at least 30 days before the reductions are made. Section 432(e)(8)(A)(ii) also provides that adjustable benefits generally may not be reduced for any participant who is in pay status before the date another notice required under Section 432(b)(3)(D) is provided. Under Section 432(b)(3)(D), if a plan is in critical status, notice thereof must be provided to participants, which must include an explanation that adjustable benefits might be reduced.

In addition to potential reductions in adjustable benefits under Section 432(e)(8), Section 432(f)(2) provides that, effective on the date the notice under Section 432(b)(3)(D) is sent, a plan in critical status generally must not make certain types of distributions, such as lump sums. Section 432 does not contain a notice requirement with respect to the distribution restrictions under Section 432(f)(2). However, the proposed regulations require the notice provided under Section 432(b)(3)(D) to include an explanation of the distribution restrictions under Section 432(f)(2). The preamble discussion of the proposed regulations indicates that a notice under Section 432(b)(3)(D) is not valid, including for purposes of the ability under Section 432(e)(8) to reduce adjustable benefits of participants who are not in pay status, if the notice does not contain an explanation of the distribution restrictions under Section 432(f)(2).

The statutory provisions relating to reductions in adjustable benefits, including the notice requirements and the participants whose benefits can be reduced, were carefully considered during the legislative process. It is inappropriate for regulations to impose additional restrictions as a result of a regulatory requirement that the notice under Section 432(b)(3)(D) contain additional information that is unrelated to potential reductions in adjustable benefits. We ask that the regulations provide that a notice that satisfies the applicable statutory requirements under Section 432(b)(3)(D), including an explanation that adjustable benefits might be reduced, is valid for purposes of determining the participants whose adjustable benefits can be reduced, even if the notice does not include information about the distribution restrictions under Section 432(f)(2).

Effective Date and Good Faith Compliance

Code Section 432 is effective for plan years beginning after 2007. Under the effective date provision in the proposed regulations, the regulations would apply to plan years beginning on or after January 1, 2008, and ending after March 18, 2008, the date of issuance of the proposed regulations.

Because the proposed regulations were issued only a short time before the first certifications relating to endangered and critical status were due, as a practical matter the actuarial determinations and other steps needed for timely certifications had to occur before the regulations were issued. In addition, as discussed in the proposed regulations, the regulations provide only limited guidance relating to plans in endangered or critical status, and additional issues are to be addressed in future regulations. Moreover, final regulations are likely to contain some changes from the proposed regulations. We therefore ask that final regulations apply only prospectively, i.e., as of a date after the issuance of final regulations. We further ask that good faith compliance with Code Section 432 be permitted for periods before the final regulations apply.

Issues to Be Addressed in Future Regulations

The preamble to the proposed regulations discusses the fact that guidance with respect to additional issues relating to multiemployer plans in endangered or critical status will be included in a second set of regulations to be issued this year. We ask that, in addressing additional issues, future regulations--

- Clarify that, in the case of a plan in critical status, employer surcharges apply only for contributions due for the period beginning 30 days after notice is provided to an employer, rather than retroactively to the beginning of the plan year;

- Clarify that adjustable benefits under a plan in critical status are benefits that can be reduced or eliminated for purposes of the default schedule under Code Section 432(e)(1);

- Clarify the funding rules that apply to (1) a multiemployer plan that was not in effect on July 16, 2006, and (2) a multiemployer plan that is spun-off after July 16, 2006 from a multiemployer plan that was in effect on that date; and

- Provide a safe harbor under which the interest rate used for purposes of determining minimum required contributions to a multiemployer plan under Code Section 431 can be used as the expected rate of growth in the value of plan assets for purposes of establishing a funding improvement or rehabilitation plan.

We appreciate your consideration of these comments and would be happy to discuss them with you.

Sincerely,

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