Internal Revenue
bulletin

Bulletin No. 2007-42
October 15, 2007

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

Rev. Rul. 2007–61, page 799.

This ruling suspends Rev. Rul. 2007–54, 2007–38 I.R.B. 604, and informs taxpayers that Treasury and the Service intend to address the issues considered in Rev. Rul. 2007–54 by regulations. Rev. Rul. 2007–54 suspended.

Notice 2007–79, page 809.

This notice allows Electronic Return Originators (EROs) to sign the following forms by rubber stamp, mechanical device (such as signature pen), or computer software program: Form 8453, *U.S. Individual Income Tax Declaration for an IRS e-file Return;* Form 8878, *IRS e-file Signature Authorization for Form 4868 or Form 2350*; and Form 8879, *IRS e-file Signature Authorization*.

Announcement 2007–88, page 801.

This announcement contains an official copy of the diplomatic notes exchanged between the United States and Angola providing for a reciprocal exemption from taxation for income from the international operation of ships and aircraft. It includes the United States offer and the Angola acceptance in Portuguese and an English translation of the Angolan note.

EMPLOYEE PLANS

REG–113891–07, page 821.

Proposed regulations under section 436 of the Code provide guidance regarding benefit restrictions for certain underfunded defined benefit pension plans and regarding the use of certain funding balances maintained for defined benefit pension plans.

Announcement 2007–90, page 856.

Pre-approved defined contribution plans; determination letters. This announcement states that the program for determination letters for pre-approved defined contribution plans, which are submitted on Form 5307, is being closed for a temporary period of time.

EXEMPT ORGANIZATIONS

Announcement 2007–96, page 859.

The IRS has revoked its determination that The Georgetown Foundation of Sandy, UT; Lumberton Family Life Center, Inc., of Lumberton, MS; Truth in Youth & Family Services, Inc., of Leland, NC; and Cunningham Charitable Group of Los Angeles, CA, qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Code.

TAX CONVENTIONS

Announcement 2007–88, page 801.

This announcement contains an official copy of the diplomatic notes exchanged between the United States and Angola providing for a reciprocal exemption from taxation for income from the international operation of ships and aircraft. It includes the United States offer and the Angola acceptance in Portuguese and an English translation of the Angolan note.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

ADMINISTRATIVE

Notice 2007–79, page 809.
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Rev. Proc. 2007–63, page 809.
This procedure provides optional rules for deeming substantiated the amount of certain business expenses of traveling away from home reimbursed to an employee or deductible by an employee or self-employed individual. Rev. Proc. 2006–41 superseded.

Rev. Proc. 2007–64, page 818.
This procedure modifies a scope provision and one of the terms and conditions under which the Service grants approval of requests by corporations for changes in annual accounting periods filed under Rev. Proc. 2006–45, 2006–45 I.R.B. 851. Rev. Proc. 2006–45 modified and clarified.

Announcement 2007–91, page 857.
This document provides a change of location for a public hearing on proposed regulations (REG–142695–05, 2007–39 I.R.B. 681) providing guidance on cafeteria plans under section 125 of the Code.

Announcement 2007–92, page 857.
This document provides a change of location for a public hearing on proposed regulations (REG–128224–06, 2007–36 I.R.B. 551) providing guidance on which costs incurred by estates or non-grantor trusts are subject to the 2–percent floor for miscellaneous itemized deductions under section 67(a) of the Code.

Announcement 2007–93, page 858.
This document contains corrections to final and temporary regulations (T.D. 9344, 2007–36 I.R.B. 535) relating to the discharge of liens under sections 7425 and 6343 of the Code.

Announcement 2007–94, page 858.
This document contains corrections to proposed regulations by cross-reference to temporary regulations (REG–148951–05, 2007–36 I.R.B. 550) relating to the discharge of liens under sections 7425 and 6343 of the Code.

The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are compiled semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

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Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 62.—Adjusted Gross Income Defined

A revenue procedure provides optional rules for deeming substantiated the amount of certain business expenses of traveling away from home reimbursed to an employee or deductible by an employee or self-employed individual. See Rev. Proc. 2007-63, page 809.

Section 162.—Trade or Business Expenses

A revenue procedure provides optional rules for deeming substantiated the amount of certain business expenses of traveling away from home reimbursed to an employee or deductible by an employee or self-employed individual. See Rev. Proc. 2007-63, page 809.

Section 267.—Losses, Expenses, and Interest With Respect to Transactions Between Related Taxpayers

A revenue procedure provides optional rules for deeming substantiated the amount of certain business expenses of traveling away from home reimbursed to an employee or deductible by an employee or self-employed individual. See Rev. Proc. 2007-63, page 809.

Section 274.—Disallowance of Certain Entertainment, etc., Expenses

A revenue procedure provides optional rules for deeming substantiated the amount of certain business expenses of traveling away from home reimbursed to an employee or deductible by an employee or self-employed individual. See Rev. Proc. 2007-63, page 809.

Section 430.—Minimum Funding Standards for Single-Employer Defined Benefit Pension Plans

26 CFR 1.430(f)–1: Effect of prefunding balance and funding standard carryover balance.

The proposed regulations under section 430(f) provide guidance regarding the use of certain funding balances maintained for defined benefit pension plans. The proposed regulations reflect changes made by the Pension Protection Act of 2006. See REG-113891-07, page 821.

Section 436.—Funding-Based Limits on Benefits and Benefit Accruals Under Single-Employer Plans

26 CFR 1.436–1: Limits on benefits and benefit accruals under single employer defined benefit plans.

The proposed regulations under section 436 provide guidance regarding benefit restrictions that apply to certain underfunded defined benefit pension plans. The proposed regulations reflect changes made by the Pension Protection Act of 2006. See REG-113891-07, page 821.

Section 442.—Change of Annual Accounting Period

This revenue procedure modifies a scope provision and one of the terms and conditions under which the Service grants approval of requests by corporations for changes in annual accounting periods filed under Rev. Proc. 2006–45, 2006–45 I.R.B. 851. See Rev. Proc. 2007-64, page 818.

Section 807.—Rules for Certain Reserves

(Also § 812.)

This ruling suspends Rev. Rul. 2007–54, 2007–38 I.R.B. 604, and informs taxpayers that Treasury and the Service intend to address the issues considered in Rev. Rul. 2007–54 by regulations. Rev. Rul. 2007–54 suspended.

Rev. Rul. 2007–61

Rev. Rul. 2007–54, 2007–38 I.R.B. 604, released on August 16, 2007, addresses the determination of life insurance reserves under section 807 of the Internal Revenue Code for a variable contract where some or all of the reserves are accounted for as part of a life insurance company's separate account reserves. The ruling also addresses the interest rate used under section 812(b)(2) to calculate required interest on the reserves if the amounts of those reserves are determined under section 807(d)(2).

Sections 807 and 812 were added to the Code by the Deficit Reduction Act of 1984, P.L. 98–369 (the 1984 Act). The legislative history of the 1984 Act provides that the regulations, rulings and case law under the Life Insurance Company Tax Act of 1959 (the 1959 Act) are to serve as interpretive guides to those 1984 Act provisions that carry over the provisions of prior law. *See* H. Rep. No. 432, Pt. 2, 98th Cong., 2d Sess. 1402; S. Prt. 169, Vol. 1, 98th Cong. 2d Sess. 524. Since Rev. Rul. 2007–54 was issued, some taxpayers have argued that the provisions on which the ruling is based carried over from the 1959 Act to the 1984 Act, and that the ruling should not be applied retroactively because its analysis is not consistent with certain authorities under the 1959 Act.

The Treasury Department and the Internal Revenue Service (IRS) believe it is important that the company's share and policyholders' share of net investment income be determined in a manner that effectively prevents the double benefit that otherwise would result from the use of tax favored investment income (such as dividends qualifying for the dividends received deduction) to fund the company's obligations to policyholders. In addition, the Treasury Department and the IRS are mindful of the benefit of notice and public comment and believe the issues in the revenue ruling would more appropriately be addressed by regulation. Accordingly, this ruling suspends Rev. Rul. 2007–54 and informs taxpayers that the Treasury Department and the IRS intend to address in regulations the issues considered in Rev. Rul. 2007–54. Until such time, the issues should be analyzed as though Rev. Rul. 2007–54 had not been issued. Regulations also may provide guidance for determining required interest under section 812(b)(2) if neither the prevailing State assumed rate nor the applicable Federal rate is used to determine the reserves for an insurance or annuity contract. This project has been added to the 2007-2008 Priority Guidance Plan and will be reflected in the next periodic update to that plan.

EFFECT ON OTHER DOCUMENTS

Rev. Rul. 2007–54 is suspended.

DRAFTING INFORMATION

The principal author of this revenue ruling is Stephen D. Hooe of the Office of

Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue ruling, contact Mr. Hooe at (202) 622–3900 (not a toll-free call).

Section 812.—Definition of Company's Share and Policyholders' Share

A revenue ruling that suspends Rev. Rul. 2007–54, 2007–38 I.R.B. 604, and informs taxpayers that Treasury and the Service intend to address the issues considered in Rev. Rul. 2007–54 by regulations. See Rev. Rul. 2007-61, page 799.

Section 898.—Taxable Year of Certain Foreign Corporations

This revenue procedure modifies a scope provision and one of the terms and conditions under which the Service grants approval of requests by corporations for changes in annual accounting periods filed under Rev. Proc. 2006–45, 2006–45 I.R.B. 851. See Rev. Proc. 2007-64, page 818.

Section 6061.—Signing of Returns and Other Documents

This notice allows Electronic Return Originators (EROs) to sign the following forms by rubber stamp, mechanical device (such as signature pen), or computer software program: Form 8453, *U.S. Individual Income Tax Declaration for an IRS e-file Return*; Form 8878, *IRS e-file Signature Authorization for Form 4868 or Form 2350*; and Form 8879, *IRS e-file Signature Authorization*. See Notice 2007-79, page 809.

Part II. Treaties and Tax Legislation
Subpart A.—Tax Conventions and Other Related Items

United States Angola Reciprocol Exemption Agreement

Announcement 2007–88

The United States and Angola have exchanged diplomatic notes evidencing a reciprocal exemption agreement for income from the international operation of ships and aircraft for taxable years beginning on or after January 1, 2006. The diplomatic notes reproduced herein contain the terms of the reciprocal exemptions.

The principal author of this announcement is Patricia Bray of the Office of Associate Chief Counsel (International). For further information regarding this announcement, contact Patricia Bray at (202) 622–5871 (not a toll-free call).

The text of the agreement is as follows.

DRAFT 8/17/2005

PROPOSED
REVISED NOTE NO. 271

Note No. 271

The Embassy of the United States of America presents its compliments to the Ministry of External Relations of the Government of Angola and has the honor to propose that the two Governments conclude an agreement to exempt from income tax, on a reciprocal basis, certain income derived from the international operation of a ship or ships and aircraft as follows:

The Government of the United States of America, in accordance with Section 872(b) and 883(a) of the U.S. Internal Revenue Code of 1986, as amended, agrees to exempt from U.S. federal income tax gross income derived from the international operation of a ship or ships or aircraft by individuals who are residents of Angola (other than U.S. citizens or residents) and corporations that are organized in Angola, in each case, that are engaged in the international operation of a ship or ships or aircraft. This exemption shall be granted on the basis of equivalent exemptions granted by the Government of Angola to individual residents of the United States and to corporations organized in the United States.

In the case of an Angolan corporation, the exemption shall apply only if the corporation meets either of the following conditions:

(1) More than 50 percent of the value of the corporation's stock is owned, directly or indirectly, by individuals who are residents of the Republic of Angola or of another country which grants a reciprocal exemption to U.S. citizens and corporations; or

(2) The corporation's stock is primarily and regularly traded on an established securities market in the Republic of Angola, or is wholly owned, directly or indirectly, by a corporation whose stock is so traded and which is also organized in the Republic of Angola.

For purposes of Subparagraph (1), the Government of the Republic of Angola will be treated as an individual resident of the Republic of Angola. Subparagraph (1) will be considered to be satisfied if the corporation is a "controlled foreign corporation" under the Internal Revenue Code.

Gross income derived from the international operation of a ship or ships or aircraft includes:

(i) Income from the rental on a full (time or voyage) basis of a ship or ships or aircraft used in international transport;

(ii) Income from the rental on a bareboat basis of a ship or ships or aircraft used in international transport;

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(iii) Income from the rental of containers and related equipment used in international transport that is incidental to income from the international operation of a ship or ships or aircraft;

(iv) Gains from the sale or other alientation of a ship or ships or aircraft used in international transport; and

(v) Income derived by an individual or corporation otherwise engaged in the international operation of a ship or ships or aircraft from active participation in a pool, an alliance, joint venture, international operating agency, or other venture, that is itself engaged in the international operation of a ship or ships or aircraft.

The Embassy, on behalf of the Government of the United States of America, proposes that if the foregoing is acceptable to the Government of Angola, this note and the Ministry's reply note shall constitute an agreement between the two Governments, which shall enter into force on the date of the Ministry's reply note and shall have effect with respect to taxable years beginning on or after January 1, 2005, and to all prior open taxable years. It shall remain in force until terminated by either Government giving written notice to the other Government through diplomatic channels.

The Embassy of the United States avails itself of this opportunity to renew to the Ministry of External Relations of the Government of Angola the assurance of its highest consideration.

The Embassy of the United States of America

REPÚBLICA DE ANGOLA
MINISTÉRIO DAS RELAÇÕES EXTERIORES

GABINETE DO VICE - MINISTRO

NOTA VERBAL N.° 116 /GVMRE/06

O Ministério das Relações Exteriores de Angola apresenta os seus melhores cumprimentos a Embaixada dos Estados Unidos da América e tem a honra de acusar a recepção da Nota de Resposta Revista de n.° 271/2005 da Embaixada dos Estados Unidos, propondo a troca de notas a isentar do imposto sobre o rendimento resultante da operação internacional de navio ou navios ou avião por empresas criadas nos Estados Unidos da América e que se dediquem à operação internacional de um navio ou navios ou avião. Esta isenção deve ser concedida com base na reciprocidade da isenção a conceder pelos Estados Unidos à empresas que sejam residentes em Angola (que não sejam cidadãos norte-americanos nem empresas e a empresas criadas em Angola).

O Governo angolano, de acordo com as disposições legais contidas no código de imposto industrial angolano (Imposto sobre rendimento) alínea g), n.° 1 do artigo 13° combinadas com a Lei n.° 18/92 de 3 de Julho nos termos do qual as empresas estrangeiras de navegação marítimas e aérea estão isentas do imposto industrial se, no País da sua nacionalidade, as empresas angolanas tiverem a mesma prerrogativa, concorda em isentar o imposto sobre o rendimento resultante da operação internacional de um navio ou navios ou avião por empresas que sejam residentes dos Estados Unidos da América e empresas criadas nos Estados Unidos, e que se dediquem à operação internacional de um navio ou navios ou avião.

O rendimento bruto resultante da operação internacional de um navio ou navios ou avião inclui:

(I) Rendimento do fretamento completo (tempo ou viagem) de um navio ou navios ou avião usados em transporte internacional;

(II) Rendimento do fretamento a casco nu de um navio ou navios ou avião usados em transporte internacional;

(III) Rendimento ou aluguer de contentores e respectivo equipamento usado no transporte internacional que seja inerente a operação internacional de um navio ou navios ou avião;

(IV) Ganhos da venda ou de outra alienação de um navio ou navios ou avião usados em transporte internacional;

(V) Rendimento obtido por indivíduo ou empresa que de alguma outra forma se dediquem a operação internacional de um navio ou navios ou avião através de participação activa em fundo comum aliança, joint venture, agência internacional ou outro empreendimento que se dedique ele próprio a operação internacional de um navio ou navios ou avião.

O Governo de Angola concorda com o conteúdo da nota acima transcrita e considera esse documento e esta resposta como constituindo um acordo entre os nossos dois Governos, e que deverá aplicar-se no ano fiscal 2006 bem como nos anteriores a que seja aplicável a Lei.

O Ministério das Relações Exteriores de Angola aproveita a oportunidade para expressar a certeza da sua mais elevada estima e consideração.

Luanda, aos 9 de Outubro de 2006

À
EMBAIXADA DOS ESTADOS
UNIDOS DA AMÉRICA

LUANDA

REPUBLIC OF ANGOLA
MINISTRY OF EXTERNAL RELATIONS
Office of the Deputy Minister

Note verbale No. 116/GVMRE/06

The Ministry of External Relations of Angola presents its compliments to the Embassy of the United States of America and has the honor to acknowledge receipt of the revised reply to its note No. 271/2005, proposing an exchange of notes to exempt from Angolan tax gross income derived from the international operation of a ship or ships or aircraft by corporations organized in the United States of America that are engaged in the international operation of a ship or ships or aircraft. This exemption shall be granted on the basis of equivalent exemptions granted by the United States to corporations[1] resident in Angola (other than United States citizens or corporations and corporations organized in Angola).

The Government of Angola, in accordance with the legal provisions contained in Article 13(1)(g) of the Angolan Industrial Tax Code (income tax), combined with Law No. 18/92 of July 3, which stipulates that foreign sea and aerial navigation companies shall be exempted from industrial tax if, in the country of their nationality, Angolan companies have the same prerogative, agrees to exempt from income tax gross

Embassy of the United States of America,
Luanda.

[1] Translator's note: Rendered "individuals" in Embassy Luanda's proposed model reply for GoA to note No. 271.

income derived from the international operation of a ship or ships or aircraft by corporations resident in the United States of America and corporations organized in the United States that are engaged in the international operation of a ship or ships or aircraft.

Gross income derived from the international operation of a ship or ships or aircraft includes:

I. Income from the rental on a full- (time or voyage) basis of a ship or ships or aircraft used in international transport;

II. Income from the rental, on a bareboat basis, of a ship or ships or aircraft used in international transport;

III. Income or [sic – typo; should be "do" (from) rather than "ou" (or)] rental of containers and related equipment used in international transport that is incidental to income form the international operation of a ship or ships or aircraft;

IV. Gains from the sale or other alienation of a ship or ships or aircraft used in international transport;

V. Income derived by an individual or corporation otherwise engaged in the international operation of a ship or ships or aircraft from active participation in a pool[,] an alliance, joint venture, international operating agency, or other venture that is itself engaged in the international operation of a ship or ships or aircraft.

The Government of Angola agrees to the proposal contained in the note transcribed above, and considers said document and this note in reply to constitute an

agreement between our two governments, which shall have effect with regards to taxable year 2006, and all prior ones to which it may apply.

[Complimentary close]

Luanda, October 9, 2006

[Initialed]

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Part III. Administrative, Procedural, and Miscellaneous

Alternative Signature Methods for Electronic Return Originators

Notice 2007–79

SECTION I. PURPOSE

This notice provides that the Internal Revenue Service will allow Electronic Return Originators (EROs) to sign the following forms by rubber stamp, mechanical device (such as signature pen), or computer software program: Form 8453, *U.S. Individual Income Tax Declaration for an IRS e-file Return*; Form 8878, *IRS e-file Signature Authorization for Form 4868 or Form 2350*; and Form 8879, *IRS e-file Signature Authorization*.

SECTION 2. BACKGROUND

Section 6061 of the Internal Revenue Code and Treas. Reg. § 1.6061–1(a) generally provide that any tax return, statement, or other document shall be signed in accordance with forms, instructions, or regulations prescribed by the Secretary. Publication 1345, *Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns*, sets forth the procedures for completing the Form 8453, Form 8878, and Form 8879. If providing the signature on a paper declaration, the taxpayer and the ERO (and the paid preparer if different from the ERO) must complete and sign the Form 8453 before the electronic data portion of the return is submitted. Taxpayers may wish to sign their returns electronically, but may choose to authorize their ERO to enter their Personal Identification Number (PIN) in the electronic return record by completing the appropriate IRS e-file signature authorization form. Form 8879 authorizes an ERO to enter PINs on Individual Income Tax Returns, and Form 8878 authorizes an ERO to enter PINs on Forms 4868, *Application for Automatic Extension of Time To File U.S. Individual Income Tax Return*; and Form 2350, *Application for Extension of Time To File U.S. Income Tax Return*.

SECTION 3. REQUIREMENTS FOR USE OF ALTERNATIVE METHODS OF SIGNING

The alternative methods of signing that this notice authorizes must include either a facsimile of the individual ERO's signature or of the ERO's printed name. EROs using one of these alternative means are personally responsible for affixing their signatures to returns or requests for extension.

This notice applies only to EROs that sign Form 8453, Form 8878, or Form 8879, and does not alter the signature requirements for any other type of document currently required to be manually signed, such as elections, applications for changes in accounting method, powers of attorney, or consent forms. In addition, this notice does not alter the requirement that Form 8453, Form 8878, or Form 8879 be signed by the taxpayer making these forms by handwritten signature or other authorized means.

SECTION 4. EFFECTIVE DATE

This notice applies to any Form 8453, Form 8878, or Form 8879 filed on or after October 15, 2007.

SECTION 5. DRAFTING INFORMATION

The principal author of this notice is Michael E. Hara of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this notice, contact Michael E. Hara at (202) 622–4910 (not a toll-free call).

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26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also Part I, §§ 62, 162, 267, 274; 1.62–2, 1.162–17, 1.267(a)–1, 1.274–5.)

Rev. Proc. 2007–63

SECTION 1. PURPOSE

This revenue procedure updates Rev. Proc. 2006–41, 2006–43 I.R.B. 777, and provides rules under which the amount of ordinary and necessary business expenses of an employee for lodging, meal, and incidental expenses, or for meal and incidental expenses, incurred while traveling away from home are deemed substantiated under § 1.274–5 of the Income Tax Regulations when a payor (the employer, its agent, or a third party) provides a *per diem* allowance under a reimbursement or other expense allowance arrangement to pay for the expenses. In addition, this revenue procedure provides an optional method for employees and self-employed individuals who are not reimbursed to use in computing the deductible costs paid or incurred for business meal and incidental expenses, or for incidental expenses only if no meal costs are paid or incurred, while traveling away from home. Use of a method described in this revenue procedure is not mandatory, and a taxpayer may use actual allowable expenses if the taxpayer maintains adequate records or other sufficient evidence for proper substantiation. This revenue procedure does not provide rules under which the amount of an employee's lodging expenses will be deemed substantiated when a payor provides an allowance to pay for those expenses but not meal and incidental expenses.

SECTION 2. BACKGROUND AND CHANGES

.01 Section 162(a) of the Internal Revenue Code allows a deduction for all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Under that provision, an employee or self-employed individual may deduct expenses paid or incurred while traveling away from home in pursuit of a trade or business. However, under § 262, no portion of the travel expenses that is attributable to personal, living, or family expenses is deductible.

.02 Section 274(n) generally limits the amount allowable as a deduction under § 162 for any expense for food, beverages, or entertainment to 50 percent of the amount of the expense that otherwise would be allowable as a deduction. In the case of any expenses for food or beverages consumed while away from home (within the meaning of § 162(a)(2)) by an individual during, or incident to, the period of duty subject to the hours of service

limitations of the Department of Transportation, § 274(n)(3) gradually increases the deductible percentage to 80 percent for taxable years beginning in 2008 or thereafter. For taxable years beginning in 2007, the deductible percentage for these expenses is 75 percent.

.03 Section 274(d) provides, in part, that no deduction is allowed under § 162 for any travel expense (including meals and lodging while away from home) unless the taxpayer complies with certain substantiation requirements. Section 274(d) further provides that regulations may prescribe that some or all of the substantiation requirements do not apply to an expense that does not exceed an amount prescribed by the regulations.

.04 Section 1.274–5(g), in part, grants the Commissioner the authority to prescribe rules relating to reimbursement arrangements or *per diem* allowances for ordinary and necessary expenses paid or incurred while traveling away from home. Pursuant to this grant of authority, the Commissioner may prescribe rules under which these arrangements or allowances, if in accordance with reasonable business practice, are regarded (1) as equivalent to substantiation, by adequate records or other sufficient evidence, of the amount of travel expenses for purposes of § 1.274–5(c), and (2) as satisfying the requirements of an adequate accounting to the employer of the amount of travel expenses for purposes of § 1.274–5(f).

.05 For purposes of determining adjusted gross income, § 62(a)(2)(A) allows an employee a deduction for expenses allowed by Part VI (§ 161 and following), subchapter B, chapter 1 of the Code, paid or incurred by the employee in connection with the performance of services as an employee under a reimbursement or other expense allowance arrangement with a payor.

.06 Section 62(c) provides that an arrangement is not treated as a reimbursement or other expense allowance arrangement for purposes of § 62(a)(2)(A) if it—

(1) does not require the employee to substantiate the expenses covered by the arrangement to the payor, or

(2) provides the employee with the right to retain any amount in excess of the substantiated expenses covered under the arrangement.

Section 62(c) further provides that the substantiation requirements described therein do not apply to any expense to the extent that, under the grant of regulatory authority prescribed in § 274(d), the Commissioner has provided that substantiation is not required for the expense.

.07 Under § 1.62–2(c), a reimbursement or other expense allowance arrangement satisfies the requirements of § 62(c) if it meets the requirements of business connection, substantiation, and returning amounts in excess of expenses as specified in the regulations. If an arrangement meets these requirements, all amounts paid under the arrangement are treated as paid under an accountable plan and are excluded from income and wages. If an arrangement does not meet these requirements, all amounts paid under the arrangement are treated as paid under a nonaccountable plan and are included in the employee's gross income, must be reported as wages or compensation on the employee's Form W–2, and are subject to the withholding and payment of employment taxes. Section 1.62–2(e)(2) specifically provides that substantiation of certain business expenses in accordance with rules prescribed under the authority of § 1.274–5(g) or (j) is treated as substantiation of the amount of the expenses for purposes of § 1.62–2. Under § 1.62–2(f)(2), the Commissioner may prescribe rules under which an arrangement providing *per diem* allowances is treated as satisfying the requirement of returning amounts in excess of expenses, even though the arrangement does not require the employee to return the portion of the allowance that relates to days of travel substantiated and that exceeds the amount of the employee's expenses deemed substantiated pursuant to rules prescribed under § 274(d), provided the allowance is reasonably calculated not to exceed the amount of the employee's expenses or anticipated expenses and the employee is required to return within a reasonable period of time any portion of the allowance that relates to days of travel not substantiated.

.08 Section 1.62–2(h)(2)(i)(B) provides that, if a payor pays a *per diem* allowance that meets the requirements of § 1.62–2(c)(1), the portion, if any, of the allowance that relates to days of travel substantiated in accordance with § 1.62–2(e), that exceeds the amount of the employee's expenses deemed substantiated for the travel pursuant to rules prescribed under § 274(d) and § 1.274–5(g) or (j), and that the employee is not required to return, is subject to withholding and payment of employment taxes. See §§ 31.3121(a)–3, 31.3231(e)–1(a)(5), 31.3306(b)–2, and 31.3401(a)–4 of the Employment Tax Regulations. Because the employee is not required to return this excess portion, the reasonable period of time provisions of § 1.62–2(g) (relating to the return of excess amounts) do not apply to this portion.

.09 Under § 1.62–2(h)(2)(i)(B)(4), the Commissioner has the discretion to prescribe special rules regarding the timing of withholding and payment of employment taxes on *per diem* allowances.

.10 Section 1.274–5(j)(1) grants the Commissioner the authority to establish a method under which a taxpayer may elect to use a specified amount for meals paid or incurred while traveling away from home in lieu of substantiating the actual cost of meals.

.11 Section 1.274–5(j)(3) grants the Commissioner the authority to establish a method under which a taxpayer may elect to use a specified amount for incidental expenses paid or incurred while traveling away from home in lieu of substantiating the actual cost of incidental expenses.

.12 Sections 3.02(1)(a), 4.04(6), and 5.06 of this revenue procedure provide transition rules for the last 3 months of calendar year 2007.

.13 Section 5.02 of this revenue procedure contains revisions to the *per diem* rates for high-cost localities and for other localities for purposes of section 5.

.14 Section 5.03 of this revenue procedure contains the list of high-cost localities and section 5.04 of this revenue procedure describes changes to the list of high-cost localities for purposes of section 5.

.15 Sections 7.10 and 8.06 of this revenue procedure refer to Rev. Rul. 2006–56, 2006–46 I.R.B. 874, which describes circumstances when a payor's reimbursement or other expense allowance arrangement evidences a pattern of abuse of the rules of § 62(c) and the regulations thereunder.

SECTION 3. DEFINITIONS

.01 *Per diem allowance*. The term "*per diem* allowance" means a payment under a

reimbursement or other expense allowance arrangement that is —

(1) paid with respect to ordinary and necessary business expenses incurred, or that the payor reasonably anticipates will be incurred, by an employee for lodging, meal, and incidental expenses, or for meal and incidental expenses, for travel away from home in connection with the performance of services as an employee of the employer,

(2) reasonably calculated not to exceed the amount of the expenses or the anticipated expenses, and

(3) paid at or below the applicable federal *per diem* rate, a flat rate or stated schedule, or in accordance with any other Service-specified rate or schedule.

.02 *Federal per diem rate and federal M&IE rate.*

(1) *In general.* The federal *per diem* rate is equal to the sum of the applicable federal lodging expense rate and the applicable federal meal and incidental expense (M&IE) rate for the day and locality of travel.

(a) *CONUS rates.* The rates for localities in the continental United States ("CONUS") are set forth in Appendix A to 41 C.F.R. ch. 301. However, in applying section 4.01, 4.02, or 4.03 of this revenue procedure, taxpayers may continue to use the CONUS rates in effect for the first 9 months of 2007 for expenses of all CONUS travel away from home that are paid or incurred during calendar year 2007 in lieu of the updated GSA rates. A taxpayer must consistently use either these rates or the updated rates for the period October 1, 2007, through December 31, 2007.

(b) *OCONUS rates.* The rates for localities outside the continental United States ("OCONUS") are established by the Secretary of Defense (rates for non-foreign localities, including Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands, and the possessions of the United States) and by the Secretary of State (rates for foreign localities), and are published in the *Per Diem* Supplement to the Standardized Regulations (Government Civilians, Foreign Areas) (updated on a monthly basis).

(c) *Internet access to the rates.* The CONUS and OCONUS rates may be found on the Internet at *www.gsa.gov.*

(2) *Locality of travel.* The term "locality of travel" means the locality where an employee traveling away from home in connection with the performance of services as an employee of the employer stops for sleep or rest.

(3) *Incidental expenses.* The term "incidental expenses" has the same meaning as in the Federal Travel Regulations, 41 C.F.R. 300–3.1 (2007). Thus, based on the current definition of "incidental expenses" in the Federal Travel Regulations, "incidental expenses" means fees and tips given to porters, baggage carriers, bellhops, hotel maids, stewards or stewardesses and others on ships, and hotel servants in foreign countries; transportation between places of lodging or business and places where meals are taken, if suitable meals can be obtained at the temporary duty site; and the mailing cost associated with filing travel vouchers and payment of employer-sponsored charge card billings.

.03 *Flat rate or stated schedule.*

(1) *In general.* Except as provided in section 3.03(2) of this revenue procedure, an allowance is paid at a flat rate or stated schedule if it is provided on a uniform and objective basis with respect to the expenses described in section 3.01 of this revenue procedure. The allowance may be paid with respect to the number of days away from home in connection with the performance of services as an employee or on any other basis that is consistently applied and in accordance with reasonable business practice. Thus, for example, an hourly payment to cover meal and incidental expenses paid to a pilot or flight attendant who is traveling away from home in connection with the performance of services as an employee is an allowance paid at a flat rate or stated schedule. Likewise, a payment based on the number of miles traveled (such as cents per mile) to cover meal and incidental expenses paid to an over-the-road truck driver who is traveling away from home in connection with the performance of services as an employee is an allowance paid at a flat rate or stated schedule.

(2) *Limitation.* An allowance that is computed on a basis similar to that used in computing the employee's wages or other compensation (such as the number of hours worked, miles traveled, or pieces produced) does not meet the business connection requirement of § 1.62–2(d), is not a *per diem* allowance, and is not paid at a flat rate or stated schedule, unless, as of December 12, 1989, (a) the allowance was identified by the payor either by making a separate payment or by specifically identifying the amount of the allowance, or (b) an allowance computed on that basis was commonly used in the industry in which the employee is employed. See § 1.62–2(d)(3)(ii).

SECTION 4. *PER DIEM* SUBSTANTIATION METHOD

.01 *Per diem allowance.* If a payor pays a *per diem* allowance in lieu of reimbursing actual lodging, meal, and incidental expenses incurred or to be incurred by an employee for travel away from home, the amount of the expenses that is deemed substantiated for each calendar day is equal to the lesser of the *per diem* allowance for that day or the amount computed at the federal *per diem* rate (see section 3.02 of this revenue procedure) for the locality of travel for that day (or partial day, see section 6.04 of this revenue procedure).

.02 *Meal and incidental expenses only per diem allowance.* If a payor pays a *per diem* allowance only for meal and incidental expenses in lieu of reimbursing actual meal and incidental expenses incurred or to be incurred by an employee for travel away from home, the amount of the expenses that is deemed substantiated for each calendar day is equal to the lesser of the *per diem* allowance for that day or the amount computed at the federal M&IE rate for the locality of travel for that day (or partial day). A *per diem* allowance is treated as paid only for meal and incidental expenses if (1) the payor pays the employee for actual expenses for lodging based on receipts submitted to the payor, (2) the payor provides the lodging in kind, (3) the payor pays the actual expenses for lodging directly to the provider of the lodging, (4) the payor does not have a reasonable belief that lodging expenses were or will be incurred by the employee, or (5) the allowance is computed on a basis similar to that used in computing the employee's wages or other compensation (such as the number of hours worked, miles traveled, or pieces produced).

.03 *Optional method for meal and incidental expenses only deduction.* In lieu of using actual expenses in computing the amount allowable as a deduction for ordinary and necessary meal and incidental expenses paid or incurred for travel

away from home, employees and self-employed individuals who pay or incur meal expenses may use an amount computed at the federal M&IE rate for the locality of travel for each calendar day (or partial day) the employee or self-employed individual is away from home. This amount will be deemed substantiated for purposes of paragraphs (b)(2) and (c) of § 1.274–5, provided the employee or self-employed individual substantiates the elements of time, place, and business purpose of the travel for that day (or partial day) in accordance with those regulations. See section 6.05(1) of this revenue procedure for rules related to the application of the limitation under § 274(n) to amounts determined under this section 4.03. See section 4.05 of this revenue procedure for a method for substantiating incidental expenses that may be used by employees or self-employed individuals who do not pay or incur meal expenses.

.04 *Special rules for transportation industry*.

(1) *In general*. This section 4.04 applies to (a) a payor that pays a *per diem* allowance only for meal and incidental expenses for travel away from home as described in section 4.02 of this revenue procedure to an employee in the transportation industry, or (b) an employee or self-employed individual in the transportation industry who computes the amount allowable as a deduction for meal and incidental expenses for travel away from home in accordance with section 4.03 of this revenue procedure.

(2) *Transportation industry defined*. For purposes of this section 4.04, an employee or self-employed individual is in the transportation industry only if the employee's or individual's work (a) is of the type that directly involves moving people or goods by airplane, barge, bus, ship, train, or truck, and (b) regularly requires travel away from home which, during any single trip away from home, usually involves travel to localities with differing federal M&IE rates. For purposes of the preceding sentence, a payor must determine that an employee or a group of employees is in the transportation industry by using a method that is consistently applied and in accordance with reasonable business practice.

(3) *Rates*. A taxpayer described in section 4.04(1) of this revenue procedure may treat $52 as the federal M&IE rate for any CONUS locality of travel, and $58 as the federal M&IE rate for any OCONUS locality of travel. A payor that uses either (or both) of these special rates with respect to an employee must use the special rate(s) for all amounts subject to section 4.02 of this revenue procedure paid to that employee for travel away from home within CONUS and/or OCONUS, as the case may be, during the calendar year. Similarly, an employee or self-employed individual that uses either (or both) of these special rates must use the special rate(s) for all amounts computed pursuant to section 4.03 of this revenue procedure for travel away from home within CONUS and/or OCONUS, as the case may be, during the calendar year. See section 4.04(6) of this revenue procedure for transition rules.

(4) *Periodic rule*. A payor described in section 4.04(1) of this revenue procedure may compute the amount of the employee's expenses that is deemed substantiated under section 4.02 of this revenue procedure periodically (not less frequently than monthly), rather than daily, by comparing the total *per diem* allowance paid for the period to the sum of the amounts computed either at the federal M&IE rate(s) for the localities of travel, or at the special rate described in section 4.04(3), for the days (or partial days) the employee is away from home during the period.

(5) *Examples*.

(a) *Example 1*. Taxpayer, an employee in the transportation industry, travels away from home on business within CONUS on 17 days (including partial days) during a calendar month and receives a *per diem* allowance only for meal and incidental expenses from a payor that uses the special rule under section 4.04(3) of this revenue procedure. The amount deemed substantiated under section 4.02 of this revenue procedure is equal to the lesser of the total *per diem* allowance paid for the month or $884 (17 days at $52 per day).

(b) *Example 2*. Taxpayer, a truck driver employee in the transportation industry, is paid a "cents-per-mile" allowance that qualifies as an allowance paid under a flat rate or stated schedule as defined in section 3.03 of this revenue procedure. Taxpayer travels away from home on business for 10 days. Based on the number of miles driven by Taxpayer, Taxpayer's employer pays an allowance of $500 for the 10 days of business travel. Taxpayer actually drives for 8 days, and does not drive for the other 2 days Taxpayer is away from home. Taxpayer is paid under the periodic rule used for transportation industry employers and employees in accordance with section 4.04(4) of this revenue procedure. The amount deemed substantiated is the full $500 because that amount does not exceed $520 (ten days away from home at $52 per day).

(6) *Transition rules*. Under the calendar-year convention provided in section 4.04(3), a taxpayer who used the federal M&IE rates during the first 9 months of calendar year 2007 to substantiate the amount of an individual's travel expenses under sections 4.02 or 4.03 of Rev. Proc. 2006–41 may not use, for that individual, the special transportation industry rates provided in this section 4.04 until January 1, 2008. Similarly, a taxpayer who used the special transportation industry rates during the first 9 months of calendar year 2007 to substantiate the amount of an individual's travel expenses may not use, for that individual, the federal M&IE rates until January 1, 2008.

.05 *Optional method for incidental expenses only deduction*. In lieu of using actual expenses in computing the amount allowable as a deduction for ordinary and necessary incidental expenses paid or incurred for travel away from home, employees and self-employed individuals who do not pay or incur meal expenses for a calendar day (or partial day) of travel away from home may use, for each calendar day (or partial day) the employee or self-employed individual is away from home, an amount computed at the rate of $3 per day for any CONUS or OCONUS locality of travel. This amount will be deemed substantiated for purposes of paragraphs (b)(2) and (c) of § 1.274–5, provided the employee or self-employed individual substantiates the elements of time, place, and business purpose of the travel for that day (or partial day) in accordance with those regulations. See section 4.03 of this revenue procedure for a method that may be used by employees or self-employed individuals who pay or incur meal expenses. The method authorized by this section 4.05 may not be used by payors that use section 4.01, 4.02, or 5.01 of this revenue procedure, or by employees or self-employed individuals who use the method described in section 4.03 of this revenue procedure. See section 6.05(4) of this revenue procedure for rules related to the application of the limitation under § 274(n) to amounts determined under this section 4.05.

SECTION 5. HIGH-LOW SUBSTANTIATION METHOD

.01 *In general*. If a payor pays a *per diem* allowance in lieu of reimbursing ac-

tual lodging, meal, and incidental expenses incurred or to be incurred by an employee for travel away from home and the payor uses the high-low substantiation method described in this section 5 for travel within CONUS, the amount of the expenses that is deemed substantiated for each calendar day is equal to the lesser of the *per diem* allowance for that day or the amount computed at the rate set forth in section 5.02 of this revenue procedure for the locality of travel for that day (or partial day, see section 6.04 of this revenue procedure). Except as provided in section 5.06 of this revenue procedure, this high-low substantiation method may be used in lieu of the *per diem* substantiation method provided in section 4.01 of this revenue procedure, but may not be used in lieu of the meal and incidental expenses only *per diem* substantiation method provided in section 4.02 of this revenue procedure.

.02 *Specific high-low rates*. Except as provided in section 5.06 of this revenue procedure, the *per diem* rate set forth in this section 5.02 is $237 for travel to any "high-cost locality" specified in section 5.03 of this revenue procedure, or $152 for travel to any other locality within CONUS. The high or low rate, as appropriate, applies as if it were the federal *per diem* rate for the locality of travel. For purposes of applying the high-low substantiation method and the § 274(n) limitation on meal expenses (see section 6.05(3) of this revenue procedure), the amount of the high and low rates that is treated as paid for meals is $58 for a high-cost locality and $45 for any other locality within CONUS.

.03 *High-cost localities*. The following localities have a federal *per diem* rate of $194 or more, and are high-cost localities for all of the calendar year or the portion of the calendar year specified in parentheses under the key city name:

Key City	*County or other defined location*
Arizona	
Phoenix/Scottsdale (January 1-March 31)	Maricopa
Sedona (March 1-April 30)	City Limits of Sedona
California	
Napa	Napa
Palm Springs (January 1-April 30)	Riverside
San Diego	San Diego
San Francisco	San Francisco
Santa Barbara	Santa Barbara
Santa Monica	City limits of Santa Monica
South Lake Tahoe (December 1-March 31)	El Dorado
Yosemite National Park	Mariposa
Colorado	
Aspen (December 1-April 30)	Pitkin
Crested Butte/Gunnison (December 1-March 31)	Gunnison
Silverthorne/Breckenridge (December 1-March 31)	Summit
Steamboat Springs (December 1-February 29)	Routt
Telluride (October 1-March 31)	San Miguel
Vail	Eagle
District of Columbia	
Washington, D.C. (also the cities of Alexandria, Falls Church, and Fairfax, and the counties of Arlington and Fairfax, in Virginia; and the counties of Montgomery and Prince George's in Maryland) (See also Maryland and Virginia)	

Key City	*County or other defined location*
Florida	
Fort Lauderdale (October 1-April 30)	Broward
Fort Walton Beach/De Funiak Springs (June 1-July 31)	Okaloosa and Walton
Key West	Monroe
Miami (October 1-February 29)	Miami-Dade
Naples (February 1-March 31)	Collier
Palm Beach (January 1-March 31)	Boca Raton, Delray Beach, Jupiter, Palm Beach Gardens, Palm Beach, Palm Beach Shores, Singer Island and West Palm Beach
Stuart (February 1-March 31)	Martin
Illinois	
Chicago	Cook and Lake
Maryland	
(For the counties of Montgomery and Prince George's, see District of Columbia)	
Baltimore City	Baltimore
Cambridge/St. Michaels (April 1-August 31)	Dorchester and Talbot
Ocean City (June 1-August 31)	Worcester
Massachusetts	
Boston/Cambridge	Suffolk, City of Cambridge
Martha's Vineyard (July 1-August 31)	Dukes
Nantucket	Nantucket
Nevada	
Incline Village/Crystal Bay/Reno/Sparks (June 1-August 31)	Washoe
New Hampshire	
Conway (July 1-August 31)	Caroll
New York	
Floral Park/Garden City/Glen Cove/Great Neck/Roslyn	Nassau
Manhattan	The Boroughs of Manhattan, Brooklyn, the Bronx and Staten Island
Queens	Queens
Saratoga Springs/Schenectady (July 1-August 31)	Saratoga and Schenectady
Tarrytown/White Plains/New Rochelle/Yonkers	Westchester
Pennsylvania	
Philadelphia	Philadelphia

Key City	*County or other defined location*
Rhode Island	
Jamestown/Middletown/Newport (October 1-November 30 and February 1-September 30)	Newport
Providence	Providence
Utah	
Park City (January 1-March 31)	Summit
Virginia	
(For the cities of Alexandria, Falls Church, and Fairfax, and the counties of Arlington and Fairfax, see District of Columbia)	
Loudon County	Loudon
Virginia Beach (June 1-August 31)	City of Virginia Beach
Washington	
Seattle	King
Wisconsin	
Lake Geneva (June 1-September 30)	Walworth

.04 *Changes in high-cost localities*. The list of high-cost localities in section 5.03 of this revenue procedure differs from the list of high-cost localities in section 5.03 of Rev. Proc. 2006–41 (changes listed by key cities).

(1) The following localities have been added to the list of high-cost localities: Sedona, Arizona; Napa, California; Palm Springs, California; San Diego, California; Yosemite National Park, California; Silverthorne/Breckenridge, Colorado; Incline Village/Crystal Bay/Reno/Sparks, Nevada; Conway, New Hampshire; Tarrytown/White Plains/New Rochelle/Yonkers, New York; Loudon County, Virginia; Virginia Beach, Virginia; and Lake Geneva, Wisconsin.

(2) The portion of the year for which the following are high-cost localities has been changed: Santa Barbara, California; Crested Butte/Gunnison, Colorado; Steamboat Springs, Colorado; Telluride, Colorado; Vail, Colorado; Fort Lauderdale, Florida; Miami, Florida; Palm Beach, Florida; Cambridge/St. Michaels, Maryland; Ocean City, Maryland; Nantucket, Massachusetts; Jamestown/Middletown/Newport, Rhode Island; and Park City, Utah.

(3) The following localities have been removed from the list of high-cost localities: New Orleans, Louisiana and Lake Placid, New York.

.05 *Specific limitation*.

(1) Except as provided in section 5.05(2) of this revenue procedure, a payor that uses the high-low substantiation method with respect to an employee must use that method for all amounts paid to that employee for travel away from home within CONUS during the calendar year. See section 5.06 of this revenue procedure for transition rules.

(2) With respect to an employee described in section 5.05(1) of this revenue procedure, the payor may reimburse actual expenses or use the meal and incidental expenses only *per diem* substantiation method described in section 4.02 of this revenue procedure for any travel away from home, and may use the *per diem* substantiation method described in section 4.01 of this revenue procedure for any OCONUS travel away from home.

.06 *Transition rules*. A payor who used the substantiation method of section 4.01 of Rev. Proc. 2006–41 for an employee during the first 9 months of calendar year 2007 may not use the high-low substantiation method in section 5 of this revenue procedure for that employee until January 1, 2008. A payor who used the high-low substantiation method of section 5 of Rev. Proc. 2006–41 for an employee during the first 9 months of calendar year 2007 must continue to use the high-low substantiation method for the remainder of calendar year 2007 for that employee. A payor described in the previous sentence may use the rates and high-cost localities published in section 5 of Rev. Proc. 2006–41, in lieu of the updated rates and high-cost localities provided in section 5 of this revenue procedure, for travel on or after October 1, 2007, and before January 1, 2008, if those rates and localities are used consistently during this period for all employees reimbursed under this method.

SECTION 6. LIMITATIONS AND SPECIAL RULES

.01 *In general*. The federal *per diem* rate and the federal M&IE rate described in section 3.02 of this revenue procedure for the locality of travel will be applied in the same manner as applied under the Federal Travel Regulations, 41 C.F.R. Part 301–11 (2007), except as provided in sections 6.02 through 6.04 of this revenue procedure.

.02 *Federal per diem rate*. A receipt for lodging expenses is not required in determining the amount of expenses deemed substantiated under section 4.01 or 5.01 of this revenue procedure. See section 7.01 of this revenue procedure for the require-

ment that the employee substantiate the time, place, and business purpose of the expense.

.03 *Federal per diem or M&IE rate*. A payor is not required to reduce the federal *per diem* rate or the federal M&IE rate for the locality of travel for meals provided in kind, provided the payor has a reasonable belief that meal and incidental expenses were or will be incurred by the employee during each day of travel.

.04 *Proration of the federal per diem or M&IE rate*. Pursuant to the Federal Travel Regulations, in determining the federal *per diem* rate or the federal M&IE rate for the locality of travel, the full applicable federal M&IE rate is available for a full day of travel from 12:01 a.m. to 12:00 midnight. The method described in section 6.04(1) of this revenue procedure must be used for purposes of determining the amount deemed substantiated under section 4.03 or 4.05 of this revenue procedure for partial days of travel away from home. For purposes of determining the amount deemed substantiated under section 4.01, 4.02, 4.04, or 5 of this revenue procedure for partial days of travel away from home, either of the following methods may be used to prorate the federal M&IE rate to determine the federal *per diem* rate or the federal M&IE rate for the partial days of travel:

(1) The rate may be prorated using the method prescribed by the Federal Travel Regulations. Currently the Federal Travel Regulations allow three-fourths of the applicable federal M&IE rate for each partial day during which the employee or self-employed individual is traveling away from home in connection with the performance of services as an employee or self-employed individual. The same ratio may be applied to prorate the allowance for incidental expenses described in section 4.05 of this revenue procedure; or

(2) The rate may be prorated using any method that is consistently applied and in accordance with reasonable business practice. For example, if an employee travels away from home from 9 a.m. one day to 5 p.m. the next day, a method of proration that results in an amount equal to two times the federal M&IE rate will be treated as being in accordance with reasonable business practice (even though only one and a half times the federal M&IE rate would be allowed under the Federal Travel Regulations).

.05 *Application of the appropriate § 274(n) limitation on meal expenses*. Except as provided in section 6.05(4), all or part of the amount of an expense deemed substantiated under this revenue procedure is subject to the appropriate limitation under § 274(n) (see section 2.02 of this revenue procedure) on the deductibility of food and beverage expenses.

(1) If an amount for meal and incidental expenses is computed pursuant to section 4.03 of this revenue procedure, the taxpayer must treat that amount as an expense for food and beverages.

(2) If a *per diem* allowance is paid only for meal and incidental expenses, the payor must treat an amount equal to the lesser of the allowance or the federal M&IE rate for the locality of travel for each day (or partial day, see section 6.04 of this revenue procedure) as an expense for food and beverages.

(3) If a *per diem* allowance is paid for lodging, meal, and incidental expenses for each calendar day (or partial day) the employee is away from home at a rate equal to or in excess of the federal *per diem* rate for the locality of travel, the payor must treat an amount equal to the federal M&IE rate for the locality of travel for each calendar day (or partial day) as an expense for food or beverages.

(4) If a *per diem* allowance is paid for lodging, meal, and incidental expenses for each calendar day (or partial day) the employee is away from home at a rate less than the federal *per diem* rate for the locality of travel, the payor must:

(a) treat an amount equal to the federal M&IE rate for the locality of travel for each calendar day (or partial day) or, if less, the amount of the allowance, as an expense for food or beverages; or

(b) treat an amount equal to 40 percent of the allowance as an expense for food or beverages.

(5) If an amount for incidental expenses is computed under section 4.05 of this revenue procedure, none of the amount so computed is subject to limitation under § 274(n) on the deductibility of food and beverage expenses.

.06 *No double reimbursement or deduction*. If a payor pays a *per diem* allowance in lieu of reimbursing actual lodging, meal, and incidental expenses, or meal and incidental expenses, in accordance with section 4 or 5 of this revenue procedure, and such amounts are treated as paid under an accountable plan, any additional payment with respect to those expenses is treated as paid under a nonaccountable plan, is included in the employee's gross income, is reported as wages or other compensation on the employee's Form W–2, and is subject to withholding and payment of employment taxes. Similarly, if an employee or self-employed individual computes the amount allowable as a deduction for meal and incidental expenses for travel away from home in accordance with section 4.03 or 4.04 of this revenue procedure, no other deduction is allowed to the employee or self-employed individual with respect to those expenses. For example, assume an employee receives a *per diem* allowance from a payor for lodging, meal, and incidental expenses, or for meal and incidental expenses, incurred while traveling away from home and such amounts are treated as paid under an accountable plan. During that trip, the employee pays for dinner for the employee and two business associates. The payor reimburses as a business entertainment meal expense the meal expense for the employee and the two business associates. Because the payor also pays a *per diem* allowance to cover the cost of the employee's meals, the amount paid by the payor for the employee's portion of the business entertainment meal expense is treated as paid under a nonaccountable plan, is reported as wages or other compensation on the employee's Form W–2, and is subject to withholding and payment of employment taxes.

.07 *Related parties*. Sections 4.01 and 5 of this revenue procedure do not apply if a payor and an employee are related within the meaning of § 267(b), but for this purpose the percentage of ownership interest referred to in § 267(b)(2) is 10 percent.

SECTION 7. APPLICATION

.01 If the amount of travel expenses is deemed substantiated under the rules provided in section 4 or 5 of this revenue procedure, and the employee substantiates to the payor the elements of time, place, and business purpose of the travel for that day (or partial day) in accordance with paragraphs (b)(2) and (c) (other than subparagraph (2)(iii)(A) thereof) of § 1.274–5, the

employee is deemed to satisfy the adequate accounting requirements of § 1.274–5(f) as well as the requirement to substantiate by adequate records or other sufficient evidence for purposes of § 1.274–5(c). See also § 1.62–2(e)(1) for the rule that in order to satisfy the substantiation requirement of an accountable plan, an arrangement must require business expenses to be substantiated to the payor within a reasonable period of time.

.02 An arrangement providing *per diem* allowances will be treated as satisfying the requirement of § 1.62–2(f)(2) of returning amounts in excess of expenses if the employee is required to return within a reasonable period of time (as defined in § 1.62–2(g)) any portion of the allowance that relates to days of travel not substantiated, even though the arrangement does not require the employee to return the portion of the allowance that relates to days of travel substantiated and that exceeds the amount of the employee's expenses deemed substantiated. For example, assume a payor provides an employee an advance *per diem* allowance for meal and incidental expenses of $250, based on an anticipated 5 days of business travel at $50 per day to a locality for which the federal M&IE rate is $39, and the employee substantiates 3 full days of business travel. The requirement to return excess amounts is treated as satisfied if the employee is required to return within a reasonable period of time (as defined in § 1.62–2(g)) the portion of the allowance that is attributable to the 2 unsubstantiated days of travel ($100), even though the employee is not required to return the portion of the allowance ($33) that exceeds the amount of the employee's expenses deemed substantiated under section 4.02 of this revenue procedure ($117) for the 3 substantiated days of travel. However, the $33 excess portion of the allowance is treated as paid under a nonaccountable plan as discussed in section 7.04 of this revenue procedure.

.03 An employee is not required to include in gross income the portion of a *per diem* allowance received from a payor that is less than or equal to the amount deemed substantiated under the rules provided in section 4 or 5 of this revenue procedure if the employee substantiates the business travel expenses covered by the *per diem* allowance in accordance with section 7.01 of this revenue procedure. See § 1.274–5(f)(2)(i). Assuming that the remaining requirements for an accountable plan provided in § 1.62–2 are satisfied, that portion of the allowance is treated as paid under an accountable plan, is not reported as wages or other compensation on the employee's Form W–2, and is exempt from the withholding and payment of employment taxes. See § 1.62–2(c)(2) and (c)(4).

.04 An employee is required to include in gross income only the portion of the *per diem* allowance received from a payor that exceeds the amount deemed substantiated under the rules provided in section 4 or 5 of this revenue procedure if the employee substantiates the business travel expenses covered by the *per diem* allowance in accordance with section 7.01 of this revenue procedure. See § 1.274–5(f)(2)(ii). In addition, the excess portion of the allowance is treated as paid under a nonaccountable plan, is reported as wages or other compensation on the employee's Form W–2, and is subject to withholding and payment of employment taxes. See § 1.62–2(c)(3)(ii), (c)(5), and (h)(2)(i)(B).

.05 If the amount of the expenses that is deemed substantiated under the rules provided in section 4.01, 4.02, or 5 of this revenue procedure is less than the amount of the employee's business expenses for travel away from home, the employee may claim an itemized deduction for the amount by which the business travel expenses exceed the amount that is deemed substantiated, provided the employee substantiates all the business travel expenses (not just the excess over the federal *per diem* rate), includes on Form 2106, "*Employee Business Expenses*," the deemed substantiated portion of the *per diem* allowance received from the payor, and includes in gross income the portion (if any) of the *per diem* allowance received from the payor that exceeds the amount deemed substantiated. See § 1.274–5(f)(2)(iii). However, for purposes of claiming this itemized deduction with respect to meal and incidental expenses, substantiation of the amount of the expenses is not required if the employee is claiming a deduction that is equal to or less than the amount computed under section 4.03 of this revenue procedure minus the amount deemed substantiated under sections 4.02 and 7.01 of this revenue procedure. The itemized deduction is subject to the appropriate limitation (see section 2.02 of this revenue procedure) on meal and entertainment expenses provided in § 274(n) and the 2-percent floor on miscellaneous itemized deductions provided in § 67.

.06 An employee who pays or incurs amounts for meal expenses and does not receive a *per diem* allowance for meal and incidental expenses may deduct an amount computed pursuant to section 4.03 of this revenue procedure only as an itemized deduction. This itemized deduction is subject to the appropriate limitation on meal and entertainment expenses provided in § 274(n) and the 2-percent floor on miscellaneous itemized deductions provided in § 67. See section 7.07 of this revenue procedure for the treatment of an employee who does not pay or incur amounts for meal expenses and does not receive a *per diem* allowance for incidental expenses.

.07 An employee who does not pay or incur amounts for meal expenses and does not receive a *per diem* allowance for incidental expenses may deduct an amount computed pursuant to section 4.05 of this revenue procedure only as an itemized deduction. This itemized deduction is subject to the 2-percent floor on miscellaneous itemized deductions provided in § 67. See section 7.06 of this revenue procedure for the treatment of an employee who pays or incurs amounts for meal expenses and does not receive a *per diem* allowance for meal and incidental expenses.

.08 A self-employed individual who pays or incurs meal expenses for a calendar day (or partial day) of travel away from home may deduct an amount computed pursuant to section 4.03 of this revenue procedure in determining adjusted gross income under § 62(a)(1). This deduction is subject to the appropriate limitation on meal and entertainment expenses provided in § 274(n).

.09 A self-employed individual who does not pay or incur meal expenses for a calendar day (or partial day) of travel away from home may deduct an amount computed pursuant to section 4.05 of this revenue procedure in determining adjusted gross income under § 62(a)(1).

.10 If a payor's reimbursement or other expense allowance arrangement evidences a pattern of abuse of the rules of § 62(c) and the regulations thereunder, all payments under the arrangement will be treated as made under a nonaccountable plan. See § 1.62–2(k) and Rev. Rul.

2006–56. Thus, these payments are included in the employee's gross income, are reported as wages or other compensation on the employee's Form W–2, and are subject to withholding and payment of employment taxes. See § 1.62–2(c)(3), (c)(5), and (h)(2), and section 8.06 of this revenue procedure.

SECTION 8. WITHHOLDING AND PAYMENT OF EMPLOYMENT TAXES

.01 The portion of a *per diem* allowance, if any, that relates to the days of business travel substantiated and that exceeds the amount deemed substantiated for those days under section 4.01, 4.02, or 5 of this revenue procedure is treated as paid under a nonaccountable plan and is subject to withholding and payment of employment taxes. See § 1.62–2(h)(2)(i)(B).

.02 In the case of a *per diem* allowance paid as a reimbursement, the excess described in section 8.01 of this revenue procedure is subject to withholding and payment of employment taxes in the payroll period in which the payor reimburses the expenses for the days of travel substantiated. See § 1.62–2(h)(2)(i)(B)(2).

.03 In the case of a *per diem* allowance paid as an advance, the excess described in section 8.01 of this revenue procedure is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the days of travel with respect to which the advance was paid are substantiated. See § 1.62–2(h)(2)(i)(B)(3). If some or all of the days of travel with respect to which the advance was paid are not substantiated within a reasonable period of time and the employee does not return the portion of the allowance that relates to those days within a reasonable period of time, the portion of the allowance that relates to those days is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period. See § 1.62–2(h)(2)(i)(A).

.04 In the case of a *per diem* allowance only for meal and incidental expenses for travel away from home paid to an employee in the transportation industry by a payor that uses the rule in section 4.04(4) of this revenue procedure, the excess of the *per diem* allowance paid for the period over the amount deemed substantiated for the period under section 4.02 of this revenue procedure (after applying section 4.04(4) of this revenue procedure), is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the excess is computed. See § 1.62–2(h)(2)(i)(B)(4).

.05 For example, assume that an employer pays an employee a *per diem* allowance under an arrangement that otherwise meets the requirements of an accountable plan to cover business expenses for meals and lodging for travel away from home at a rate of 120 percent of the federal *per diem* rate for the localities to which the employee travels. The employer does not require the employee to return the 20 percent by which the reimbursement for those expenses exceeds the federal *per diem* rate. The employee substantiates 6 days of travel away from home: 2 days in a locality in which the federal *per diem* rate is $160 and 4 days in a locality in which the federal *per diem* rate is $120. The employer reimburses the employee $960 for the 6 days of travel away from home (2 x (120% x $160) + 4 x (120% x $120)), and does not require the employee to return the excess payment of $160 (2 days x $32 ($192-$160) + 4 days x $24 ($144-$120)). For the payroll period in which the employer reimburses the expenses, the employer must withhold and pay employment taxes on $160. See section 8.02 of this revenue procedure.

.06 If a *per diem* allowance arrangement has no mechanism or process to determine when an allowance exceeds the amount that may be deemed substantiated and the arrangement routinely pays allowances in excess of the amount that may be deemed substantiated without requiring actual substantiation of all the expenses or repayment of the excess amount, the failure of the arrangement to treat the excess allowances as wages for employment tax purposes causes all payments made under the arrangement to be treated as made under a nonaccountable plan. See Rev. Rul. 2006–56.

SECTION 9. EFFECTIVE DATE

This revenue procedure is effective for *per diem* allowances for lodging, meal and incidental expenses, or for meal and incidental expenses only, that are paid to an employee on or after October 1, 2007, with respect to travel away from home on or after October 1, 2007. For purposes of computing the amount allowable as a deduction for travel away from home, this revenue procedure is effective for meal and incidental expenses or for incidental expenses only paid or incurred on or after October 1, 2007.

SECTION 10. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2006–41 is superseded.

DRAFTING INFORMATION

The principal author of this revenue procedure is Jeffrey T. Rodrick of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information regarding this revenue procedure, contact Mr. Rodrick at (202) 622–4930 (not a toll-free call).

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26 CFR 601.204: Changes in accounting periods and in methods of accounting.
(Also Part I, §§ 442, 898; 1.442–1.)

Rev. Proc. 2007–64

SECTION 1. PURPOSE

This revenue procedure modifies a scope provision and one of the terms and conditions under which the Internal Revenue Service grants approval of requests by corporations for changes in annual accounting periods filed under Rev. Proc. 2006–45, 2006–45 I.R.B. 851. Specifically, this revenue procedure modifies the scope provision regarding a corporation that exits a consolidated group. See section 4.02(13) of Rev. Proc. 2006–45. In addition, this revenue procedure modifies the terms and conditions relating to recordkeeping and book conformity in the case of a controlled foreign corporation ("CFC") that has a majority U.S. shareholder year (as defined in § 898(c)(3) of the Internal Revenue Code) and that is changing to a one-month deferral year described in § 898(c)(2) or to a 52–53-week taxable year that references such one-month deferral year. See section 6.02 of Rev. Proc. 2006–45.

SECTION 2. BACKGROUND

.01 Section 442 and § 1.442–1(a) of the Income Tax Regulations generally provide that a taxpayer that wants to change its annual accounting period and use a new taxable year must obtain the approval of the Commissioner.

.02 Section 1.442–1(b)(2) provides that a change in annual accounting period will be approved only if the taxpayer agrees to the Commissioner's prescribed terms, conditions, and adjustments for effecting the change.

.03 Rev. Proc. 2006–45 provides the exclusive procedures for certain corporations to obtain automatic approval of the Commissioner to change their annual accounting periods.

.04 Section 4.02(13) of Rev. Proc. 2006–45 excludes from the scope of the revenue procedure a corporation that ceases to be a member of a consolidated group during the consolidated group's first effective year (as defined in section 5.05 of Rev. Proc. 2006–45).

.05 The Service has determined that it is appropriate to modify the scope of Rev. Proc. 2006–45 to clarify that any corporation leaving a consolidated group is excluded from the automatic change procedures under Rev. Proc. 2006–45 during the consolidated group's taxable year (without regard to a change in the consolidated group's accounting period) in which the corporation ceases to be a member of the consolidated group. A corporation that ceases to be a member of a consolidated group must continue to use the annual accounting period of the consolidated group, unless the corporation receives approval under Rev. Proc. 2002–39, 2002–1 C.B. 1046, to change its annual accounting period (or is required to change its annual accounting period upon joining another consolidated group).

.06 Section 898(c)(2) provides that a specified foreign corporation (*i.e.*, a CFC) may elect, in lieu of the taxable year under § 898(c)(1)(A) (*i.e.*, the majority U.S. shareholder year as defined in § 898(c)(3)), a taxable year beginning one month earlier than the majority U.S. shareholder year (*i.e.*, one-month deferral year described in § 898(c)(2)).

.07 Section 4.02(8) of Rev. Proc. 2006–45 includes in the scope of the revenue procedure a CFC that has a majority U.S. shareholder year and that is changing to a one-month deferral year or to a 52–53-week taxable year that references such one-month deferral year.

.08 With respect to the terms and conditions of change under Rev. Proc. 2006–45, section 6.02(1) of that revenue procedure generally requires that a corporation compute its income and keep its books and records (including financial statements and reports to creditors) on the basis of the requested taxable year. That section further requires that the books and records of the corporation be closed as of the last day of the first effective year and that the corporation conform the accounting period used for financial statement purposes and reports to creditors concurrently.

.09 The Service has determined that in the case of a CFC changing to a one-month deferral year or to a 52–53-week taxable year that references such one-month deferral year, the CFC is not required to issue financial statements and reports to creditors on the basis of the requested year as otherwise required by section 6.02(1) of Rev. Proc. 2006–45. However, as required by section 6.02(1) of Rev. Proc. 2006–45, the CFC must close its books and records as of the last day of the first effective year and, every year after the first effective year, must close its books and records as of the last day of the requested taxable year, either a one-month deferral year or a 52–53-week taxable year that references such one-month deferral year. The CFC must also compute its income and earnings and profits for U.S. tax purposes on the basis of the requested year.

SECTION 3. SCOPE

.01 *Corporations leaving a consolidated group.* This revenue procedure applies to a corporation leaving a consolidated group that wants to change its annual accounting period in the year the corporation ceases to be a member of the consolidated group.

.02 *CFCs changing to one-month deferral year or to a 52–53-week taxable year that references such one-month deferral year.* This revenue procedure also applies to a CFC that has a majority U.S. shareholder year, and that is properly applying under Rev. Proc. 2006–45 to change to a one-month deferral year or to a 52–53-week taxable year that references such one-month deferral year.

SECTION 4. MODIFICATIONS

.01 Section 4.02(13) is modified to read as follows: "*Corporation that exits a consolidated group.* A corporation that ceases to be a member of a consolidated group and wants to change its annual accounting period during the consolidated group's taxable year in which the corporation ceases to be a member of the consolidated group. For purposes of the prior sentence, the consolidated group's taxable year is determined without regard to a change in the consolidated group's annual accounting period. A corporation that ceases to be a member of a consolidated group must continue to use the annual accounting period of the consolidated group, unless the corporation receives approval under Rev. Proc. 2002–39 to change its annual accounting period (or is required to change its annual accounting period upon joining another consolidated group). A corporation that ceases to be a member of a consolidated group during the consolidated group's first effective year is not a member of the consolidated group for purposes of the consolidated group's change in accounting period. See section 7.02(7) of this revenue procedure.

(a) *Example 1.* On March 31, 2006, ABC Corporation ceases to be a member of a consolidated group that has a taxable year ending on November 30. ABC Corporation is not eligible to change its annual accounting period under this revenue procedure to a taxable year beginning before December 1, 2006.

(b) *Example 2.* Assume the same facts as *Example 1*, except that the consolidated group changes its annual accounting period to a taxable year ending on August 31, effective August 31, 2006. ABC Corporation is not eligible to change its annual accounting period under this revenue procedure to a taxable year beginning before December 1, 2006.

(c) *Example 3.* Assume the same facts as *Example 2*, except that the consolidated group changes its annual accounting period to a taxable year ending on January 31, effective January 31, 2006. ABC Corporation is not eligible to change its annual accounting period under this revenue procedure to a taxable year beginning before February 1, 2007."

.02 Section 6.02 of Rev. Proc. 2006–45 is modified to add paragraph (4) as follows: "(4) *CFCs changing to a year described in § 898(c)(2) or to a 52–53-week taxable year that references such one-month deferral year.* The terms and conditions regarding financial statements and reports to creditors in section

6.02(1) of this revenue procedure do not apply in the case of a CFC that has a majority U.S. shareholder year (as defined in § 898(c)(3)), and that is changing to a one-month deferral year described in § 898(c)(2) or to a 52–53-week taxable year that references such one-month deferral year. Such a CFC is nevertheless required to close its books and records as of the last day of the first effective year and every year thereafter to close its books and records on the last day of the requested taxable year, and to compute its income and earnings and profits for U.S. tax purposes on the basis of the requested taxable year.

SECTION 5. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2006–45 is modified and clarified.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective for changes in annual accounting periods for which the first effective year (as defined in section 5.05 of Rev. Proc. 2006–45) ends on or after October 18, 2006.

DRAFTING INFORMATION

The principal author of this revenue procedure is Jeffrey S. Marshall of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information regarding this revenue procedure, contact Mr. Marshall at (202) 622–4960 (not a toll-free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking

Benefit Restrictions for Underfunded Pension Plans

REG–113891–07

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations providing guidance regarding the use of certain funding balances maintained for defined benefit pension plans and regarding benefit restrictions for certain underfunded defined benefit pension plans. The proposed regulations reflect changes made by the Pension Protection Act of 2006. These regulations affect sponsors, administrators, participants, and beneficiaries of single employer defined benefit pension plans.

DATES: Written or electronic comments and requests for a public hearing must be received by November 28, 2007.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–113891–07), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. to 4 p.m. to CC:PA:LPD:PR (REG–113891–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–113891–07).

FOR FURTHER INFORMATION CONTACT: Lauson C. Green or Linda S.F. Marshall at (202) 622–6090; concerning submissions and requests for a public hearing, contact Kelly Banks at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by October 29, 2007. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this proposed regulation is in §1.430(f)–1(f) and §§1.436–1(f) and 1.436–1(h). This information is required in order for a qualified defined benefit plan's enrolled actuary to provide a timely certification of the plan's AFTAP for each plan year to avoid certain benefit restrictions. In addition, these proposed regulations provide for several written elections to be made by the plan sponsor upon occasion. This information is voluntary to obtain a benefit. The likely respondents are qualified retirement plan sponsors and enrolled actuaries.

Estimated total annual reporting burden: 60,000 hours.

Estimated average annual burden hours per respondent: 0.75 hours.

Estimated number of respondents: 80,000.

Estimated annual frequency of responses: occasional.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains proposed Income Tax Regulations (26 CFR part 1) under sections 430(f) and 436, as added to the Code by the Pension Protection Act of 2006 (PPA '06), Public Law 109–280, 120 Stat. 780.

Section 412 contains minimum funding rules that generally apply to defined benefit plans.[1] The minimum funding rules that apply specifically to single employer defined benefit plans (including multiple employer plans within the meaning of section 413(c)) are set forth in new section 430.

Section 430 generally provides that the minimum required contribution for a year is the sum of the target normal cost for the year and the shortfall and waiver amortization charges. Under section 430(f)(3), certain funding balances referred to as the prefunding balance and the funding standard carryover balance are permitted to be used to reduce the otherwise applica-

[1] Section 302 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), sets forth funding rules that are parallel to those in section 412 of the Code, section 303 of ERISA sets forth additional funding rules for defined benefit plans (other than multiemployer plans) that are parallel to those in section 430 of the Code, and section 206(g) of ERISA sets forth funding-based limitations for defined benefit plans (other than multiemployer plans) that are parallel to those in section 436 of the Code. Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713) and section 302 of ERISA, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these proposed regulations for purposes of ERISA, as well as the Code. Thus, these proposed Treasury regulations issued under sections 430(f) and 436 of the Code apply as well for purposes of ERISA sections 303(f) and 206(g), respectively.

ble minimum required contribution for a plan year in certain situations. Under section 430(f)(7), the funding standard carryover balance is based on the funding standard account credit balance as determined under section 412 for a plan as of the last day of the last plan year beginning in 2007. Under section 430(f)(6), the prefunding balance represents the accumulation of the contributions that an employer makes for a plan year that exceed the minimum required contribution for the year. Thus, an employer that makes additional contributions for a plan year is permitted in certain circumstances to use those excess contributions in order to satisfy the minimum funding requirement in a subsequent plan year.

The treatment of these balances under section 430 reflects congressional concern with the treatment of a funding standard account credit balance under the section 412 rules in effect prior to PPA '06. Accordingly, section 430(f)(3) sets forth new limits on the ability of a poorly funded plan to use the prefunding balance and the funding standard carryover balance for a plan year. In addition, section 430(f)(4) requires that the prefunding balance and the funding standard carryover balance be subtracted from the value of plan assets for certain purposes (including the determination of the plan's funding target attainment percentage (FTAP), as defined under section 430(d)(2)) and section 430(f)(8) requires that the prefunding balance and the funding standard carryover balance be adjusted for actual investment return on the plan assets. In order to give employers the opportunity to minimize the impact of the requirement to subtract the prefunding balance and funding standard carryover balance from the plan assets, section 430(f)(5) permits an employer to elect to reduce the balances.

Section 401(a)(29) requires that a defined benefit plan (other than a multiemployer plan) satisfy the requirements of section 436. Section 436 sets forth a series of limitations on the accrual and payment of benefits under an underfunded plan. Under section 436(g), these limitations (other than the limitations on accelerated benefit payments under section 436(d)) do not apply to a plan for the first 5 plan years of the plan, taking into account any predecessor plan.

Section 436(b) sets forth a limitation on plant shutdown and other unpredictable contingent event benefits in situations where the plan's adjusted funding target attainment percentage (AFTAP) for the plan year is less than 60 percent or would be less than 60 percent taking into account the occurrence of the event. For this purpose, an "unpredictable contingent event benefit" means any benefit payable solely by reason of (1) a plant shutdown (or a similar event) or (2) an event other than attainment of age, performance of service, receipt or derivation of compensation, or the occurrence of death or disability. Under section 436(b)(2), the limitation does not apply for a plan year if the plan sponsor makes a specified contribution (in addition to any minimum required contribution). If the AFTAP for a plan year is less than 60 percent, then the specified contribution is equal to the amount of the increase in the plan's funding target for the plan year attributable to the occurrence of the event. If the AFTAP for a plan year is 60 percent or more but would be less than 60 percent taking into account the occurrence of the event, then the specified contribution is the amount sufficient to result in an AFTAP of 60 percent taking into account the occurrence of the event.

Under section 436(c), a plan amendment that has the effect of increasing the liabilities of the plan by reason of any increase in benefits (including changes in vesting) may not take effect if the plan's AFTAP for the plan year is less than 80 percent or would be less than 80 percent taking into account the amendment. Under section 436(c)(2), the limitation does not apply for a plan year if the plan sponsor makes a specified contribution (in addition to any minimum required contribution). If the plan's AFTAP for the plan year is less than 80 percent, then the specified contribution is equal to the amount of the increase in the plan's funding target for the plan year attributable to the amendment. If the plan's AFTAP for the plan year is 80 percent or more but would be less than 80 percent taking into account the amendment, then the specified contribution is the amount sufficient to result in an AFTAP of 80 percent taking into account the amendment. In addition, under section 436(c)(3), the limitation does not apply to an amendment that provides for a benefit increase under a formula not based on compensation, but only if the rate of increase does not exceed the contemporaneous rate of increase in average wages of the participants covered by the amendment.

Under section 436(d), a plan is required to set forth certain limitations on accelerated benefit distributions. If the plan's AFTAP for a plan year is less than 60 percent, the plan must not make any prohibited payments after the valuation date for the plan year. If the plan's AFTAP for a plan year is at least 60 percent but is less than 80 percent, the plan must not pay any prohibited payment to the extent the payment exceeds the lesser of (1) 50 percent of the amount otherwise payable under the plan and (2) the present value of the maximum PBGC guarantee with respect to a participant. In addition, if the plan sponsor is in bankruptcy proceedings, the plan may not pay any prohibited payment unless the plan's enrolled actuary certifies that the AFTAP of the plan is at least 100 percent. However, section 436(d) does not apply to a plan for a plan year if the terms of the plan provide for no benefit accruals with respect to any participant for the period beginning on September 1, 2005, and extending throughout the plan year.

Under section 436(d)(5), a "prohibited payment" is (1) any payment, in excess of the monthly amount paid under a single life annuity (plus any social security supplements that are provided under the plan), to a participant or beneficiary, (2) any payment for the purchase of an irrevocable commitment from an insurer to pay benefits (an annuity contract), or (3) any other payment specified by the Secretary by regulations.

Under section 436(e), a plan is required to provide that if the plan's AFTAP is less than 60 percent for a plan year, all future benefit accruals under the plan must cease as of the valuation date for the plan year. Under section 436(e)(2), the limitation ceases to apply with respect to any plan year, effective as of the first day of the plan year, if the plan sponsor makes a contribution (in addition to any minimum required contribution for the plan year) equal to the amount sufficient to result in an AFTAP of 60 percent.

Section 436(f) sets forth a series of rules under which the limitations of section 436 will not apply to a plan. Under section 436(f)(1), an employer is permitted to provide security to the plan (in the form of a

surety bond, cash, or other forms satisfactory to the Treasury Department and the parties involved) that is treated as an asset of the plan for purposes of determining the plan's AFTAP. Under section 436(f)(2), if an employer uses the option in section 436(b)(2), 436(c)(2), or 436(e)(2) to make the specified contribution that would avoid a limitation under section 436, the specified contribution must be an actual contribution and the employer may not use a prefunding balance or funding standard carryover balance in lieu of making the specified contribution. In addition, a contribution to avoid a benefit limitation is disregarded in determining whether the minimum required contribution under section 430 has been made and in determining the plan's prefunding balance.

Section 436(f)(3) describes certain situations in which an employer is deemed to have made the election in section 430(f)(5) to reduce the plan's funding standard carryover balance or prefunding balance. Such an election has the effect of increasing the plan's FTAP (because the result of the election is a higher asset value used to determine the FTAP) and could lead to the plan not being subject to a benefit limitation under section 436. In particular, if the limitation under section 436(d) would otherwise apply to a plan, the plan sponsor is treated as having made an election (a deemed election) to reduce any prefunding balance or funding standard carryover balance by the amount necessary to prevent the benefit limitation from applying. A comparable rule applies to the other benefit limitations under sections 436(b), 436(c), and 436(e), but only in the case of a plan maintained pursuant to a collective bargaining agreement. In either case, this deeming rule applies only if the prefunding balance and funding standard carryover balances are large enough to avoid the application of a section 436 limitation.

Section 436(h) sets forth a series of presumptions that apply during the portion of the plan year that is before the plan's enrolled actuary has certified the plan's AFTAP for the year. Under section 436(h)(1), if a plan was subject to a limitation under section 436(b), 436(c), 436(d), or 436(e) for the plan year preceding the current plan year, the plan's AFTAP for the current year is presumed to be the same as for the preceding year until the plan's enrolled actuary certifies the plan's AFTAP for the current year. Under section 436(h)(3), if any of these limitations did not apply to the plan for the preceding year, but the plan's AFTAP for the preceding year was within 10 percentage points of the limitation's threshold, the plan's AFTAP is presumed to be reduced by 10 percentage points as of the first day of the 4th month of the current plan year, unless the plan's enrolled actuary has certified the plan's AFTAP for the current year by that day (and that day is deemed to be the plan's valuation date for purposes of applying the benefit limitations). If the plan's enrolled actuary has not certified the plan's AFTAP by the first day of the 10th month of the current plan year, section 436(h)(2) provides that the plan's AFTAP is conclusively presumed to be less than 60 percent as of that day (and that day is deemed to be the valuation date for purposes of applying the benefit limitations).

Under section 436(i), unless the plan provides otherwise, if a limitation on prohibited payments or future benefit accruals under section 436(d) or (e) ceases to apply to a plan, all such payments and benefit accruals resume, effective as of the day following the close of the limitation period.

Section 436(j) provides definitions that are used under section 436, including the plan's AFTAP. In general, the plan's AFTAP is based on the plan's FTAP for the plan year. However, the plan's AFTAP is determined by adding the aggregate amount of purchases of annuities for employees other than highly compensated employees (within the meaning of section 414(q)) made by the plan during the two preceding plan years to the numerator and the denominator of the fraction used to determine the FTAP.

In addition, section 436(j)(3) provides a special rule which applies to certain well-funded plans under which the plan's FTAP for purposes of section 436 (and hence the plan's AFTAP) is determined by using the plan's assets without reduction for the prefunding balance and the funding standard carryover balance. Section 436(j)(3)(B) sets forth a transition rule for determining eligibility for this special rule.

Section 436(k) provides that, for plan years that begin in 2008, the determination of the plan's FTAP for the preceding year is to be made pursuant to guidance issued by the Secretary.

Explanation of Provisions

I. *Section 430(f) — Effect of Prefunding Balance and Funding Standard Carryover Balance.*

A. *Overview.*

1. *In general.*

The proposed regulations would be the second in a series of proposed regulations under new section 430.[2] These regulations would provide guidance on the application of section 430(f), relating to the establishment and maintenance of a funding standard carryover balance and a prefunding balance for purposes of sections 430 and 436. The Treasury Department and the IRS intend to issue additional proposed regulations relating to other portions of the rules under section 430 later in 2007.

2. *Multiple employer plans.*

The proposed regulations under section 430(f) apply to plans subject to section 412 that are maintained by one employer or a controlled group of employers and to multiple employer plans within the meaning of section 413(c). In the case of a multiple employer plan to which section 413(c)(4)(A) applies, the rules under the proposed regulations would be applied separately for each employer under the plan, as if each employer maintained a separate plan. Thus, each employer under such a multiple employer plan may have a separate funding standard carryover balance and a prefunding balance for the plan. In the case of a multiple employer plan to which section 413(c)(4)(A) does not apply (that is, a plan described in section 413(c)(4)(B) that has not made the election for section 413(c)(4)(A) to apply), the proposed regulations under section 430(f) would apply as if all participants in the plan were employed by a single employer.

[2] Proposed regulation §§1.430(h)(3)–1 and 1.430(h)(3)–2, relating to the mortality tables used to determine liabilities under section 430(h)(3), were issued May 29, 2007 (REG–143601–06, 2007–24 I.R.B. 1398 [72 FR 29456]).

B. *Establishment of prefunding balance and funding standard carryover balance.*

The proposed regulations would provide that an employer is permitted to establish a prefunding balance for a plan that represents the accumulation of contributions made for plan years beginning on or after the effective date of section 430 with respect to the plan (the first effective plan year) that are in excess of the minimum required contributions (determined without regard to the prefunding balance and funding standard carryover balance) for those plan years. Specifically, for the first effective plan year of a plan, the prefunding balance is initialized at zero dollars and an employer is permitted to elect to add some or all of the excess contributions made to a plan for each plan year to the prefunding balance as of the first day of the next plan year. For this purpose, the excess contributions are generally determined as the amount by which the employer contributions to the plan for the plan year exceed the minimum required contribution for the plan year, with appropriate adjustments for interest determined at the effective interest rate under section 430(h)(2)(A). However, the proposed regulations would provide that any contribution that is made to avoid the application of a benefit limitation under section 436 is not taken into account in determining the amount of excess contributions.

The proposed regulations would also provide that the minimum required contribution for purposes of determining the amount of excess contributions for the year is determined without regard to any offset of the minimum required contribution for the year as a result of the use of the prefunding or funding standard carryover balances. Accordingly, an employer would not be permitted to add to the prefunding balance any amount of contributions that are "excess" by reason of an offset of the minimum required contribution for the year through the use of the prefunding balance or funding standard carryover balance. This prohibition precludes an employer from avoiding the requirement to adjust the prefunding balance and funding standard carryover balance by the actual rate of return on plan assets in the situation where the plan assets have experienced a loss (or a rate of return that is lower than the effective interest rate that is used for interest adjustments with respect to minimum required contributions for the plan year).

The proposed regulations would provide that the funding standard carryover balance is initialized as the balance in the funding standard account as of the last day of the last plan year before section 430 applies to a plan (the pre-effective plan year). This is generally the last plan year beginning in 2007, but could be a later year in the case of a plan to which a delayed effective date applies under the rules of sections 104 through 106 of PPA '06.

C. *Maintenance of prefunding balance and funding standard carryover balance.*

The proposed regulations would provide that a plan's prefunding balance and funding standard carryover balance as of the beginning of a plan year are adjusted to reflect the actual rate of return on plan assets for the plan year. This calculation of the actual rate of return on plan assets for the plan year is determined on the basis of fair market value and must take into account the amount and timing of all contributions, distributions, and other plan payments made during the year. The adjustment for investment return is applied to the prefunding balance and funding standard carryover balance after any reductions to those balances as described under the following two headings in this preamble. In addition, the proposed regulations would provide special rules in the case of a plan with a valuation date that is not the first day of the plan year.

D. *Use of prefunding balance and funding standard carryover balance to offset minimum funding requirements for a year.*

The proposed regulations would provide that the employer may elect to use some or all of the prefunding balance or funding standard carryover balance to offset the otherwise applicable minimum required contribution for a plan year, provided that the plan met a funding percentage threshold for the preceding plan year. Specifically, an employer is permitted to make such an election only if the plan's prior year funding ratio was at least 80 percent. For this purpose, the plan's prior year funding ratio generally is a fraction (expressed as a percentage), the numerator of which is the value of plan assets on the valuation date for the preceding plan year, reduced by the amount of any prefunding balance (but not the amount of any funding standard carryover balance), and the denominator of which is the funding target of the plan for the preceding plan year (determined without regard to the at-risk rules of section 430(i)(1)).

The proposed regulations would provide a transition rule to determine a plan's prior year funding ratio for the first effective plan year. Under this transition rule, the current liability for the plan for the pre-effective plan year is substituted for the funding target of the plan for that plan year. In addition, the transition rule provides that the value of plan assets is determined under section 412(c)(2) as in effect for that pre-effective plan year, except that the value of plan assets must be limited so that it is not less than 90 percent and not more than 110 percent of the fair market value of plan assets.

The proposed regulations would reflect the rule in section 430(f)(3)(B) that requires the plan sponsor to have reduced the funding standard carryover balance in full (either by using the funding standard carryover balance to offset the minimum required contribution for a year or through a voluntary reduction under section 430(f)(5)) before the prefunding balance is permitted to be used to offset a current year minimum funding requirement.

E. *Subtraction from plan assets and employer election to reduce balances.*

The proposed regulations would reflect the rules under section 430(f)(4) which provide that the prefunding balance and funding standard carryover balance are subtracted from the plan assets for certain purposes. These include the determination of the FTAP, which is also relevant for purposes of applying the benefit limitations of section 436.

In accordance with section 430(f)(4)(A), the proposed regulations would provide that the amount of the prefunding balance is subtracted from the value of plan assets for purposes of determining whether a plan is exempt from the requirement to establish a new shortfall amortization base under section 430(c)(5) only if an election to use the prefunding balance to offset the minimum

required contribution is made for the plan year. In addition, pursuant to section 430(f)(4)(B)(ii), the proposed regulations would provide that the prefunding balance and funding standard carryover balance are not subtracted from plan assets for purposes of determining the funding shortfall under section 430(c)(4) to the extent that there is a binding written agreement with the Pension Benefit Guaranty Corporation (PBGC) which provides that all or a portion of those balances cannot be used to offset the minimum required contribution for a plan year. For this purpose, an agreement with the PBGC is taken into account with respect to a plan year only if the agreement was executed prior to the valuation date for the plan year.

In addition, section 436(j) sets forth an exception from the requirement to subtract the plan's prefunding balance and funding standard carryover balance from the value of plan assets in determining a plan's FTAP for purposes of the benefit limitation rules of section 436 provided that the plan's FTAP would meet certain standards if it were calculated without subtracting the balances from plan assets.

Section 430(f)(5) provides that an employer may elect to reduce the amount of the prefunding balance and the funding standard carryover balance. This will have the effect of increasing the plan assets for various purposes. For example, the increase in plan assets will increase the FTAP, which may allow the plan to avoid the application of section 436 limitations. The proposed regulations would reflect the rule in section 430(f)(5)(B) that requires the employer to reduce the funding standard carryover balance in full (either by using the funding standard carryover balance to offset the minimum required contribution for a year or through a voluntary reduction under section 430(f)(5)) before any reduction is permitted for the prefunding balance.

F. *Elections under section 430(f).*

The proposed regulations would provide that an election under section 430(f) is made by the plan sponsor by providing written notification of the election to the plan's enrolled actuary and the plan administrator, must be irrevocable when made, and must satisfy certain timing rules. The written notification must set forth the relevant details of the election, including the specific amounts involved in the election with respect to the prefunding balance and funding standard carryover balance. An election under section 430(f) generally must be made on or before the due date (with extensions) for the filing of the plan's Form 5500, "*Annual Return/Report of Employee Benefit Plan*", for the plan year to which the election relates (or, in the case of a plan not required to file a Form 5500 for the plan year, on or before the last day of the seventh month after the end of the plan year to which the election relates). For this purpose, an election to add to the prefunding balance relates to the plan year for which excess contributions were made. However, the proposed regulations would require any section 430(f)(5) election to reduce a portion of the prefunding balance or funding standard carryover balance for a plan year to be made by the end of the plan year to which the election relates. For example, in the case of a calendar year plan required to file Form 5500, an election to add to the prefunding balance as of the first day of the 2010 plan year (in an amount not in excess of the 2009 interest-adjusted excess contributions), must be made no later than the due date for filing the 2009 Form 5500 (with extensions), while an election to reduce the prefunding balance as of the first day of the 2010 plan year must be made by the end of the 2010 plan year. In both cases, the election would be reported on the 2010 Form 5500 (Schedule SB) that would be filed in 2011.

The proposed regulations would provide that, for purposes of elections under section 430(f), any reference in the proposed regulations to the plan sponsor generally means the employer or employers responsible for making contributions to the plan. However, in the case of elections under section 430(f) for multiple employer plans to which section 413(c)(4)(A) does not apply, any reference in the proposed regulations to the plan sponsor means the plan administrator within the meaning of section 414(g).

II. *Section 436 — Limits on Benefits and Benefit Accruals Under Single Employer Defined Benefit Plans.*

A. *Overview and general rules.*

1. *In general.*

The proposed regulations would set forth the rules that a defined benefit pension plan that is subject to section 412 and that is not a multiemployer plan must satisfy in order to comply with the requirement in section 401(a)(29) that the plan meet the requirements of section 436. This requirement is a qualification requirement. A plan satisfies the requirements of section 436 only if the plan meets the requirements of these regulations.

2. *New plans.*

In accordance with section 436(g), the proposed regulations would provide that the limitations described in sections 436(b), 436(c), and 436(e) do not apply to a plan for the first five plan years of the plan. For purposes of applying this new plan rule, plan years under a plan are aggregated with plan years under a predecessor plan. Thus, the only benefit limitation that could apply under a plan that is not a successor plan during the first five years of its existence is the section 436(d) limitation applicable to accelerated benefit payments (such as single sum distributions).

3. *Multiple employer plans.*

The proposed regulations under section 436 apply to plans maintained by one employer (including a controlled group of employers) and to multiple employer plans (within the meaning of section 413(c)). In the case of a multiple employer plan to which section 413(c)(4)(A) applies, the rules under the proposed regulations would be applied separately for each employer under the plan, as if each employer maintained a separate plan. Thus, the benefit limitations under section 436 could apply differently to employees of different employers under such a multiple employer plan. In the case of a multiple employer plan to which section 413(c)(4)(A) does not apply (that is, a plan described in section 413(c)(4)(B) that has not made the election for section 413(c)(4)(A) to

apply), the proposed regulations under section 436 would apply as if all participants in the plan were employed by a single employer.

4. *Treatment of plan as of close of prohibited or cessation period.*

The proposed regulations would provide that, if a limitation on accelerated benefit payments under section 436(d) (such as single sum distributions) applies to a plan as of a section 436 measurement date, but that limit subsequently ceases to apply to the plan as of a later section 436 measurement date, then the limitation does not apply to benefits with annuity starting dates that are on or after that later section 436 measurement date. In addition, the proposed regulations would provide that, if a limitation on benefit accruals under section 436(e) applies to a plan, unless the plan provides otherwise, benefit accruals under the plan will resume effective as of the section 436 measurement date as of which benefit accruals are no longer restricted.

With respect to a participant who had an annuity starting date within a period during which the accelerated benefit payment limitation rules of section 436(d) applied to the plan, once the limitation ceases to apply, the participant's benefits will continue to be paid in the form previously elected unless the plan permits the participant to be offered a new election which would modify the prior election. The proposed regulations would permit a plan to provide that the participant will be offered the opportunity to have a new election under which the form of benefit previously elected may be modified, subject to applicable qualification requirements, and that new election will constitute a new annuity starting date for purposes of section 417. Similarly, a plan is permitted to be amended to provide that any benefit accruals that were limited under the rules of section 436(e) will be credited under the plan once the limitation no longer applies, subject to applicable qualification requirements. If a plan provides for the restoration of benefit accruals for the period of the limitation under preexisting plan terms, the plan is treated as having adopted an amendment that has the effect of increasing liabilities under the plan if the period of the limitation exceeded 12 months. Whether a plan is amended or is treated as having been amended as described above, the amendment or pre-existing plan provision is subject to the limitations of section 436(c).[3]

In addition, the proposed regulations would provide that a plan is permitted to be amended to provide that any unpredictable contingent event benefits that were limited under the rules of section 436(b) will be paid or reinstated when the limitation no longer applies, subject to applicable qualification requirements. Any such amendment is subject to the limitations of section 436(c). A plan is not permitted to provide for restoration of any such unpredictable contingent event benefits without an amendment that complies with section 436(c).

5. *Deemed election to reduce prefunding and funding standard carryover balances.*

The proposed regulations would provide that, if a limitation on accelerated benefit payments under section 436(d) would otherwise apply to a plan, the plan sponsor is treated as having made an election under section 430(f) to reduce the prefunding balance or funding standard carryover balance by such amount as is necessary for the AFTAP to be at or above the applicable threshold (60, 80, or 100 percent, as the case may be) in order for the benefit limitation not to apply to the plan. In such a case, the plan sponsor is treated as having made that election on the section 436 measurement date as of which the benefit limitation would otherwise apply. This deemed election applies if the plan provides for accelerated distributions that would be limited in a plan year, regardless of whether a plan participant is eligible or elects to receive such a distribution during the plan year (but does not apply if the plan does not provide for any accelerated distributions that are subject to the benefit limitation). However, the deemed reduction applies with respect to this limitation only if the prefunding and funding standard carryover balances to be reduced are large enough to avoid the application of the limitation. Thus, no reduction of prefunding and funding standard carryover balances is required if the limitation would still apply for a year even if those balances were reduced to zero.

In addition, the proposed regulations would provide that, in the case of a plan maintained pursuant to one or more collective bargaining agreements between an employee representative and one or more employers in which a benefit limitation under section 436(b), 436(c), or 436(e) would otherwise apply to the plan, the employer is treated for purposes of section 436 as having made an election under section 430(f) to reduce the prefunding balance or funding standard carryover balance by such amount as is necessary for the AFTAP to be at or above the applicable threshold for the benefit limitation not to apply to the plan, taking into account the unpredictable contingent event benefits or plan amendment, as applicable. The proposed regulations would provide that, in the case of a plan with respect to which collective bargaining agreements apply to some, but not all, of the plan participants, the plan is considered a collectively bargained plan for purposes of this provision if at least 25 percent of the participants in the plan are members of the collective bargaining units for whom the benefit levels under the plan are specified under the collective bargaining agreements. As in the case of the deemed reduction in funding balances for the accelerated benefit distributions under section 436(d), the deemed reduction applies only if the prefunding and funding standard carryover balances to be reduced are large enough to avoid the application of the limitation under section 436(b), 436(c), or 436(e), as applicable.

If the mandatory reduction of funding balances applies to a plan, the employer is treated as having made that election on the date as of which the applicable benefit restriction would otherwise apply. In addition, the proposed regulations would provide that, if a plan (whether or not collectively bargained) is presumed to have an AFTAP of less than 60 percent under the section 436(h) presumption rules, then the plan is treated as if the plan's funding standard carryover balance and prefunding balance are insufficient to increase the plan's AFTAP to the threshold percentage.

[3] The PBGC has informed the IRS and the Treasury Department that it expects similarly to treat such an automatic restoration of missed benefit accruals as a plan amendment.

6. *Section 436 measurement date.*

The "section 436 measurement date" is a defined term under the proposed regulations that is used to describe the date that stops or starts the application of the limitations of sections 436(d) and 436(e) and is also used for calculations with respect to applying the limitations of sections 436(b) and 436(c). The regulations would provide that the date of the enrolled actuary's certification of the AFTAP for the plan year is a section 436 measurement date if it occurs within the first nine months of the plan year. If the date of an enrolled actuary's certification of the AFTAP is between the first day of the 10th month of a plan year and the last day of that plan year, that date is not a section 436 measurement date for purposes of the limitations of section 436(d) or 436(e) because, in that case, the plan's AFTAP is presumed to be under 60 percent (however, receipt of the enrolled actuary's certification during that period impacts the plan's presumed "carryover" AFTAP for the following year). The proposed regulations would provide that a section 436 measurement date occurs where there is a change in the plan's AFTAP under the presumption rules of section 436(h). In addition, the proposed regulations would provide a series of rules in cases where the enrolled actuary's certification of the AFTAP for a plan year is made after the end of the plan year, as described below under the heading "Presumed underfunding for purposes of benefit limitations."

B. *Limitation on plant shutdown and other unpredictable contingent event benefits.*

In accordance with section 436(b), the proposed regulations would provide that a plan that provides for any unpredictable contingent event benefit[4] must provide that the benefit will not be paid to a plan participant during a plan year if the AFTAP for the plan year is less than 60 percent (or is 60 percent or more but would be less than 60 percent if the benefits attributable to the unpredictable contingent event were taken into account in determining the AFTAP). However, this prohibition on payment of unpredictable contingent event benefits no longer applies for a plan year, effective as of the first day of the plan year, if the employer makes the contribution specified in section 436(b)(2), as described in paragraph II.F in this preamble.

For this purpose, the proposed regulations would provide that an "unpredictable contingent event benefit" means any benefit or increase in benefits to the extent the benefit or increase would not be payable but for the occurrence of an unpredictable contingent event, and an "unpredictable contingent event" means a plant shutdown (whether full or partial) or similar event, or an event other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability. Thus, for example, if a plan provides for an unreduced early retirement benefit upon the occurrence of an event other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability, then that unreduced early retirement benefit is an unpredictable contingent event benefit to the extent of any portion of the benefit that would not be payable but for the occurrence of the event, even if the remainder of the benefit is payable without regard to the occurrence of the event. Similarly, an unpredictable contingent event benefit under the proposed regulations includes a benefit payable upon the presence of circumstances specified in the plan (other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability), so that a plan that provides those benefits upon a participant's severance from employment in those circumstances, but not upon a severance from employment that does not involve those circumstances, is providing an unpredictable contingent event benefit.

Unpredictable contingent event benefits attributable to a plant shutdown or other unpredictable contingent event that occurred within a period during which no limitation under section 436(b) applied to the plan are not affected by the limitation as it applies in a subsequent period. For example, if a plant shutdown occurs in 2010 and a plan's funded status is such that its shutdown benefits are not subject to the limitation for that plan year, benefits paid pursuant to that shutdown are permitted to be paid in a later plan year even if the plan's AFTAP for the subsequent year is less than 60 percent. Conversely, if a plant shutdown occurs in 2010 and a plan's funded status is such that its shutdown benefits are subject to the limitation under section 436(b) for that plan year and cannot be paid, those shutdown benefits related to the 2010 plant shutdown are not permitted to be paid in a later year even if the plan's AFTAP for the later year is at or above the 60 percent threshold for the section 436(b) limitation (subject to the rules permitting plan amendments to reinstate previously restricted benefits, including unpredictable contingent event benefits, as described in paragraph II.A.4 of this preamble).

C. *Limitations on plan amendments increasing liability for benefits.*

In accordance with section 436(c), the proposed regulations would provide that a plan satisfies the limitation on plan amendments increasing liability for benefits only if the plan provides that no amendment to the plan that has the effect of increasing liabilities of the plan by reason of increases in benefits, establishment of new benefits, changing the rate of benefit accrual, or changing the rate at which benefits become nonforfeitable is permitted to take effect if the AFTAP for the plan year is less than 80 percent (or is 80 percent or more but would be less than 80 percent if the benefits attributable to the amendment were taken into account in determining the AFTAP). However, this prohibition on plan amendments no longer applies for a plan year if the employer makes the contribution specified in section 436(c)(2), as described in paragraph II.F of this preamble.

In accordance with section 436(c)(3), the limitation on amendments increasing liabilities does not apply to any amendment that provides for an increase in benefits under a formula that is not based on a participant's compensation, but only if the rate of increase in benefits does not exceed the contemporaneous rate of increase in average wages of participants covered

[4] See also Notice 2007–14, 2007–7 I.R.B. 501 (see §601.601(d)(2) of this chapter), requesting comments on the types of benefits that are permitted to be provided in a qualified defined benefit plan, including benefits payable in the event of a plant shutdown or similar event.

by the amendment. The proposed regulations would provide that the determination of the rate of increase in average wages is made by taking into consideration the net increase in average wages during the period beginning with the effective date of the most recent benefit increase applicable to all of those participants who are covered by the current amendment and ending on the effective date of the current amendment. If the participants covered by an amendment include both currently employed participants and terminated participants (who will have no increase or decrease in wages for this purpose after severance from employment), all covered participants must be included in determining the increase in average wages of the participants covered by the amendment. Alternatively, the employer could adopt two amendments — one that increases benefits for currently employed participants and another one that increases benefits for the terminated participants. In that case, this exception from application of the section 436(c) limitation generally would apply to the amendment that increases benefits for currently employed participants (based solely on the wages of those current employees), but the amendment that applies only to terminated participants (who received no increase in wages from the employer during the period over which the increase in average wages is determined) would not be eligible for the exception.

In addition, the proposed regulations would provide that, to the extent that any amendment results in (or is made pursuant to) a mandatory increase in the vesting of benefits under the Code or ERISA (such as vesting rate increases pursuant to statute and plan termination amendments under section 411(d)(3)), that amendment does not constitute an amendment that changes the rate at which benefits become nonforfeitable for purposes of section 436(c).

D. *Limitations on accelerated benefit distributions.*

1. *Funding percentage less than 60 percent.*

In accordance with section 436(d)(1), under the proposed regulations, a plan must provide that, if the plan's AFTAP for a plan year is less than 60 percent, the plan will not pay any prohibited payment with an annuity starting date that is on or after the applicable section 436 measurement date. However, if a participant requests such a prohibited distribution, the plan must permit the participant to elect another form of benefit available under the plan or to defer payment to a later date to the extent permitted under applicable qualification requirements. Similar rules apply in any case in which a beneficiary is entitled to a prohibited payment (for example, where a qualified pre-retirement survivor annuity is offered in an alternative single sum payment).

2. *Bankruptcy.*

In accordance with section 436(d)(2), under the proposed regulations, a plan must provide that the plan will not pay any prohibited payment with an annuity starting date that is during any period during a plan year in which the plan sponsor is a debtor in a case under title 11, United States Code, or similar Federal or State law, until the date on which the enrolled actuary of the plan certifies that the plan's AFTAP is not less than 100 percent.

3. *Limited payment if percentage at least 60 percent but less than 80 percent.*

In accordance with section 436(d)(3), under the proposed regulations, a plan must provide that, in any case in which the plan's AFTAP for a plan year is 60 percent or more but is less than 80 percent, a participant is permitted to elect a prohibited payment only if the present value of the portion of the payment that is greater than the amount of the monthly straight life annuity under the plan (and any social security supplement, if applicable) does not exceed 50 percent of the present value of the participant's benefits (or if less, 100 percent of the present value of the maximum guarantee with respect to the participant under section 4022 of ERISA). For this purpose, present value is determined using the rules of section 417(e) except that, if the plan provides a single sum distribution that is larger than the present value of the benefit determined using the rules of section 417(e), then that larger benefit is substituted for the present value of the participant's benefits before applying the 50 percent factor. Similar rules apply in any case in which a beneficiary is entitled to a prohibited payment.

If an optional form of benefit that is otherwise available under the terms of the plan is not available as of the annuity starting date because it is a prohibited payment that cannot be paid under the preceding paragraph, then the plan must provide a participant who elects such an optional form with the option either to defer payment to a later date (to the extent permitted under applicable qualification requirements) or to bifurcate the benefit into unrestricted and restricted portions. If the participant elects to bifurcate the benefit, the plan must permit the participant to elect, with respect to the unrestricted portion, any optional form of benefit otherwise available under the plan with respect to the participant's entire benefit (whether or not the optional form of benefit with respect to the unrestricted portion is a prohibited payment). The unrestricted portion of the benefit is the lesser of (i) 50 percent of the benefit and (ii) the benefit that has a present value that does not exceed 100 percent of the present value of the maximum PBGC guarantee with respect to the participant under section 4022 of ERISA. If the participant elects payment of the unrestricted portion of the benefit in the form of a prohibited payment, then the plan must permit the participant to elect payment of the restricted portion in any optional form of benefit under the plan that would have been permitted with respect to the participant's entire benefit other than a prohibited payment. A plan is also permitted (but not required) to offer optional forms of benefit that are solely available during the period section 436(d)(3) applies to the plan, such as an optional form of benefit that provides for the current payment of the unrestricted portion of the benefit, with a delayed commencement for the restricted portion of the benefit, subject to other applicable qualification requirements.

A participant who receives a prohibited payment (or a series of prohibited payments under a single optional form of benefit) under the rule permitting certain prohibited payments cannot receive any additional payment that would be a prohibited payment until there is a plan year for which none of the limitations on accelerated distributions under section 436(d) apply. Benefits provided to a participant and any beneficiary are aggregated for purposes of determining the limited distribution under section 436(d)(3). The pro-

posed regulations would also reflect the rules of section 436(d)(3)(B)(ii), which describes how this limited distribution is allocated among the beneficiaries of a participant.

4. *Exception for certain frozen plans.*

In accordance with section 436(d)(4), the limitations under section 436(d) will not apply to a plan for any plan year if the terms of the plan, as in effect for the period beginning on September 1, 2005, provided for no benefit accruals with respect to any participants. However, if such a plan provides for any benefit accruals during a plan year, this exception will cease to apply for the plan as of the date those accruals start.

5. *Prohibited payment.*

In accordance with section 436(d)(5), the proposed regulations would provide that the term "prohibited payment" means:

(i) Any payment for a month that is in excess of the monthly amount paid under a single life annuity (plus any social security supplements described in the last sentence of section 411(a)(9)), to a participant or beneficiary whose annuity starting date (as defined in section 417(f)(2)) occurs during any period that a limitation on accelerated benefit payments is in effect;

(ii) Any payment for the purchase of an irrevocable commitment from an insurer to pay benefits; and

(iii) Any other payment that is identified as a prohibited payment by the Commissioner in revenue rulings and procedures, notices and other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2) of this chapter).

In addition, for purposes of applying the limitations on accelerated benefit payments under the requirements of section 436(d), the term *annuity starting date* means, as applicable—

(a) The first day of the first period for which an amount is payable as an annuity as described in section 417(f)(2)(A)(i);

(b) In the case of a benefit not payable in the form of an annuity, the first day on which all events have occurred (including the participant's election, the participant's severance from employment if the participant is below normal retirement age, and, if applicable, the participant's survival to the date as of which payment is made) which entitle the participant to such benefit as described in section 417(f)(2)(A)(ii);

(c) In the case of an amount payable under a retroactive annuity starting date, the benefit commencement date; and

(d) The date of any payment for the purchase of an irrevocable commitment from an insurer to pay benefits under the plan.

E. *Limitation on benefit accruals.*

In accordance with section 436(e), under the proposed regulations, a plan must provide that, in any case in which the plan's AFTAP for a plan year is less than 60 percent, benefit accruals under the plan will cease as of the applicable section 436 measurement date. If a plan must cease benefit accruals under this limitation, then the plan is also not permitted to be amended in a manner that would increase the liabilities of the plan by reason of an increase in benefits or establishment of new benefits. This rule applies regardless of whether an amendment would otherwise be permissible under section 436(c)(3) (involving certain amendments to increase benefits under a formula not based on a participant's compensation). This prohibition on additional benefit accruals will no longer apply for a plan year if the plan sponsor makes the contribution specified in section 436(e)(2), as described in paragraph II.F of this preamble.

F. *Rules relating to contributions required to avoid benefit limitations.*

The proposed regulations provide rules regarding contributions by the plan sponsor to avoid benefit limitations under section 436. An employer sponsoring a plan that would otherwise be subject to the limitations of section 436 can avoid the application of those limits through one of four different techniques: 1) reducing the funding standard carryover balance and prefunding balance; 2) making additional contributions for a prior plan year that are not added to the prefunding balance; 3) making the specific contributions described in sections 436(b)(2), 436(c)(2), and 436(e)(2); and 4) providing security, as described in section 436(f)(1).

As noted in this preamble, under the first of the techniques, if a plan sponsor elects to reduce the plan's funding standard carryover balance or the prefunding balance, this will have the effect of increasing the plan assets that are taken into account in determining the plan's FTAP and AFTAP and, thereby, will raise the AFTAP to a level so that the benefit limitations may no longer apply to the plan. Alternatively, if the deadline for making prior year contributions has not passed, the plan sponsor could utilize the second technique — making additional contributions for the prior plan year. If these additional contributions are not added to the prefunding balance, then the additional contributions will also have the effect of increasing the plan's FTAP and AFTAP.

The third and fourth techniques for avoiding the application of the benefit limitations of section 436 are described in §1.436–1(f) of the proposed regulations. Under the third technique, the plan sponsor makes additional contributions that are specifically designated at the time the contribution is used to avoid the application of a limitation under section 436(b), 436(c), or 436(e). The proposed regulations would provide for this designation to be provided to the plan's enrolled actuary and plan administrator in writing. Furthermore, the designation must be irrevocable, except as described below. If the contributions are made on a date other than the valuation date for the plan year, the contributions must be adjusted for interest (using the plan's effective interest rate, except as provided in the proposed regulations). These contributions are separate from any minimum required contributions required by section 430, and no prefunding balance or funding standard carryover balance under section 430(f) may be used as a contribution to avoid a section 436 benefit limitation. A plan sponsor that makes such a current year contribution will nonetheless fail to satisfy the minimum funding requirements if it does not make the minimum required contribution under section 430 for the year. In addition, as noted above, these contributions are not taken into account in determining whether a plan sponsor is making excess contributions for purposes of adding to the plan's prefunding balance.

The fourth technique for a plan sponsor to avoid the application of the benefit limitations of section 436 is for the plan sponsor to provide security. In such a case, the AFTAP for the plan year is determined by treating as an asset of the plan any security

provided by a plan sponsor by the valuation date for the plan year in a form meeting certain specified requirements. However, this security is not taken into account for any other purpose, including section 430. The only security permitted to be provided by a plan sponsor for this purpose is (i) a bond issued by a corporate surety company that is an acceptable surety for purposes of section 412 of ERISA, or (ii) cash or United States obligations that mature in three years or less that are held in escrow by a bank or insurance company. The regulations would reflect sections 436(f)(1)(C) and (D) in specifying when the security is to be contributed to the plan and when it may be released. If the security is turned over to the plan, then that amount is treated as an employer contribution when it is turned over to the plan. The proposed regulations would provide that any such security turned over to the plan pursuant to the enforcement mechanism cannot be treated as a contribution to avoid or terminate the application of a section 436 benefit limitation under section 436(b)(2), 436(c)(2), or 436(e)(2).

G. *Presumed underfunding for purposes of benefit limitations.*

The proposed regulations reflect the rules of section 436(h), which sets forth a series of presumptions that are used to apply the section 436 benefit limitations in situations where the plan's enrolled actuary has not yet issued a certification of the plan's AFTAP for the plan year. In addition, the proposed regulations also set forth rules for the application of the limitations prior to and during the period those presumptions apply to a plan, and describe the interaction of those presumptions with plan operations after the plan's enrolled actuary has issued a certification of the plan's AFTAP for the plan year. These rules are designed to encourage plans to obtain certifications in a timely manner, with a particular emphasis with respect to plans that have a greater likelihood of having a new section 436 benefit limitation apply because they had an AFTAP for the prior plan year that was near a threshold for a benefit limitation to apply.

The proposed regulations would provide that, in any case in which a plan was subject to a benefit limitation on the last day of the prior plan year, the first day of the plan year is a section 436 measurement date and the AFTAP of the plan for the current plan year is presumed to be equal to the preceding year's certified AFTAP until the plan's enrolled actuary certifies the AFTAP of the plan for the current plan year. Because no plan could be subject to a benefit limitation for a plan year that precedes the plan year that begins in 2008, the section 436(h)(1) presumption generally will not apply to any plan before the first plan year beginning in 2009.

In accordance with section 436(h)(3), the proposed regulations would provide that, if the enrolled actuary of the plan has not certified the AFTAP of the plan for the current plan year by the first day of the 4th month of the plan year and the AFTAP for the preceding year was certified to be at least 60 percent but less than 70 percent or at least 80 percent but less than 90 percent (or, if that preceding year is the pre-effective plan year, was certified to be less than 90 percent), then the first day of the 4th month of the current plan year is a section 436 measurement date, and the AFTAP of the plan is presumed to be equal to 10 percentage points less than the AFTAP of the plan for the preceding plan year. This presumption will apply until the earlier of the date the enrolled actuary certifies the AFTAP for the plan year or the first day of the 10th month of the plan year.

In accordance with section 436(h)(2), the proposed regulations would provide that, in any case in which no certification of the specific AFTAP for the current plan year is made before the first day of the 10th month of such year, that date is a section 436 measurement date and, as of that date, the plan's AFTAP is conclusively presumed to be less than 60 percent. In such a case, the presumed AFTAP of under 60 percent for the current plan year will continue to apply under the rules of section 436(h)(1) for the next plan year, until such time as the enrolled actuary certifies the AFTAP for either the current plan year or the next plan year.

The proposed regulations would provide rules that apply the section 436(h) presumptions for the plan year in cases in which the enrolled actuary's certification for the prior plan year is made on or after the first day of the 10th month of that prior plan year. If the date of the enrolled actuary's certification of the specific AFTAP for a plan year occurs on or after the date the conclusive presumption applies but on or before the last day of the plan year, the proposed regulations would provide that the certified percentage is disregarded for that plan year but is used for purposes of the presumption rule of section 436(h)(1) starting with the beginning of the following plan year (rather than continuing to apply the less-than-60 percent presumption that applied before the first day of that following plan year). If the date of the enrolled actuary's certification of the specific AFTAP for a plan year occurs after the end of the plan year but prior to the first day of the 4th month in the following plan year, the proposed regulations would provide that the certification date is treated as a section 436 measurement date for that following plan year and that, starting on that date, the plan's AFTAP is presumed to be the certified AFTAP for the prior year (rather than continuing to apply the less-than-60 percent presumption that applied before the certification). If the date of the enrolled actuary's certification of the specific AFTAP for a plan year occurs after the first day of the 4th month in the following plan year but before the first day of the 10th month, the proposed regulations would provide that the certification date also is a section 436 measurement date for that following plan year, and the plan's AFTAP for that following year beginning on that date is presumed to be the certified AFTAP for the prior year (rather than continuing to apply the less-than-60 percent presumption that applied before the certification). However, in such a case, if a 10 percentage point reduction in the AFTAP would have applied on the first day of the 4th month of that following plan year if the AFTAP for the prior plan year had been certified before that day, then the same 10 percentage point reduction applies on the date of the certification. These presumption rules based on the prior year AFTAP do not apply once a certification of the following year's AFTAP is issued by the plan's enrolled actuary.

The enrolled actuary's certification of the AFTAP for a plan year must be made in writing, must be provided to the plan administrator, and must certify the plan's AFTAP for the plan year. As an alternative to certifying a specific number for the plan's AFTAP, the regulations would provide that the enrolled actuary is permitted to certify during the first nine months of a

plan year that the plan's AFTAP for that year is within a percentage "range" that is either (i) 60 percent or higher, but less than 80 percent, (ii) 80 percent or higher, or (iii) 100 percent or higher. The proposed regulations would provide that such a "range" certification ends the application of the presumptions provided that the enrolled actuary follows up with a certification of the specific AFTAP before the first day of the 10th month of that year and that the certified specific AFTAP is within the range of the earlier certification.

If this "range" certification alternative is followed, the plan is treated as having a certified AFTAP at the smallest value within the applicable range. Thus, for example, if the enrolled actuary certified that the AFTAP was more than 60 percent but less than 80 percent, then the plan is treated as having an AFTAP of 60 percent for purposes of applying the limitations of section 436(b) until the earlier of the date of the specific AFTAP certification or the first day of the 10th month of the plan year. In such a case, if the plan has an unpredictable contingent event or a plan amendment that increases liability for benefits, unpredictable contingent event benefits cannot be paid and the plan amendment cannot take effect unless the plan sponsor makes a contribution described in section 436(b)(2) or 436(c)(2), as applicable. If the plan sponsor makes a contribution under section 436(b)(2) or section 436(c)(2), the proposed regulations would provide that the contribution is recharacterized as a regular employer contribution that is taken into account under section 430 for the current plan year to the extent it is determined that the contribution was not needed to avoid the application of the benefit limit, based on the subsequent calculation of the specific AFTAP.

The proposed regulations would specify that the enrolled actuary is generally not permitted to certify the AFTAP based on a value of assets that includes contributions receivable for the prior year that have not actually been made as of the date of the certification. However, this rule would not apply to certifications that are made for plan years beginning before January 1, 2009. Thus, for a certification with respect to 2008, the enrolled actuary is permitted to take in account contributions for 2007 that are reasonably expected but have not yet been made by the plan sponsor at the time of the certification. However, if the plan sponsor does not make those contributions, the enrolled actuary's certification will be incorrect, which will result in a failure to satisfy section 401(a)(29) and section 436 if the difference constitutes a material change.

If the enrolled actuary for the plan provides a certification of the AFTAP for the plan year (including a range certification) and that certified percentage is superseded by a subsequent determination of the AFTAP for that plan year, that later percentage must be applied and a determination must be made whether the change in the applicable percentage is a material change or an immaterial change. For this purpose, the proposed regulations would specify that there is a material change if plan operations with respect to benefits that are addressed by section 436, taking into account any actual contributions and elections under section 430(f) made by the plan sponsor based on the prior certified percentage, would have been different based on the subsequent determination of the plan's AFTAP for the plan year. Thus, for example, if after the actuary certifies the plan's AFTAP for a plan year, the plan sponsor elects to add excess contributions for the prior plan year to the plan's prefunding balance, this would have the effect of reducing the plan's AFTAP, and such a change could be a material change.

The proposed regulations would specify that an immaterial change is a change in an AFTAP that is not a material change. In addition, the proposed regulations would provide that if the difference between the AFTAP for a plan year and the later revised determination of that percentage is the result of additional contributions for the preceding year that are made by the plan sponsor after the date of the enrolled actuary's certification or results from the plan sponsor's election to reduce the prefunding or funding standard carryover balance after the date of the certification, such change is always treated as an immaterial change (regardless of whether it would otherwise affect the application of the section 436 benefit limitations).

In the case of a material change where the plan was operated in accordance with the prior certification of the AFTAP for the plan year, the plan will not have satisfied the requirements of section 401(a)(29) and section 436. In the case of a material change where the plan was operated in accordance with the subsequent certification of the AFTAP during the period of time the prior certification applied, the plan will not have been operated in accordance with its terms. In addition, in the case of a material change, the rules requiring application of a presumed AFTAP under section 436(h) continue to apply from and after the date of the prior certification until the date of the subsequent certification. In the case of an immaterial change, the revised percentage applies prospectively but it does not change the inapplicability of the presumptions under section 436(h) for the plan year prior to the date of the subsequent certification.

H. *Coordination between presumptions and determination of AFTAP.*

1. *Periods during which a presumption applies to the plan.*

A plan must provide that, for any period during which a presumption under section 436(h) applies to the plan, the limitations applicable under sections 436(b), 436(c), 436(d), and 436(e) apply to the plan as if the actual AFTAP for the year were the presumed AFTAP. During that period, the rules relating to the deemed election to reduce the funding standard carryover balance and the prefunding balance must be applied based on the presumed percentage with respect to the applicable limitations. Thus, a plan's prefunding balance and funding standard carryover balance must be reduced if the reduction would be sufficient to avoid the applicable limitation. The proposed regulations provide rules for determining the amount of the reduction in balances.

If the presumed AFTAP for the plan year changes during the year because of application of the presumption in section 436(h)(3), the rules regarding the deemed election to reduce funding balances must be reapplied based on the new presumed AFTAP. This reapplication of the deemed election may require an additional reduction in funding balances if the amount of the reduction in funding balances that is necessary to reach the applicable threshold to avoid the application of the limitation under section 436(d) or 436(e) is greater than the amount that was initially reduced.

2. *Periods prior to certification where no presumption applies.*

If no presumptions under section 436(h) apply to a plan for a period and the plan's enrolled actuary has not yet issued the certification of the plan's AFTAP for the plan year, the plan is not permitted to limit the payment of unpredictable contingent event benefits or the accrual of benefits based on an expectation that the limitations under section 436(d) or 436(e) will apply to the plan once the enrolled actuary's certification of the AFTAP is issued. In addition, the proposed regulations would provide that, if no presumptions under section 436(h) apply to a plan during a period and the plan's enrolled actuary has not yet issued a certification of the plan's AFTAP for the plan year, the limitations under sections 436(b) and 436(c) that apply to unpredictable contingent event benefits and certain plan amendments, respectively, during that period must be applied following the special rules described below in paragraph H.3. of this preamble. Thus, if after application of those rules the plan would be treated as having an AFTAP below the applicable threshold under section 436(b) or 436(c), the limitation will apply unless the plan sponsor makes a contribution to avoid application of the applicable benefit limitations described in section 436(b)(2) or 436(c)(2). In such case, following the certification of the AFTAP for the current plan year by the plan's enrolled actuary, the proposed regulations would provide that those contributions are recharacterized as employer contributions under section 430 for the current plan year to the extent they exceed the amount necessary to avoid application of the applicable limitation under section 436(b) or 436(c) based on the certified percentage.

3. *Periods prior to certification — special rules for unpredictable contingent event benefits and plan amendments that increase liability.*

The proposed regulations would provide that, during the pre-certification period, the rules relating to the deemed election to reduce the funding standard carryover balance and the prefunding balance must be applied based on the plan's presumed AFTAP. The proposed regulations would provide rules for determining the amount of the reduction in those balances that would apply in such a situation and provide that, in making such determination, the presumed adjusted funding target is increased to take into account the benefits attributable to the unpredictable contingent event or the plan amendment described in section 436(b) and 436(c), respectively. For this purpose, if no presumption applies under the rules of section 436(h) (for example, because the plan's actual AFTAP for the prior year was certified to be at least 80 percent), then that prior year's actual AFTAP is substituted for the presumed AFTAP for the plan year in determining the presumed adjusted funding target. In the case of a plan that is not a collectively bargained plan with a funding standard carryover balance or a prefunding balance, the deemed election rules do not apply for purposes of sections 436(b) and 436(c), and the plan sponsor is permitted (but not required) to reduce those balances in order to increase the adjusted plan assets that are compared to the presumed AFTAP.

If, after application of such funding balance reductions and the other calculations set forth in the proposed regulations, the plan's AFTAP (taking into account the additional benefits) is less than the applicable threshold under section 436(b) or 436(c), as applicable, then the plan is not permitted to provide any benefits attributable to the unpredictable contingent event or plan amendment unless the plan sponsor makes a contribution that would allow payment of unpredictable contingent event benefits or would permit a plan amendment increasing benefit liabilities to go into effect under the rules of section 436(b)(2) or 436(c)(2).

If, after application of such funding balance reductions, the plan's AFTAP (taking into account the additional benefits) is greater than or equal to the applicable threshold under section 436(b) or 436(c), as applicable, then the plan is not permitted to limit the payment of unpredictable contingent event benefits under section 436(b) or to restrict a plan amendment increasing liability for benefits from taking effect under section 436(c) based on an expectation that those limitations will apply to the plan once the enrolled actuary's certification is issued.

4. *Limitations based on AFTAP.*

The proposed regulations would provide that, on and after the date the enrolled actuary for the plan issues a certification of the AFTAP for the current plan year, the plan must apply that certified percentage (however, if the certification is issued on or after the first day of the 10th month of the current plan year but before the first day of the following plan year, the certified percentage applies under the presumption rules beginning on the first day of that following plan year). For example, the plan sponsor must apply the certified AFTAP for a plan year to an unpredictable contingent event that occurs or a plan amendment that is effective on or after the date of the enrolled actuary's certification during the plan year. Thus, the plan administrator must determine if the AFTAP is at or above the applicable threshold, taking into account the increase in the funding target that would be attributable to the unpredictable contingent event or plan amendment if the unpredictable contingent event benefits or the increase in liability attributable to the plan amendment were taken into account.

After the AFTAP for a plan year is certified by the plan's enrolled actuary, with respect to the application of limitations under sections 436(d) and 436(e) (accelerated benefit payments and benefit accruals, respectively) for the plan year, the deemed election to reduce funding balances must be reapplied based on the actual funding target for the year (provided the certification is issued by the first day of the 10th month). This reapplication of the deemed election may require an additional reduction in funding balances if the amount of the reduction in funding balances that is necessary to reach the applicable threshold to avoid the application of those limitations is greater than the amount of a prior reduction for the plan year. The proposed regulations would also reflect section 436(d)(2), which provides that no prohibited payments under section 436(d)(5) are permitted to be paid by a plan during any period in which the plan sponsor is a debtor in a case under title 11, United States Code, or any similar Federal or State law, if the plan's enrolled actuary has not yet certified the plan's AFTAP for the plan year to be at least 100 percent. Thus, the

presumptions do not apply for purposes of section 436(d)(2).

The proposed regulations would provide that the enrolled actuary's certification of the AFTAP does not affect the application of the limitation under section 436(d) for participants with annuity starting dates before the certification. Similarly, the enrolled actuary's certification for the plan year does not affect the application of the limitation under section 436(e) of this section prior to the date of that certification.

With respect to the impact of the enrolled actuary's certification of the AFTAP for a plan year on periods prior to the certification, the proposed regulations would provide that the certification does not affect the application of limitations under sections 436(b) and 436(c) for periods prior to the date the certification is issued, regardless of the extent to which the certified percentage varies from the presumed percentage. Notwithstanding the foregoing, in the case of a plan that, for a plan year, did not provide benefits attributable to an unpredictable contingent event or plan amendment based on the preceding year's certified AFTAP (and where sufficient contributions under section 436(b)(2) or 436(c)(2) were not made), the plan must provide any benefits that were not so provided if those benefits would be permitted under the rules of section 436 based on the certified AFTAP, taking into account the increase in the funding target that would be attributable to the unpredictable contingent event benefits or increase in liability due to the plan amendment.

A special rule applies if a plan is providing benefits with respect to one or more unpredictable contingent events occurring within the plan year or amendments taking effect within the plan year. In such a case, the restrictions on unpredictable contingent event benefits and plan amendments are applied with respect to a subsequent unpredictable contingent event or amendment by treating the increase in the funding target attributable to the subsequent event or amendment as if it included the increases in the funding target attributable to all such earlier events or amendments.

I. *Determination of funding target attainment percentage.*

For purposes of section 436, the *funding target* means the funding target under section 430(d) or section 430(i), as applicable to the plan for a plan year.

For purposes of section 436, the *funding target attainment percentage* (FTAP) for any plan year is the fraction (expressed as a percentage), the numerator of which is the value of net plan assets, and the denominator of which is the plan's funding target (determined without regard to the at-risk rules under section 430(i) even in the case of a plan that is in at-risk status). For this purpose, pursuant to section 430(f)(4), the value of net plan assets for the plan year is generally determined by subtracting the plan's funding standard carryover balance and prefunding balance (if any) for the plan year from the value of plan assets.

The *adjusted funding target attainment percentage* (AFTAP) for any plan year is the fraction (expressed as a percentage), the numerator of which is the adjusted plan assets and the denominator of which is the adjusted funding target. The adjusted plan assets equals the net plan assets, increased by the aggregate amount of purchases of annuities for employees other than highly compensated employees (as defined in section 414(q)) which were made by the plan during the preceding 2 plan years. The proposed regulations would provide that the adjusted funding target equals the funding target for the plan year (determined without regard to the at-risk rules under section 430(i)), increased by the aggregate amount of purchases of annuities for employees other than highly compensated employees (as defined in section 414(q)) which were made by the plan during the preceding 2 plan years.

If the FTAP for a plan year, determined without regard to the section 430(f)(4) subtraction of the funding standard carryover balance and the prefunding balance from the value of plan assets, would be 100 percent or more, then, for purposes of section 436 (but not section 430(d)), the value of net plan assets used in the determination of the FTAP and the AFTAP is determined without regard to any subtraction of funding balances under section 430(f)(4). The proposed regulations would reflect the transition rule of section 436(j)(3)(B) under which a plan is permitted to phase up to 100 percent for purposes of the preceding sentence.

The proposed regulations would also provide that, in the case of the first plan year beginning in 2008, the FTAP for the preceding plan year is determined as a fraction (expressed as a percentage), the numerator of which is the value of net plan assets, and the denominator of which is the plan's current liability determined pursuant to section 412(l)(7) on the valuation date for the last plan year that begins before 2008 (the 2007 plan year). For this purpose, the value of plan assets is determined under section 412(c)(2) as in effect for the 2007 plan year, except that the value of plan assets prior to subtraction of the plan's funding standard account credit balance described below can neither be less than 90 percent of the fair market value of plan assets nor greater than 110 percent of the fair market value of plan assets on the valuation date for that plan year. If a plan has a funding standard account credit balance as of the valuation date for the 2007 plan year, that balance must be subtracted from the asset value described above as of that date unless the value of plan assets is greater than or equal to 90 percent of the plan's current liability determined under section 412(l)(7) on the valuation date for the 2007 plan year.

In the case of the first plan year beginning in 2008, for purposes of determining the AFTAP for the 2007 plan year, the proposed regulations provide that the adjusted funding target is equal to the current liability determined pursuant to section 412(l)(7) on the valuation date for the 2007 plan year, increased by the aggregate amount of purchases of annuities for employees other than highly compensated employees (as defined in section 414(q)) which were made by the plan during the preceding 2 plan years. In any case in which the plan's enrolled actuary has not issued a certification of the AFTAP of the plan for the 2007 plan year using this rule, the AFTAP of the plan for the first plan year beginning in 2008 is presumed to be less than 60 percent until the AFTAP of the plan for the 2007 plan year has been certified or the AFTAP of the plan for the first plan year beginning in 2008 has been certified. This rule applies for purposes of sections 436(b) and 436(c) at the beginning of the first plan year beginning in 2008 and applies for purposes of sections 436(d) and

436(e) as of the first day of the 4th month of the first plan year beginning in 2008. The special rules permitting range certifications for plan years beginning after 2007 do not apply to the 2007 plan year.

However, if the employer makes an election to reduce some or all of the funding standard carryover balance as of the first day of the first plan year beginning in 2008 in accordance with proposed §1.430(f)–1(e), then the present value (determined as of the valuation date for the prior year using the valuation interest rate for that prior year) of the amount so reduced is not treated as part of the funding standard account credit balance when that balance is subtracted from the value of net plan assets. Thus, an employer's election to reduce the funding standard carryover balance in 2008 will have the effect of reducing the amount that must be subtracted from the assets in determining the 2007 AFTAP for purposes of applying the presumptions under section 436(h)(3) as of the first day of the 4th month of the plan year beginning in 2008.

Proposed Legislation

As of the date of issuance of these proposed regulations, bills have been introduced in the House of Representatives and the Senate that would exclude mandatory cash-out distributions under section 411(a)(11) from application of the accelerated payments limitation under section 436(d) and that would provide the Treasury Department with authority to address application of the presumptions under section 436(h) to plans that have valuation dates that are later than the first day of the plan year.[5] Proposed §1.436–1(d)(6) and §1.436–1(h)(5), respectively, are reserved in order to accommodate such changes.

Section 1107 of PPA '06 and Code Section 411(d)(6)

Under section 1107 of PPA '06, a plan sponsor is permitted to delay adopting a plan amendment pursuant to statutory provisions under PPA '06 (or pursuant to any regulation issued under PPA '06) until the last day of the first plan year beginning on or after January 1, 2009 (January 1, 2011 in the case of governmental plans). As described in Rev. Proc. 2007–44, 2007–28 I.R.B. 54, this amendment deadline applies to both interim and discretionary amendments that are made pursuant to PPA '06 statutory provisions or any regulation issued under PPA '06. See §601.601(d)(2) of this chapter. If section 1107 of PPA '06 applies to an amendment of a plan, section 1107 provides that the plan does not fail to meet the requirements of section 411(d)(6) by reason of such amendment, except as provided by the Secretary of the Treasury.[6] For example, section 411(d)(6) relief would be available for plan amendments that would prohibit single sum or other accelerated distributions if the plan's AFTAP was less than 60 percent, in accordance with section 436(d) and §1.436–1(d) of the proposed regulations. Plan sponsors should note that the IRS and the Treasury Department are reviewing whether sample plan amendments should be issued with respect to section 436 and the §1.436–1 regulations.

ERISA notice to participants and beneficiaries

Under section 101(j) of ERISA, as amended by PPA '06, the plan administrator of a single employer plan is required to provide a written notice to participants and beneficiaries within 30 days after:

- The date the plan has become subject to a restriction described in the ERISA provisions that are parallel to paragraphs (b) and (d) of Code section 436;

- In the case of a plan that is subject to the ERISA provisions that are parallel to paragraph (e) of Code section 436, the valuation date for the plan year for which the plan's AFTAP is less than 60 percent (or, if earlier, the date the AFTAP is presumed to be less than 60 percent under the ERISA provisions that parallel the presumption rules in paragraph (h) of Code section 436); and

- At such other time as may be determined by the Secretary of the Treasury.

The notice is required to be provided in writing, except that the notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.

Effective/Applicability Dates

1. *Section 1.430(f)–1.*

In general, these regulations under section 430(f) are proposed to apply to plan years beginning on or after January 1, 2008. However, in the case of a plan for which the effective date of section 430 is delayed in accordance with sections 104 through 106 of the Pension Protection Act of 2006, Public Law 109–280, 120 Stat. 780, the regulations under section 430(f) are proposed to apply to plan years beginning on or after the effective date of section 430 with respect to the plan. Unlike section 436, section 430 and the regulations under section 430(f) do not include a delayed effective date for collectively bargained plans.

2. *Section 1.436–1.*

In general, the regulations under section 436 are proposed to apply to plan years beginning on or after January 1, 2008. However, in the case of a plan for which the effective date of section 436 is delayed in accordance with sections 104 through 106 of the Pension Protection Act of 2006, Public Law 109–280, 120 Stat. 780, the regulations under section 436 are proposed to apply to plan years beginning on or after the effective date of section 436 with respect to the plan. In addition, in the case of a collectively bargained plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before January 1, 2008, the regulations under section 436 would not apply to plan years beginning before the earlier of: (1) the later of the date on which the last collective bargaining agreement relating to the plan terminates (determined without

[5] H.R. 3361 (August 3, 2007) and S. 1974 (August 2, 2007), at sections 2(c)(1)(C), 2(c)(2)(C), 2(c)(1)(F), and 2(c)(2)(F).

[6] Except to the extent permitted under section 411(d)(6) and the §1.411(d)–4 regulations, or under a statutory provision such as section 1107 of PPA '06, section 411(d)(6) prohibits a plan amendment that decreases a participant's accrued benefits or that has the effect of eliminating or reducing an early retirement benefit or retirement-type subsidy, or eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment. However, an amendment that eliminates or decreases benefits that have not yet accrued does not violate section 411(d)(6), provided the amendment is adopted and effective before the benefits accrue.

regard to any extension thereof agreed to after August 17, 2006), or the first day of the first plan year to which the proposed regulations under section 436 would otherwise apply, or (2) January 1, 2010. For this purpose, any plan amendment made pursuant to a collective bargaining agreement relating to the plan which amends the plan solely to conform to any requirement under the proposed regulations would not be treated as a termination of the collective bargaining agreement. The determination of whether a plan is a collectively bargained plan is the same as described above in paragraph II.A.5 of this preamble with respect to a plan sponsor's deemed election to reduce funding balances.

3. *Reliance on proposed regulations.*

For periods following the issuance of these proposed regulations and before final regulations are issued, these proposed regulations may be relied upon for plan qualification purposes, provided that such reliance is on a consistent and reasonable basis.

4. *Effect on plans subject to section 402 of PPA '06.*

The IRS and the Treasury Department are reviewing the applicability of section 436 and the funding balance rules of section 430(f) to plans that have made elections under section 402 of PPA '06 (taking into account the amendments to section 402 of PPA '06 by section 6615 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (Public Law 110–28)) and any special rules for such plans will be addressed in future guidance.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information imposed by these proposed regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. The estimated burden imposed by the collection of information contained in these proposed regulations is 0.75 hours per respondent. Moreover, most of this burden is attributable to the requirement for a qualified defined benefit plan's enrolled actuary to provide a timely certification of the plan's AFTAP for each plan year to avoid certain benefit restrictions, which is imposed by section 436(h) of the Code. In addition, these proposed regulations provide for several written elections to be made by the plan sponsor upon occasion; these written elections will require minimal time to prepare. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (one signed and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the public hearing will be published in the Federal Register.

Drafting Information

The principal authors of these regulations are Lauson C. Green and Linda S.F. Marshall, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in the development of these regulations.

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.430(f)–1 is added to read as follows:

§1.430(f)–1 Effect of prefunding balance and funding standard carryover balance.

(a) *In general*—(1) *Overview.* This section provides rules relating to the application of prefunding balances and funding standard carryover balances under section 430(f). Section 430 and this section apply to single employer defined benefit plans (including multiple employer plans) that are subject to section 412, but do not apply to multiemployer plans (as defined in section 414(f)). Paragraph (b) of this section sets forth rules regarding a plan sponsor's election to maintain a funding standard carryover balance or a prefunding balance. Paragraph (c) of this section provides rules under which those balances must be subtracted from plan assets. Paragraph (d) of this section describes a plan sponsor's election to use those balances to offset the minimum required contribution. Paragraph (e) of this section describes a plan sponsor's election to reduce those balances (which will affect the determination of the value of plan assets for purposes of sections 430 and 436). Paragraph (f) of this section sets forth rules regarding elections under this section. Paragraph (g) of this section contains examples. Paragraph (h) of this section contains effective/applicability dates and transitional provisions.

(2) *Special rules for multiple employer plans.* In the case of a multiple employer plan to which section 413(c)(4)(A) applies, the rules of this section are applied separately for each employer under the plan, as if each employer maintained a separate plan. Thus, each employer under such a multiple employer plan may have a separate funding standard carryover balance and a prefunding balance for the plan. In the case of a multiple employer plan to which section 413(c)(4)(A) does not apply (that is, a plan described in section 413(c)(4)(B) that has not made the election for section 413(c)(4)(A) to apply), the rules of this section are applied as if all participants in the plan were employed by a single employer.

(b) *Election to maintain balances*—(1) *Prefunding balance*—(i) *In general*. A plan sponsor is permitted to maintain a prefunding balance for a plan. A prefunding balance maintained for a plan consists of a beginning balance of zero, increased by the amount of excess contributions to the extent the employer elects to do so as described in paragraph (b)(1)(ii) of this section, and decreased to the extent provided in paragraph (b)(1)(iii) of this section. The prefunding balance is adjusted further for investment return and interest as provided in paragraphs (b)(3) and (b)(4) of this section.

(ii) *Increases*—(A) *In general*. If the plan sponsor of a plan elects to add to the plan's prefunding balance, as of the first day of each plan year following the first effective plan year for the plan, the prefunding balance is increased by the amount so elected by the plan sponsor for the plan year. The amount added to the prefunding balance cannot exceed the interest-adjusted excess contributions for the preceding plan year determined under paragraph (b)(1)(ii)(B) of this section.

(B) *Interest-adjusted excess contribution*. For purposes of this paragraph (b)(1)(ii), the interest-adjusted excess contribution for the preceding plan year is the amount, increased with interest in accordance with the rules of paragraph (b)(1)(iv)(A) of this section, of the excess, if any, of—

(*1*) The present value of the employer contributions (other than contributions to avoid or terminate benefit limitations described in §1.436–1(f)(2)) to the plan for the preceding plan year determined under the rules of paragraph (b)(1)(iv)(B) of this section); over

(*2*) The minimum required contribution for the preceding plan year (determined without regard to any election to offset the minimum required contribution under paragraph (d) of this section for the preceding plan year).

(iii) *Decreases*. The prefunding balance of a plan is decreased (but not below zero) by the sum of—

(A) As of the first day of each plan year after the first effective plan year for the plan, any amount of the prefunding balance that was used under paragraph (d) of this section to offset the minimum required contribution of the plan for the preceding plan year; and

(B) As of the first day of each plan year, any reduction in the prefunding balance under paragraph (e) of this section for the plan year.

(iv) *Adjustments for interest*—(A) *Adjustment of excess contribution*. The amount of the excess contribution for the preceding year (as determined under paragraph (b)(1)(ii)(B) of this section) is increased for interest accruing for the period between the valuation date for the preceding plan year and the first day of the current year. For this purpose, interest is determined by using the plan's effective interest rate under section 430(h)(2)(A) for the preceding plan year.

(B) *Determination of present value*. The present value of the contributions described in paragraph (b)(1)(ii)(B)(*1*) of this section is determined as of the valuation date for the preceding plan year, using the plan's effective interest rate under section 430(h)(2)(A) for the preceding plan year.

(2) *Funding standard carryover balance*—(i) *In general*. A funding standard carryover balance is only permitted to be maintained by a plan that had a positive balance in the funding standard account under section 412(b) as of the end of the pre-effective plan year for the plan. The funding standard carryover balance as of the beginning of the first effective plan year for the plan is the positive balance in the funding standard account under section 412(b) as of the end of the pre-effective plan year for the plan, decreased to the extent provided in paragraph (b)(2)(ii) of this section and adjusted further for investment return and interest as provided in paragraphs (b)(3) and (b)(4) of this section.

(ii) *Decreases*. The funding standard carryover balance of a plan is decreased (but not below zero) by the sum of—

(A) As of the first day of each plan year after the first effective plan year for the plan, any amount of the funding standard carryover balance that was used under paragraph (d) of this section to offset the minimum required contribution of the plan for the preceding plan year; and

(B) As of the first day of each plan year, any reduction in the funding standard carryover balance under paragraph (e) of this section for the plan year.

(3) *Adjustments for investment experience*. In determining a plan's prefunding balance under paragraph (b)(1) of this section or a plan's funding standard carryover balance under paragraph (b)(2) of this section as of the first day of a plan year, the balance must be adjusted to reflect the actual rate of return on plan assets for the preceding plan year. This adjustment is applied to the balance after subtracting amounts used to offset the minimum required contribution for the preceding plan year pursuant to paragraph (d) of this section and after any reduction of balances for that preceding plan year under paragraph (e) of this section. For this purpose, the actual rate of return on plan assets for the preceding plan year is determined on the basis of fair market value and must take into account the amount and timing of all contributions, distributions, and other plan payments made during that period.

(4) *Valuation date other than the first day of the plan year*—(i) *In general*. If a plan's valuation date is not the first day of the plan year, solely for purposes of applying paragraphs (c), (d), and (e) of this section, the plan's prefunding balance and funding standard carryover balance (if any) determined under this paragraph (b) are increased to the valuation date using the plan's effective interest rate under section 430(h)(2)(A) for the plan year.

(ii) *Special rule for adjustments for investment experience*. For purposes of applying the rules regarding the adjustments for investment experience in paragraph (b)(3) of this section, in the case of a plan with a valuation date that is not the first day of the plan year, the amount of the funding balances that must be subtracted from plan assets under paragraph (d) of this section (because they are used to offset the minimum required contribution for the plan year) must be adjusted to the first day of the plan year using the effective interest rate under section 430(h)(2)(A) for that year.

(c) *Effect of balances on plan assets*—(1) *In general*. In the case of any plan with a prefunding balance or a funding standard carryover balance, the amount of those balances must be subtracted from the value of plan assets for purposes of sections 430 and 436, except as provided in paragraphs (c)(2), (c)(3), and (c)(4) of this section.

(2) *Subtraction of balances in determining new shortfall amortization base*—(i) *Prefunding balance*. For purposes of de-

termining whether a plan is exempt from the requirement to establish a new shortfall amortization base under section 430(c)(5), the amount of the prefunding balance is subtracted from the value of plan assets only if an election under paragraph (d) of this section to use the prefunding balance to offset the minimum required contribution is made for the plan year.

(ii) *Funding standard carryover balance*. For purposes of determining whether a plan is exempt from the requirement to establish a new shortfall amortization base under section 430(c)(5), the funding standard carryover balance is not subtracted from the value of plan assets regardless of whether any portion of either the funding standard carryover balance or the prefunding balance is used to offset the minimum required contribution for the plan year under paragraph (d) of this section.

(3) *Special rule for certain binding agreements with PBGC*. If there is in effect for a plan year a binding written agreement with the Pension Benefit Guaranty Corporation (PBGC) which provides that all or a portion of the prefunding balance or funding standard carryover balance (or both balances) is not available to offset the minimum required contribution for a plan year, that specified amount is not subtracted from the value of plan assets for purposes of determining the funding shortfall under section 430(c)(4). For example, if a PBGC agreement provides that $5 million of a plan's balances is unavailable to offset the minimum required contribution for a plan year, the sum of the plan's prefunding balance and funding standard carryover balance is $20 million, and the plan's assets are $100 million, the value of plan assets for purposes of determining the funding shortfall under section 430(c)(4) is reduced by $15 million ($20 million less $5 million) to $85 million. For purposes of this paragraph (c)(3), an agreement with the PBGC is taken into account with respect to a plan year only if the agreement was executed prior to the valuation date for the plan year.

(4) *Exception for section 436(j) and (k) special adjustment rules*. See section 436(j) and (k) and §1.436–1(j)(2)(ii) and (iii) for exceptions from the requirement to subtract the prefunding and funding standard carryover balances from plan assets in determining a plan's funding target attainment percentage for purposes of section 436.

(d) *Election to apply balances against minimum required contribution*—(1) *In general*. Subject to the limitations provided in paragraphs (d)(2) and (d)(3) of this section, in the case of any plan year in which the plan sponsor elects to use all or a portion of the prefunding balance or the funding standard carryover balance to offset the minimum required contribution for the current plan year, the minimum required contribution for the plan year (determined after taking into account any waiver under section 412(c)) is offset as of the valuation date for the plan year by the amount so used.

(2) *Requirement to use funding standard carryover balance before prefunding balance*. To the extent that a plan has a funding standard carryover balance greater than zero, no amount of the plan's prefunding balance may be used to offset the minimum required contribution. Thus, a plan's funding standard carryover balance must be exhausted before the plan's prefunding balance may be applied under paragraph (d)(1) of this section to offset the minimum required contribution.

(3) *Limitation for underfunded plans*. An election to apply a funding standard carryover balance or a prefunding balance under paragraph (d)(1) of this section is not available for a plan year if the plan's prior year funding ratio is less than 80 percent. For purposes of this paragraph (d)(3), except as provided in paragraph (h)(5) of this section, the plan's prior year funding ratio is the fraction (expressed as a percentage)—

(i) The numerator of which is the value of plan assets on the valuation date for the preceding plan year, reduced by the amount of any prefunding balance (but not the amount of any funding standard carryover balance); and

(ii) The denominator of which is the funding target of the plan for the preceding plan year (determined without regard to section 430(i)(1)).

(e) *Election to reduce balances*—(1) *In general*. A plan sponsor may make an election for a plan year to reduce any portion of a plan's prefunding balance and funding standard carryover balance under this paragraph (e). If such an election is made, the amount of those balances that must be subtracted from plan assets pursuant to paragraph (c)(1) of this section will be smaller and, accordingly, the plan assets taken into account for purposes of sections 430 and 436 will be larger. Thus, this election to reduce a plan's prefunding balance and funding standard carryover balance is taken into account in the determination of plan assets for the plan year and applies for all purposes under sections 430 and 436, including for purposes of determining the plan's prior year funding ratio under paragraph (d)(3) of this section for the following plan year. See also section 436(f)(3) and §1.436–1(a)(5) for a rule under which the plan sponsor is deemed to make the election described in this paragraph (e).

(2) *Coordination between prefunding balance and funding standard carryover balance*. To the extent that a plan has a funding standard carryover balance greater than zero, no election under paragraph (e)(1) of this section is permitted to be made that reduces the plan's prefunding balance. Thus, a plan must exhaust its funding standard carryover balance before it is permitted to make an election under paragraph (e)(1) of this section with respect to its prefunding balance.

(f) *Elections*—(1) *Method of making elections*. Any election under this section by the plan sponsor must be made by providing written notification of the election to the plan's enrolled actuary and the plan administrator. The written notification must set forth the relevant details of the election, including the specific amounts involved in the election with respect to the prefunding balance and funding standard carryover balance.

(2) *Timing of elections*—(i) *General rule*. Except as provided in paragraph (f)(2)(ii) of this section, any election under this section must be made on or before the due date (with extensions) for the filing of the plan's Form 5500, "*Annual Return/Report of Employee Benefit Plan*", for the plan year to which the election relates (or, in the case of a plan not required to file a Form 5500 for the plan year, on or before the last day of the seventh month after the end of the plan year to which the election relates). For this purpose, an election to add to the prefunding balance relates to the plan year for which excess contributions were made. For example, in the case of a plan required to file a Form 5500, an election to add to the prefunding balance

as of the first day of the 2010 plan year (in an amount not in excess of the 2009 interest-adjusted excess contributions under the rules of paragraph (b)(1)(ii) of this section) must be made no later than the due date for filing the 2009 Form 5500 even though the election is reported on the 2010 Form 5500 (Schedule SB).

(ii) *Election to reduce balances*. Any election under paragraph (e) of this section to reduce the prefunding balance or funding standard carryover balance for a plan year (for example, in order to avoid a benefit restriction under section 436) must be made by the end of the plan year to which the election relates.

(3) *Irrevocability of elections*. A plan sponsor's election under this section with respect to the plan's funding standard carryover balance or prefunding balance is irrevocable (and must be unconditional).

(4) *Plan sponsor*—(i) *In general*. For purposes of the elections described in this section, except as provided in paragraph (f)(4)(ii) of this section, any reference to the plan sponsor means the employer or employers responsible for making contributions to or under the plan.

(ii) *Certain multiple employer plans*. For purposes of the elections described in this section, in the case of plans that are multiple employer plans to which section 413(c)(4)(A) does not apply, any reference to the plan sponsor means the plan administrator within the meaning of section 414(g).

(g) *Examples*. The following examples illustrate the application of this section:

Example 1. (i) Plan P is a defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. The funding standard carryover balance of Plan P is $25,000 as of the beginning of the 2008 plan year. The sponsor of Plan P, Sponsor S, does not elect in 2008, pursuant to paragraph (e)(1) of this section, to reduce any portion of the funding standard carryover balance prior to the determination of the value of plan assets. The actual rate of return on Plan P's assets in 2008 is 2%. The effective interest rate in 2008 for Plan P is 6%. The minimum required contribution for Plan P under section 430 for 2008 is $100,000. The prior year funding ratio for Plan P for 2008, as determined under paragraph (h)(5) of this section, is not less than 80%.

(ii) Sponsor S makes a contribution to Plan P of $150,000 on December 1, 2008, for the 2008 plan year and makes no other contributions for the 2008 plan year. Because this contribution was made on a date other than the valuation date for the 2008 plan year, the contribution must be adjusted to reflect interest that would otherwise have accrued between the valuation date and the date of the contribution, at the effective rate of interest for the 2008 plan year. The amount of the contribution after adjustment is $142,198, determined as $150,000 discounted for 11 months of compound interest at an effective annual interest rate of 6%.

(iii) The excess of employer contributions for 2008 over the minimum required contribution for 2008, as of the valuation date, is $42,198 ($142,198 less $100,000). Accordingly, the increase in Plan P's prefunding balance as of January 1, 2009, cannot exceed $44,730 (which is the excess contribution of $42,198 adjusted for 12 months of interest at an effective interest rate of 6%).

(iv) Furthermore, if Sponsor S does not elect to apply any portion of the funding standard carryover balance toward the minimum contribution in 2008, the funding standard carryover balance as of January 1, 2009, is $25,500 (which is the funding standard carryover balance as of January 1, 2008, adjusted for investment experience at an effective interest rate of 2%).

Example 2. (i) The facts are the same as in *Example 1* except that the contribution of $150,000 is made on February 1, 2009, for the 2008 plan year.

(ii) The amount of the contribution after adjustment is $140,824, which is determined as $150,000 discounted for 13 months of interest at an effective interest rate of 6%. Accordingly, the increase in Plan P's prefunding balance as of January 1, 2009, cannot exceed $43,273 (which is the excess contribution of $40,824 adjusted for 12 months of interest at an effective interest rate of 6%).

Example 3. (i) The facts are the same as in *Example 1* except that Sponsor S contributes $85,000 to Plan P on January 1, 2008, for the 2008 plan year and makes no other contributions to Plan P for the 2008 plan year. In addition, Sponsor S elects to use $15,000 of the funding standard carryover balance to offset Plan P's minimum required contribution in 2008, pursuant to paragraph (d)(1) of this section.

(ii) With respect to the 2009 plan year, the adjustment for investment experience under paragraph (b)(3) of this section for the funding standard carryover balance for the preceding plan year is $200, determined as the actual rate of return on plan assets for 2008 as applied to the 2008 funding standard carryover balance after reduction for the amount of that balance used under paragraph (d)(1) of this section (that is, $25,000 less $15,000, multiplied by the actual rate of return of 2%).

(iii) The funding standard carryover balance, as of January 1, 2009, is $10,200, determined as the 2008 funding standard carryover balance less the amount used to offset the 2008 minimum required contribution, adjusted for investment experience during the 2008 year ($25,000 less $15,000 plus $200).

Example 4. (i) The facts are the same as in *Example 3* except that Sponsor S contributes $90,000 (instead of $85,000) to Plan P on January 1, 2008, for the 2008 plan year.

(ii) Notwithstanding the fact that the amount that Sponsor S contributed to Plan P exceeds the minimum required contribution ($85,000) after it has been offset as a result of the use of the funding standard carryover balance, the maximum amount that Sponsor S may add to the prefunding balance as of January 1, 2009, is $0. This is because the maximum amount that may be added to the prefunding balance is the excess of $90,000 over $100,000. See paragraphs (b)(1)(ii)(A) and (B) of this section.

Example 5. (i) Plan Q is a defined benefit plan with a plan year that is the calendar year and a valuation date of July 1. The funding standard carryover balance of Plan Q is $50,000 as of January 1, 2009, the beginning of the 2009 plan year. The prefunding balance of Plan Q as of the beginning of the 2009 plan year is $0. The actual rate of return on Plan Q's assets in 2009 is 10%. The effective interest rate for Plan Q for 2009 is 5%. The funding ratio for Plan Q in 2008 is 85%, as determined under paragraph (d)(3) of this section. Thus, the prior year funding ratio for 2009 is not less than 80%.

(ii) Pursuant to paragraph (b)(4) of this section, the funding standard carryover balance is increased to $51,235 as of July 1, 2009 (that is, an increase to reflect 6 months of interest at an effective interest rate of 5%). Sponsor T does not elect in 2009 to reduce any portion of the funding standard carryover balance pursuant to paragraph (e) of this section. The funding standard carryover balance ($51,235) is subtracted from the value of plan assets, as of July 1, 2009, prior to the determination of the minimum funding contribution and, accordingly, $51,235 is the maximum amount that may applied against the minimum required contribution.

(iii) The minimum required contribution for Plan Q for 2009 is $200,000. Sponsor T makes a contribution to Plan Q of $190,000 on July 1, 2009, for the 2009 plan year, and makes no other contributions for the 2009 plan year. Sponsor T elects to use $10,000 of the funding standard carryover balance to offset Plan Q's minimum required contribution in 2009. Accordingly, the value of the funding standard carryover balance as of July 1, 2009, prior to adjustment for investment experience, is $41,235 (that is, $51,235 less $10,000).

(iv) The value of the funding standard carryover balance as of January 1, 2010, is determined by first discounting the value as of July 1, 2009, after amounts have been used to offset the minimum required contribution, to January 1, 2009, at the effective interest rate and then crediting this so determined amount with a full year's investment experience at a rate equal to the actual rate of return. Thus, the July 1, 2009, value of $41,235 is discounted for 6 months of interest, at an effective interest rate of 5%, to obtain a January 1, 2009, value of $40,241. Accordingly, the value of the funding standard carryover balance as of January 1, 2010, is $44,265 (that is, $40,241 increased with one year's investment return at a rate of 10%).

(h) *Effective/applicablility date and transition rules*—(1) *General effective/applicability date*. Except as provided in paragraph (h)(2) of this section, this section applies to plan years beginning on or after January 1, 2008.

(2) *Plans with delayed effective date*. In the case of a plan for which the effective date of section 430 is delayed in accordance with sections 104 through 106 of the Pension Protection Act of 2006, Public Law 109–280, 120 Stat. 780, this section applies to plan years beginning on or after the effective date of section 430 with respect to the plan.

(3) *First effective plan year*. For purposes of this section, the first effective plan year for a plan is the first plan year to which this section applies under paragraph (h)(1) or (h)(2) of this section.

(4) *Pre-effective plan year*. For purposes of this section, the pre-effective plan year for a plan is the last plan year beginning before the first effective date applicable under paragraph (h)(1) or (h)(2) of this section. Thus, except for plans with a delayed effective date under paragraph (h)(2) of this section, the pre-effective plan year for a plan is the last plan year beginning before January 1, 2008.

(5) *Special lookback rule for pre-effective plan year's funding ratio*—(i) *Plan assets*. For purposes of determining a plan's prior year funding ratio pursuant to paragraph (d)(3) of this section for the first effective plan year, the value of plan assets on the valuation date of the preceding plan year is determined under section 412(c)(2) as in effect for that pre-effective plan year, except that—

(A) If the value of plan assets is less than 90 percent of the fair market value of plan assets for the pre-effective plan year on that date, for this purpose such value is considered to be 90 percent of the fair market value; and

(B) If the value of plan assets is greater than 110 percent of the fair market value of plan assets on the valuation date for the pre-effective plan year on that date, for this purpose such value is considered to be 110 percent of the fair market value.

(ii) *Funding target*. For purposes of determining a plan's prior year funding ratio pursuant to paragraph (d)(3) of this section for the first effective plan year, the funding target of the plan for the preceding plan year is equal to the plan's current liability under section 412(l)(7) on the valuation date for the plan's pre-effective plan year.

Par. 3. Section 1.436–1 is added to read as follows:

§1.436–1 Limits on benefits and benefit accruals under single employer defined benefit plans.

(a) *General rules*—(1) *Qualification requirement*. Section 401(a)(29) provides that a defined benefit pension plan that is subject to section 412 and that is not a multiemployer plan (within the meaning of section 414(f)) is a qualified plan only if it satisfies the requirements of section 436. This section provides rules relating to funding-based limitations on certain benefits under section 436, and the requirements of section 436 are satisfied only if the plan meets the requirements of this section beginning with the plan's first effective plan year. This section applies to single employer defined benefit plans (including multiple employer plans), but does not apply to multiemployer plans.

(2) *Organization of the regulation*. Paragraph (b) of this section describes a limitation on shutdown benefits and other unpredictable contingent event benefits. Paragraph (c) of this section describes limitations on plan amendments increasing liabilities. Paragraph (d) of this section describes limitations on accelerated benefit payments. Paragraph (e) of this section describes limitations on benefit accruals. Paragraph (f) of this section provides rules relating to methods to avoid benefit limitations. Paragraph (g) of this section provides rules for the operation of the plan in relation to benefit limitations under section 436. Paragraph (h) of this section describes related presumptions regarding underfunding that apply for purposes of the benefit limitations under section 436. Paragraph (j) of this section contains definitions. Paragraph (k) of this section contains effective/applicability date provisions.

(3) *Special rules for certain plans*—(i) *New plans*. The limitations described in paragraphs (b), (c), and (e) of this section do not apply to a plan for the first 5 plan years of the plan. For purposes of applying this rule, plan years of a plan are aggregated with plan years of a predecessor plan in accordance with section 414(a) or §1.415(f)–1(c).

(ii) *Multiple employer plans*. In the case of a multiple employer plan to which section 413(c)(4)(A) applies, this section applies separately with respect to each employer under the plan, as if each employer maintained a separate plan. Thus, the benefit limitations under section 436 and this section could apply differently to participants who are employees of different employers under such a multiple employer plan. In the case of a multiple employer plan to which section 413(c)(4)(A) does not apply (that is, a plan described in section 413(c)(4)(B) that has not made the election for section 413(c)(4)(A) to apply), this section applies as if all participants in the plan were employed by a single employer.

(4) *Treatment of plan as of close of prohibited or cessation period*—(i) *Resumption of benefit payments and accruals*—(A) *Resumption of accelerated payments*. If a limitation on accelerated benefit payments under paragraph (d) of this section applied to a plan as of a section 436 measurement date, but that limit no longer applies to the plan as of a later section 436 measurement date, then the prohibition on paying accelerated benefits under the plan does not apply to benefits with annuity starting dates that are on or after that later section 436 measurement date. Any amendment to eliminate the payment of accelerated benefit payments for periods in which they are not restricted under section 436 is subject to the rules of section 411(d)(6).

(B) *Resumption of benefit accruals*. Unless the plan provides otherwise, benefit accruals under the plan resume effective as of the section 436 measurement date on which benefit accruals are no longer restricted under paragraph (e) of this section.

(ii) *Missed benefit payments and accruals*—(A) *Option to amend plan to restore benefits*. A plan is permitted to be amended to provide participants who had an annuity starting date within a period during which the rules of paragraph (d) of this section applied to the plan with the opportunity to have a new election under which the form of benefit previously elected may be modified, subject to applicable qualification requirements. A participant who makes such a new election is treated as having a new annuity starting date under section 417. Similarly, a plan is permitted to be amended to provide that any benefit accruals which were limited under the rules of paragraph (e) of this section are credited under the plan when the limitation no longer applies, subject to applicable qualification requirements. Any such plan amendment with respect to a new annuity starting date or crediting of benefit accruals is subject to the requirements of section 436(c) and paragraph (c) of this section.

(B) *Automatic plan provisions to restore benefits*. A plan is permitted to provide that participants who had an annuity starting date within a period during which

the rules of paragraph (d) of this section applied to the plan are automatically provided with the opportunity to have a new annuity starting date (which would constitute a new annuity starting date under section 417) under which the form of benefit previously elected may be modified, subject to applicable qualification requirements, once the rules of paragraph (d) of this section cease to apply. In addition, a plan is permitted to provide for the automatic restoration of benefit accruals that had been limited under section 436(e) as of the section 436 measurement date that the limitation ceases to apply, as described in paragraph (a)(4)(ii)(A) of this section. However, if a plan provides for the automatic restoration of those benefit accruals and the period of the limitation exceeds 12 months, the plan will be treated as having adopted, effective as of the section 436 measurement date on which the limitation ceases to apply, a plan amendment that has the effect of increasing liabilities under the plan. Such an amendment is subject to the limitations of paragraph (c) of this section.

(iii) *Shutdown and other unpredictable contingent event benefits*—(A) *In general*. If any unpredictable contingent event benefits under paragraph (b) of this section are limited with respect to an unpredictable contingent event, that limitation applies to all such benefits that otherwise would have been paid to any plan participant with respect to that unpredictable contingent event.

(B) *Benefits not paid*. Notwithstanding paragraph (a)(4)(iii)(A) of this section, a plan is permitted to be amended to provide that any unpredictable contingent event benefits that were limited under the rules of paragraph (b) of this section will be paid or reinstated as of the section 436 measurement date on which the limitation no longer applies, subject to applicable qualification requirements. Such a plan amendment is subject to the requirements of section 436(c) and paragraph (c) of this section. A plan is not permitted to provide for restoration of any such unpredictable contingent event benefits without an amendment that complies with section 436(c).

(iv) *Example*. The following example illustrates the application of this paragraph (a)(4):

Example. (i) Plan T is a non-collectively bargained defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. As of January 1, 2011, Plan T does not have a funding standard carryover balance or a prefunding balance. Plan T's sponsor is not in bankruptcy. Beginning January 1, 2011, Plan T is subject to the restriction on accelerated benefit distributions under paragraph (d)(3) of this section based on a presumed adjusted funding target attainment percentage (AFTAP) of 75%, and can therefore only pay a portion (generally 50%) of the accelerated benefit distributions otherwise payable to participants who commence benefit payments while the restriction is in effect.

(ii) U is a participant in Plan T. Participant U retires on February 1, 2011, and elects to receive benefits in the form of a single sum. However, because U elected a form of payment that is a prohibited payment that is not permitted to be paid under paragraph (d)(3)(i) of this section, U elects in accordance with paragraph (d)(3)(ii) of this section to receive 50% of his benefit in a single sum and the remainder as an immediately commencing straight life annuity.

(iii) On March 1, 2011, the enrolled actuary for the Plan certifies that the AFTAP for 2011 is 80%. Accordingly, beginning March 1, 2011, Plan T is no longer subject to the restriction under paragraph (d)(3) of this section.

(iv) Effective March 1, 2011, Plan T is amended to provide that a participant whose benefits were restricted under paragraph (d)(3) of this section may elect within a specified period on or after March 1, 2011, a new annuity starting date and receive the remainder of his or her pension benefits in an accelerated form of payment. Plan T's enrolled actuary determines that the AFTAP, taking into account the amendment, is still 80%. The amendment is permitted to take effect because Plan T has an AFTAP of 80% taking into account the amendment, and is therefore neither subject to the restriction on plan amendments in paragraph (c) of this section nor the restrictions on accelerated benefit payments under paragraphs (d)(1) and (d)(3) of this section. Accordingly, Participant U may elect, subject to otherwise applicable qualification rules, including spousal consent, to receive the remainder of his benefits in the form of a single sum on or after March 1, 2011.

(5) *Deemed election to reduce funding balances*—(i) *Limitations on accelerated benefit payments*. If a benefit limitation under paragraph (d) of this section would (but for this paragraph (a)(5)) apply to a plan, the employer is treated as having made an election under section 430(f) to reduce the prefunding balance or funding standard carryover balance by such amount as is necessary for the adjusted funding target attainment percentage to be at or above the applicable threshold (60, 80, or 100 percent, as the case may be) in order for the benefit limitation not to apply to the plan. In such a case, the employer is treated as having made that election on the section 436 measurement date as of which the benefit limitation would otherwise apply (without regard to whether a participant is eligible for or requests a payment that is a prohibited payment described in paragraph (d)(5) of this section).

(ii) *Other limitations for collectively bargained plans*—(A) *General rule*. In the case of a collectively bargained plan to which a benefit limitation under paragraph (b), (c), or (e) of this section would (but for this paragraph (a)(5)) apply, the employer is treated as having made an election under section 430(f) to reduce the prefunding balance or funding standard carryover balance by such amount as is necessary for the adjusted funding target attainment percentage to be at or above the applicable threshold in order for the benefit limitation not to apply to the plan, taking into account the unpredictable contingent event benefits or plan amendment, as applicable. In such a case, the employer is treated as having made that election on the date as of which the applicable benefit limitation would otherwise apply.

(B) *Treatment of plans with both collectively bargained and non-collectively bargained employees*. In the case of a plan with respect to which collective bargaining agreements apply to some, but not all, of the plan participants, the plan is considered a collectively bargained plan for purposes of this paragraph (a)(5)(ii) if at least 25 percent of the participants in the plan are members of collective bargaining units for which the benefit levels under the plan are specified under a collective bargaining agreement.

(iii) *Exception for insufficient funding balances*—(A) *In general*. Paragraphs (a)(5)(i) and (a)(5)(ii) of this section apply with respect to a benefit limitation for any plan year only if the application of those paragraphs would result in the corresponding benefit limitation not applying for such plan year. Thus, if the plan's prefunding and funding standard carryover balances were reduced to zero and the resulting increase in plan assets taken into account would still not increase the plan's adjusted funding target attainment percentage enough to reach the threshold percentage applicable to the benefit limitation, the deemed election to reduce those balances pursuant to paragraph (a)(5)(i) or (a)(5)(ii) of this section does not apply.

(B) *Presumed adjusted funding target attainment percentage less than 60 percent*. If a plan is presumed to have an adjusted funding target attainment percentage of less than 60 percent under para-

graph (h)(3) of this section, then the plan is treated as if the funding standard carryover balance and the prefunding balance are insufficient to increase the adjusted funding target attainment percentage to the threshold percentage of 60 percent. Accordingly, paragraphs (a)(5)(i) and (a)(5)(ii) of this section do not apply to such a plan.

(iv) *Example*. The following example illustrates the application of this paragraph (a)(5):

Example. (i) Plan W is a collectively bargained, single-employer defined benefit plan sponsored by Sponsor X, with a plan year that is the calendar year and a valuation date of January 1. Sponsor X is not in bankruptcy.

(ii) The enrolled actuary for Plan W issues a certification on March 1, 2010, that the 2010 AFTAP is 81%. Sponsor X adopts an amendment on March 25, 2010, to increase benefits under a formula based on participant compensation, with an effective date of May 1, 2010. (Because the formula is based on compensation, the exception in paragraph (c)(3) of this section for increases with respect to a formula not based on compensation does not apply.) The plan's enrolled actuary determines that the plan's AFTAP for 2010 would be 75% if the benefits attributable to the plan amendment were taken into account. This percentage is below the 80% threshold for the plan amendment limitation under paragraph (c) of this section.

(iii) Because the AFTAP would be below the 80% threshold if the benefits attributable to the plan amendment were taken into account, Sponsor X is deemed to have made an election under paragraph (a)(5)(ii) of this section to reduce Plan W's prefunding balance and funding standard carryover balance by the amount necessary for the AFTAP to reach the 80% threshold (reflecting the increase in funding target attributable to the plan amendment) in order for the limitation under paragraph (c) of this section not to apply.

(iv) In this case, provided the reduction in funding balances is sufficient for the limitation not to apply, the plan amendment will go into effect on its effective date (May 1). See paragraph (f) of this section for other methods to avoid benefit limitations (where, for example, the amount necessary for a benefit limitation not to apply for a plan year exceeds the aggregate funding balances).

(b) *Limitation on shutdown benefits and other unpredictable contingent event benefits*—(1) *In general*. A plan that contains an unpredictable contingent event benefit satisfies section 436(b) and this section only if it provides that the benefit will not be paid to a plan participant during a plan year if the adjusted funding target attainment percentage for the plan year—

(i) Is less than 60 percent; or

(ii) Is 60 percent or more, but would be less than 60 percent if the benefits attributable to the unpredictable contingent event were taken into account in determining the adjusted funding target attainment percentage.

(2) *Exemption*—(i) *In general*. The prohibition on payment of unpredictable contingent event benefits under paragraph (b)(1) of this section ceases to apply with respect to a plan year, effective as of the first day of the plan year, upon payment by the plan sponsor of the contribution described in paragraph (f)(2) of this section.

(ii) *Prior unpredictable contingent event*. Unpredictable contingent event benefits attributable to an unpredictable contingent event that occurred within a period during which no limitation under this paragraph (b) applied to the plan are not affected by the limitation described in this paragraph (b) as it applies in a subsequent period. For example, if a plant shutdown occurs in 2010 and the plan's funded status is such that shutdown benefits related to that shutdown are not subject to the limitation described in this paragraph (b) for that calendar plan year, this paragraph (b) will not apply to restrict payment of those shutdown benefits even if another shutdown occurs in 2012 that results in shutdown benefits related to that later shutdown being restricted under this paragraph (b) (where the plan's adjusted funding target attainment percentage for 2012 is less than 60 percent taking into account the liability attributable to those shutdown benefits).

(3) *Unpredictable contingent event*. For purposes of this section, an *unpredictable contingent event benefit* means any benefit or increase in benefits to the extent the benefit or increase would not be payable but for the occurrence of an unpredictable contingent event. For this purpose, an *unpredictable contingent event* means a plant shutdown (whether full or partial) or similar event, or an event other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability. Thus, for example, if a plan provides for an unreduced early retirement benefit upon the occurrence of an event other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability, then that unreduced early retirement benefit is an unpredictable contingent event benefit to the extent of any portion of the benefit that would not be payable but for the occurrence of the event, even if the remainder of the benefit is payable without regard to the occurrence of the event. Similarly, if a plan includes a benefit payable upon the presence of circumstances specified in the plan (other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability), but not upon a severance from employment that does not include those circumstances, the plan is providing an unpredictable contingent event benefit.

(c) *Limitations on plan amendments increasing liability for benefits*—(1) *In general*. Except as provided in this paragraph (c), a plan satisfies section 436(c) and this section only if the plan provides that no amendment to the plan that has the effect of increasing liabilities of the plan by reason of increases in benefits, establishment of new benefits, changing the rate of benefit accrual, or changing the rate at which benefits become nonforfeitable takes effect if the adjusted funding target attainment percentage for the plan year is—

(i) Less than 80 percent; or

(ii) Is 80 percent or more, but would be less than 80 percent if the benefits attributable to the amendment were taken into account in determining the adjusted funding target attainment percentage.

(2) *Exemption*. The limitations on plan amendments in paragraph (c)(1) of this section cease to apply and the amendment is permitted to take effect as of the later of the first day of the plan year or the effective date of the amendment upon payment by the plan sponsor of the contribution described in paragraph (f)(2) of this section.

(3) *Exception for certain benefit increases*—(i) *In general*. The limitation on plan amendments under paragraph (c)(1) of this section does not apply to any amendment that provides for an increase in benefits under a formula that is not based on a participant's compensation, but only if the rate of increase in benefits does not exceed the contemporaneous rate of increase in average wages of participants covered by the amendment. The determination of the rate of increase in average wages is made by taking into consideration the net increase in average wages from the period of time beginning with the effective date of the most recent benefit increase applicable to all of those participants who are covered by the current amendment and

ending on the effective date of the current amendment.

(ii) *Application to terminated participants*. If an amendment applies to both currently employed and terminated participants, all such participants must be included in determining the increase in average wages of the participants covered by the amendment. For this purpose, terminated participants are treated as having no increase or decrease in wages for the period after severance from employment.

(iii) *Separate amendments for different plan populations*. In lieu of a single amendment that applies to both currently employed participants and terminated participants as described in paragraph (c)(3)(ii) of this section, the employer could adopt two amendments — one that increases benefits for currently employed participants and another one that increases benefits for terminated participants. In that case, the two amendments are considered separately in determining the increase in average wages, and the exception in this paragraph (c)(3) from application of the section 436(c) limitation would apply separately to each amendment (so that an amendment providing for increases in benefits for currently employed participants could go into effect, but an amendment providing for increases in benefits for terminated participants who received no increase in wages from the employer during the period over which the increase in average wages is determined could not go into effect).

(4) *Exception for statutorily required vesting*. To the extent that any amendment results in (or is made pursuant to) a mandatory increase in the vesting of benefits under the Code or ERISA (such as vesting rate increases pursuant to statute, plan termination amendments under section 411(d)(3), and amendments that lead to vesting increases required by top heavy rules under section 416), that amendment does not constitute an amendment that changes the rate at which benefits become nonforfeitable for purposes of section 436(c) and this paragraph (c).

(d) *Limitations on accelerated benefit payments*—(1) *Funding percentage less than 60 percent*—(i) *In general*. A plan satisfies the requirements of section 436(d)(1) and this paragraph (d)(1) only if the plan provides that, if the plan's adjusted funding target attainment percentage for a plan year is less than 60 percent, the plan will not pay any prohibited payment with an annuity starting date on or after the applicable section 436 measurement date.

(ii) *Request for prohibited distribution*. If a participant or beneficiary requests a distribution that is prohibited under paragraph (d)(1)(i) of this section, the plan must permit the participant or beneficiary to elect another form of benefit available under the plan or to defer payment to a later date to the extent permitted under applicable qualification requirements.

(2) *Bankruptcy*. A plan satisfies the requirements of section 436(d)(2) and this paragraph (d)(2) only if the plan provides that the plan will not pay any prohibited payment with an annuity starting date that is during any period in which the plan sponsor is a debtor in a case under title 11, United States Code, or similar Federal or State law, except for payments made with an annuity starting date within a plan year that is on or after the date on which the enrolled actuary of the plan certifies that the plan's adjusted funding target attainment percentage for that plan year is not less than 100 percent. The rules of paragraph (d)(1)(ii) of this section apply if payments are prohibited under this paragraph (d)(2).

(3) *Limited payment if percentage at least 60 percent but less than 80 percent*—(i) *In general*. A plan satisfies the requirements of section 436(d)(3) and this paragraph (d)(3) only if the plan provides that, in any case in which the plan's adjusted funding target attainment percentage for a plan year is 60 percent or more but is less than 80 percent, a participant or beneficiary is permitted to elect the payment of a benefit with an annuity starting date on or after the applicable section 436 measurement date in the form of a prohibited payment only if the present value, determined in accordance with section 417(e)(3), of the portion of the payment that is greater than the amount of the straight life annuity under the plan (as described in paragraph (d)(5)(i)(A) of this section) does not exceed the lesser of—

(A) 50 percent of the present value of the benefits, determined in accordance with section 417(e)(3) (or, if greater, 50 percent of the amount of any single sum that would be payable without regard to this paragraph (d)); or

(B) 100 percent of the PBGC guarantee amount described in paragraph (d)(3)(iv) of this section.

(ii) *Bifurcation if optional form unavailable*—(A) *General rule*. If an optional form of benefit that is otherwise available under the terms of the plan is not available as of the annuity starting date because of the application of paragraph (d)(3)(i) of this section, then the plan must provide a participant or beneficiary who elects such an optional form with the option either to defer payment to a later date (to the extent permitted under applicable qualification requirements) or to bifurcate the benefit into unrestricted and restricted portions. If the participant or beneficiary elects to bifurcate the benefit, the plan must permit the participant or beneficiary to elect, with respect to the unrestricted portion, any optional form of benefit otherwise available under the plan with respect to the participant's or beneficiary's entire benefit (whether or not the optional form of benefit with respect to the unrestricted portion is a prohibited payment). In such a case, if the participant or beneficiary elects payment of the unrestricted portion of the benefit described in paragraph (d)(3)(ii)(B) of this section in the form of a prohibited payment, the plan must permit the participant or beneficiary to elect payment of the restricted portion described in paragraph (d)(3)(ii)(C) of this section in any optional form of benefit under the plan that is not a prohibited payment and that would have been permitted with respect to the participant's or beneficiary's entire benefit. A plan is also permitted to offer optional forms of benefit that are solely available during the period this paragraph (d)(3) applies to the plan, such as an optional form of benefit that provides for the current payment of the unrestricted portion of the benefit, with a delayed commencement for the restricted portion of the benefit, subject to other applicable qualification requirements.

(B) *Unrestricted portion of the benefit*. The unrestricted portion of the benefit is the lesser of—

(*1*) 50 percent of the benefit; and

(*2*) The portion of the benefit that has a present value equal to the PBGC guarantee amount described in paragraph (d)(3)(iv) of this section.

(C) *Restricted portion of the benefit*. The restricted portion of the benefit is the

portion of the benefit that is not described in paragraph (d)(3)(ii)(B) of this section.

(iii) *One-time application*—(A) *In general*. A plan satisfies the requirements of this paragraph (d) only if the plan provides that, in the case of a participant who receives a prohibited payment (or series of prohibited payments under a single optional form of benefit) pursuant to paragraph (d)(3)(i) or (ii) of this section, the participant cannot thereafter receive any additional prohibited payment during any period of consecutive plan years to which the limitations under either this paragraph (d)(3), paragraph (d)(1) of this section, or paragraph (d)(2) of this section apply.

(B) *Treatment of beneficiaries*. For purposes of this paragraph (d)(3), benefits provided to a participant and any beneficiary (including an alternate payee, as defined in section 414(p)(8)) are aggregated. If the accrued benefit of a participant is allocated to such an alternate payee and one or more other persons, the unrestricted amount under paragraphs (d)(3)(i) and (d)(3)(ii) of this section is allocated among such persons in the same manner as the accrued benefit is allocated, unless a qualified domestic relations order (as defined in section 414(p)(1)(A)) with respect to the participant or the alternate payee provides otherwise.

(iv) *Present value of PBGC maximum benefit guarantee*. The amount described in this paragraph (d)(3)(iv) is, with respect to a participant, the present value (determined under guidance prescribed by the Pension Benefit Guaranty Corporation, using the interest and mortality assumptions under section 417(e)) of the maximum benefit guarantee under section 4022 of ERISA.

(v) *Examples*. The following examples illustrate the application of this paragraph (d)(3):

Example 1. (i) Plan A is subject to the restriction on accelerated benefit distributions under paragraph (d)(3) of this section for the 2010 plan year, and can therefore only pay a portion of the accelerated benefit payments otherwise payable to participants whose annuity starting date occurs while the restriction applies.

(ii) Participant P is not married, and retires at age 65 during 2010, while the restriction under paragraph (d)(3) of this section applies to Plan A. P's accrued benefit is $10,000 per month, payable commencing at age 65 as a straight life annuity. Plan A provides for an optional single sum payment (subject to the restrictions under section 436) equal to the present value of the participant's accrued benefit using actuarial assumptions under section 417(e). P's single sum payment, determined without regard to this paragraph (d), is calculated to be $1,416,000, payable at age 65.

(iii) The PBGC guaranteed monthly benefit for a straight life annuity payable at age 65 in 2010 (for purposes of this example) is $4,500. The present value of the PBGC guaranteed benefit using actuarial assumptions under section 417(e) is $637,200.

(iv) Because Participant P retires during a period when the restriction in paragraph (d)(3) of this section applies to Plan A, only a portion of the benefit can be paid in the form of a single sum. P elects a single sum payment. Because a single sum payment is a prohibited payment, a determination must be made whether the payment can be paid under paragraph (d)(3)(i) of this section. In this case, because the portion of Participant P's benefit that is greater than a straight life annuity exceeds the lesser of 50% of the benefit otherwise payable, or the present value of the PBGC guaranteed benefit, it cannot be paid under paragraph (d)(3)(i) of this section. Accordingly, the maximum single sum that Participant P can receive is $637,200 (that is, the lesser of 50% of $1,416,000 or $637,200).

(v) Pursuant to paragraph (d)(3)(ii) of this section, the plan must offer P the option to bifurcate the benefit into restricted and unrestricted portions. The unrestricted portion is a monthly straight life annuity of $4,500, which can be paid in a single sum of $637,200. If P elects to receive the unrestricted portion of the benefit in the form of a single sum, then, with respect to the $5,500 restricted portion, the plan must permit P to elect any form of benefit that would otherwise be permitted with respect to the full $10,000 that is not a prohibited payment. Alternatively, the plan could permit P to elect to defer commencement of the restricted portion, subject to applicable qualification rules.

Example 2. (i) The facts are the same as in *Example 1*. In addition, Plan A provides an optional form of payment (subject to any benefit restrictions under section 436) that consists of a partial payment equal to the total return of employee contributions to the plan accumulated with interest, with an annuity payment for the remainder of the participant's benefit.

(ii) Participant Q is not married, and retires at age 65 during 2010, while Plan A is subject to the restriction under paragraph (d)(3) of this section. Participant Q has an accrued benefit equal to a straight life annuity of $3,000 per month. Under the optional form described in paragraph (i) of this *Example 2*, Q may elect a partial payment of $99,120 (representing the return of employee contributions accumulated with interest) plus a straight life annuity of $2,300 per month. The present value of Participant Q's accrued benefit, using actuarial assumptions under section 417(e), is $424,800. The present value of the PBGC guarantee payable at age 65 in the form of a straight life annuity is determined to be $637,200 for the purposes of this *Example 2*.

(iii) Under the bifurcation approach of paragraph (d)(3)(ii) of this section, Q can receive the partial single sum payment available under the terms of Plan A as long as the amount of the single sum does not exceed the unrestricted portion of the benefit under paragraph (d)(3)(ii)(B) of this section. The unrestricted portion of Q's benefit is the lesser of 50% of the benefit otherwise payable, or the present value of the PBGC guaranteed benefit. Accordingly, the maximum single sum that Q can receive is $212,400 (that is, the lesser of 50% of $424,800, or $637,200).

(iv) Because the present value of the portion of Q's benefit that is greater than the straight life annuity ($99,120) is less than the lesser of 50% of the present value of benefits (50% of $424,800) and $637,200 (100% of the PBGC guaranteed benefit), the optional form described in paragraph (i) of this *Example 2* is permitted to be paid under paragraph (d)(3)(i) of this section.

(4) *Exception for cessation of benefit accruals*. This paragraph (d) does not apply to a plan for a plan year if the terms of the plan, as in effect for the period beginning on September 1, 2005, provided for no benefit accruals with respect to any participants. If a plan that is described in this paragraph (d)(4) provides for benefit accruals during any time after September 1, 2005, this paragraph (d)(4) ceases to apply for the plan as of the date any benefits accrue under the plan.

(5) *Prohibited payment*—(i) *In general*. For purpose of this paragraph (d), the term *prohibited payment* means—

(A) Any payment for a month that is in excess of the monthly amount paid under a straight life annuity (plus any social security supplements described in the last sentence of section 411(a)(9)) to a participant or beneficiary whose annuity starting date occurs during any period that a limitation under this paragraph (d) is in effect;

(B) Any payment for the purchase of an irrevocable commitment from an insurer to pay benefits; and

(C) Any other payment that is identified as a prohibited payment by the Commissioner in revenue rulings and procedures, notices and other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2) of this chapter).

(ii) *Annuity starting date*. Solely for purposes of applying the limitations on accelerated benefit payments under this paragraph (d), the term *annuity starting date* means, as applicable—

(A) The first day of the first period for which an amount is payable as an annuity as described in section 417(f)(2)(A)(i);

(B) In the case of a benefit not payable in the form of an annuity, the first day on which all events have occurred (including the participant's election, the participant's severance from employment if the participant is below normal retirement age, and, if applicable, the participant's survival to the date as of which payment is made)

which entitle the participant to such benefit as described in section 417(f)(2)(A)(ii);

(C) In the case of an amount payable under a retroactive annuity starting date, the benefit commencement date; and

(D) The date of any payment for the purchase of an irrevocable commitment from an insurer to pay benefits under the plan.

(6) *Involuntary distributions under section 411(a)(11).* [Reserved].

(e) *Limitation on benefit accruals for plans with severe funding shortfalls*—(1) *In general.* A plan satisfies the requirements of section 436(e) and this paragraph (e) only if it provides that, in any case in which the plan's adjusted funding target attainment percentage for a plan year is less than 60 percent, benefit accruals under the plan will cease as of the applicable section 436 measurement date. If a plan is required to cease benefit accruals under this paragraph (e), then the plan is not permitted to be amended in a manner that would increase the liabilities of the plan by reason of an increase in benefits or establishment of new benefits. The preceding sentence applies regardless of whether an amendment would otherwise be permissible under paragraph (c)(3) of this section.

(2) *Exemption.* The prohibition on additional benefit accruals under a plan described in paragraph (e)(1) of this section ceases to apply with respect to any plan year, effective as of the first day of the plan year, upon payment by the plan sponsor of the contribution described in paragraph (f)(2) of this section.

(f) *Methods to avoid benefit limitations*—(1) *In general.* This paragraph (f) sets forth rules relating to employer contributions and other methods to avoid the application of section 436 limitations under a plan for a plan year. In general, there are four methods a plan sponsor may utilize to avoid or terminate one or more of the benefit limitations under this section for a plan year. Two of these methods (where the plan sponsor elects to reduce the prefunding balance or funding standard carryover balance and where the plan sponsor makes additional contributions under section 430 for the prior plan year within the time period provided by section 430(j)(1) which are not added to the prefunding balance) involve increasing the amount of plan assets which are taken into account in determining the adjusted funding target attainment percentage. The other two methods (making a contribution that is specifically designated as a current year contribution to avoid application of a benefit limitation under paragraph (b), (c), or (e) of this section, and providing security under section 436(f)(1)) are described in paragraphs (f)(2) and (f)(3) of this section, respectively.

(2) *Current year contributions to avoid or terminate benefit limitations*—(i) *General rules*—(A) *Amount of contribution*—(*1*) *In general.* This paragraph (f)(2) sets forth rules regarding contributions to avoid the application of section 436 limitations under a plan for a plan year that apply to unpredictable contingent event benefits, plan amendments that increase liabilities for benefits, and benefit accruals.

(*2*) *Interest adjustment.* Any contribution made by a plan sponsor pursuant to this paragraph (f)(2) on a date other than the valuation date for the plan year must be adjusted with interest at the plan's effective interest rate under section 430(h)(2)(A) for the plan year. If the plan's effective interest rate for the plan year has not been determined at the time of the contribution, then this interest adjustment must be made using the highest of the three segment rates as applicable for the plan year under section 430(h)(2)(C). In such a case, if the effective interest rate for the year under section 430(h)(2)(A) is subsequently determined to be less than that highest rate, the excess is recharacterized as a section 430 contribution for the current plan year.

(B) *Prefunding balance or funding standard carryover balance may not be used.* No prefunding balance or funding standard carryover balance under section 430(f) may be used as a contribution described in this paragraph (f)(2). However, a plan sponsor is permitted to elect to reduce the funding standard carryover balance or the prefunding balance in order to increase the adjusted funding target attainment percentage for a plan year. See paragraph (a)(5) of this section for a rule mandating such a reduction in certain situations.

(ii) *Section 436 contributions separate from minimum required contributions*—(A) *In general.* The contributions described in this paragraph (f)(2) are contributions described in section 436(b)(2), (c)(2), and (e)(2), and are separate from any minimum required contributions under section 430. Thus, if a plan sponsor makes a contribution described in this paragraph (f)(2) for a plan year but does not make the minimum required contribution for the plan year, the plan will fail to satisfy the minimum funding requirements under section 430 for the plan year. In addition, a contribution described in this paragraph (f)(2) is disregarded in determining the prefunding balance under section 430(f)(6) and §1.430(f)–1(b)(1)(i).

(B) *Designation requirement.* Any contribution made by a plan sponsor pursuant to this paragraph (f)(2) must be designated as such at the time the contribution is used to avoid or terminate the limitations under this paragraph (f)(2) and, except as specifically provided in paragraph (g) or (h) of this section, cannot subsequently be recharacterized with respect to any plan year as a contribution to satisfy a minimum required contribution obligation, or otherwise. The designation must be made in accordance with the rules and procedures that otherwise apply to elections under §1.430(f)–1(f) with respect to funding balances.

(iii) *Contribution for unpredictable contingent event benefits.* In the case of a contribution to avoid the application of the limitation on benefits attributable to an unpredictable contingent event under section 436(b)—

(A) If the adjusted funding target attainment percentage for the plan year determined without taking into account the liability attributable to the unpredictable contingent event benefits is less than 60 percent, then the amount of the contribution under section 436(b)(2) is equal to the amount of the increase in the funding target of the plan for the plan year if the benefits attributable to the unpredictable contingent event were included in the determination of the funding target.

(B) If the adjusted funding target attainment percentage for the plan year determined without taking into account the liability attributable to the unpredictable contingent event benefits is 60 percent or more, then the amount of the contribution under section 436(b)(2) is the amount that would be sufficient to result in an adjusted funding target attainment percentage for the plan year of 60 percent if—

(*1*) The benefits attributable to the unpredictable contingent event were included in the determination of the funding target; and

(*2*) The contribution were included as part of the assets of the plan.

(iv) *Contribution for plan amendments increasing liability for benefits*. In the case of a contribution to avoid the application of the limitation on benefits attributable to a plan amendment under section 436(c)—

(A) If the adjusted funding target attainment percentage for the plan year determined without taking into account the liability attributable to the plan amendment is less than 80 percent, then the amount of the contribution under section 436(c)(2) is equal to the amount of the increase in the funding target of the plan for the plan year if the liabilities attributable to the amendment were included in the determination of the funding target.

(B) If the adjusted funding target attainment percentage for the plan year determined without taking into account the liability attributable to the plan amendment is 80 percent or more, then the amount of the contribution under section 436(c)(2) is the amount that would be sufficient to result in an adjusted funding target attainment percentage for the plan year of 80 percent if—

(*1*) The liabilities attributable to the plan amendment were included in the determination of the funding target; and

(*2*) The contribution were included as part of the assets of the plan.

(v) *Contribution required for continued benefit accruals*. In the case of a contribution to avoid the application of the limitation on accruals under section 436(e), the amount of the contribution under section 436(e)(2) is equal to the amount sufficient to result in an adjusted funding target attainment percentage for the plan year of 60 percent if the contribution were included as part of the assets of the plan.

(3) *Security to increase adjusted funding target attainment percentage*—(i) *In general*. For purposes of avoiding benefit limitations under section 436, a plan sponsor may provide security in the form described in paragraph (f)(3)(ii) of this section. In such a case, the adjusted funding target attainment percentage for the plan year is determined by treating as an asset of the plan any security provided by a plan sponsor by the valuation date for the plan year in a form meeting the requirements of paragraph (f)(3)(ii) of this section. However, this security is not taken into account as a plan asset for any other purpose, including section 430.

(ii) *Form of security*. The forms of security permitted under paragraph (f)(3)(i) of this section are limited to—

(A) A bond issued by a corporate surety company that is an acceptable surety for purposes of section 412 of ERISA; or

(B) Cash, or United States obligations which mature in 3 years or less, held in escrow by a bank or an insurance company.

(iii) *Enforcement*. Any form of security provided under paragraph (f)(3)(i) of this section must provide—

(A) That it will be paid to the plan upon the earliest of—

(*1*) The plan termination date as defined in section 4048 of ERISA;

(*2*) If there is a failure to make a payment of the minimum required contribution for any plan year beginning after the security is provided, the due date for the payment under section 430(j)(1) or 430(j)(3); or

(*3*) If the plan's adjusted funding target attainment percentage is less than 60 percent (without regard to any security provided under this paragraph (f)(3)) for a consecutive period of 7 years, the valuation date for the last year in the 7-year period; and

(B) That the plan administrator must notify the surety, bank, or insurance company that issued or holds the security of any event described in paragraph (f)(3)(iii)(A) of this section within 10 days of its occurrence.

(iv) *Release of security*. The form of security is permitted to provide that it will be released (and any amounts thereunder will be refunded together with any interest accrued thereon) as provided in the agreement governing the escrow, but such release is not permitted until the plan's enrolled actuary has certified that the plan's adjusted funding target attainment percentage for a plan year is at least 90 percent (without regard to any security provided under this paragraph (f)(3)).

(v) *Contribution of security to plan*. Any amount of security provided under this paragraph (f)(3) that is subsequently turned over to the plan (whether pursuant to the enforcement mechanism of paragraph (f)(3)(iii) of this section or after its release under paragraph (f)(3)(iv) of this section) is treated as a contribution by the plan sponsor under section 430 when contributed and, if turned over pursuant to paragraph (f)(3)(iii) of this section, is not a contribution under paragraph (f)(2) of this section.

(4) *Examples*. The following examples illustrate the application of this paragraph (f):

Example 1. (i) Plan Z is a non-collectively bargained defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. Plan Z's sponsor is not in bankruptcy and did not purchase any annuities in 2009 or 2010. As of January 1, 2011, Plan Z does not have a funding standard carryover balance or a prefunding balance. As of that date, Plan Z has plan assets (and adjusted plan assets) of $2,000,000 and a funding target (and an adjusted funding target) of $2,550,000. On March 1, 2011, the enrolled actuary for the plan certifies that the AFTAP as of January 1, 2011, is 78.43%. The effective rate of interest for Plan Z for the 2011 plan year is 5.5%.

(ii) On May 1, 2011, the plan sponsor amends Plan Z to increase benefits. The enrolled actuary for the plan determines that the present value, as of January 1, 2011, of the increase in the funding target due to this amendment is $400,000. Because the AFTAP prior to the plan amendment is less than 80%, Plan Z is subject to the restriction on plan amendments in paragraph (c) of this section, and the amendment cannot take effect unless the employer utilizes one of the methods described in paragraph (f) of this section to avoid benefit limitations.

(iii) In order for this amendment to be permitted to become effective, the plan sponsor makes a contribution described in paragraph (f)(2) of this section. Because the AFTAP prior to the amendment was less than 80%, the provisions of paragraph (f)(2)(iv)(A) of this section apply. The amount of the contribution as of January 1, 2011, needed to avoid the restriction on plan amendments under paragraph (c) of this section is equal to the amount of the increase in the funding target attributable to the amendment, or $400,000. Under the provisions of paragraph (f)(2)(iv)(A) of this section, this contribution is required even though, if the contribution were included as part of the plan assets and the liability attributable to the plan amendment were included in the funding target, the AFTAP would be 81.36% (because the adjusted plan assets would have been $2,400,000 and the adjusted funding target would have been $2,950,000 (that is, adjusted plan assets of $2,000,000 plus the contribution of $400,000 as of January 1, 2011; divided by the adjusted funding target of $2,550,000 increased to reflect the additional $400,000 in the funding target attributable to the plan amendment)).

(iv) However, because the contribution is not paid until May 1, 2011, the necessary contribution amount must be adjusted to reflect interest that would otherwise have accrued between the valuation date and the date of the contribution, at Plan Z's effective rate of interest for the 2011 plan year. The amount of the required contribution after adjustment is $407,203, determined as $400,000 increased for 4 months of compound interest at an effective annual interest rate of 5.5%.

(v) A contribution of $407,203 is made on May 1, 2011, and is designated as a contribution under

paragraph (f)(2) of this section. Accordingly, the contribution is not applied toward minimum funding requirements under section 430, and is not eligible for inclusion in the prefunding balance under §1.430(f)–1(b)(1). Since this contribution meets the requirements of paragraph (f)(2) of this section, the plan amendment can take effect.

Example 2. (i) The facts are the same as in *Example 1*, except that the plan is in at-risk status under section 430(i). The funding target determined under section 430(i) is $2,600,000, and the funding target determined without regard to section 430(i) is $2,550,000.

(ii) On May 1, 2011, the plan sponsor amends Plan Z to increase benefits. The plan's enrolled actuary determines that the present value as of January 1, 2011 of the increase in the funding target due to the amendment (taking into account the at-risk status of the plan) is $440,000. Because the AFTAP prior to the plan amendment is less than 80%, Plan Z is subject to the restriction on plan amendments in paragraph (c) of this section, and the amendment cannot take effect unless the employer utilizes one of the methods described in paragraph (f) of this section to avoid benefit limitations.

(iii) In order for this amendment to be permitted to become effective, the plan sponsor makes a contribution described in paragraph (f)(2) of this section. Because the AFTAP prior to the amendment was less than 80%, the provisions of paragraph (f)(2)(iv)(A) of this section apply. The amount of the contribution as of January 1, 2011, needed to avoid the restriction on plan amendments under paragraph (c) of this section is equal to the amount of the increase in funding target attributable to the amendment, or $440,000. Under the provisions of paragraph (f)(2)(iv)(A) of this section, this contribution is required even though, if the contribution were included as part of the plan assets and the liability attributable to the plan amendment were included in the funding target, the AFTAP would exceed 80%.

(iv) However, because the contribution is not paid until May 1, 2011, the necessary contribution amount must be adjusted to reflect interest that would otherwise have accrued between the valuation date and the date of the contribution, at Plan Z's effective rate of interest for the 2011 plan year. The amount of the required contribution after adjustment is $447,923, determined as $440,000 increased for 4 months of compound interest at an effective annual interest rate of 5.5%.

(v) A contribution of $447,923 is made on May 1, 2011, and is designated as a contribution under paragraph (f)(2) of this section. Accordingly, the contribution is not applied toward minimum funding requirements under section 430, and is not eligible for inclusion in the prefunding balance under §1.430(f)–1(b)(1). Since this contribution meets the requirements of paragraph (f)(2) of this section, the plan amendment can take effect.

Example 3. (i) The facts are the same as in *Example 1*, except that the enrolled actuary for the plan does not issue the certification of the 2011 AFTAP until September 1, 2011. Prior to October 1, 2010, the enrolled actuary had certified the 2010 AFTAP to be 82%. The highest of the three segment rates applicable to the 2011 plan year under section 430(h)(2)(C) is 6%.

(ii) Because the enrolled actuary has not certified the actual AFTAP as of January 1, 2011, and the amendment is scheduled to take effect after April 1, 2011, the rules of paragraph (h)(2)(ii) of this section apply. Accordingly, the AFTAP for 2011 (prior to reflecting the effect of the amendment) is presumed to be 10 percentage points lower than the 2010 AFTAP, or 72%. Because this presumed AFTAP is less than 80%, the restriction on plan amendments in paragraph (c) of this section applies, and the plan amendment cannot take effect.

(iii) In order to allow the plan amendment to take effect, the plan sponsor decides to make a contribution under paragraph (f)(2) of this section on May 1, 2011. Because the presumed AFTAP was less than 80% prior to reflecting the plan amendment, the rules of paragraph (f)(2)(iv)(A) of this section apply, and the amount of the contribution under section 436(c)(2) is the amount of the increase in the funding target for the year if the plan amendment were included in the determination of the funding target. Accordingly, an additional contribution of $400,000 is required as of January 1, 2011, to avoid the restriction on plan amendments under paragraph (c) of this section.

(iv) However, since the contribution is not made until May 1, 2011, the amount of the required contribution must be adjusted to reflect interest that would otherwise have accrued between the valuation date and the date of the contribution. Since the effective interest rate has not yet been determined, the interest adjustment is based on the highest of the three segment rates applicable for the 2011 plan year under section 430(h)(2)(C), or 6%. The amount of the required contribution after adjustment is $407,845, determined as $400,000 increased for 4 months of compound interest at the highest segment interest rate for 2011, or 6%.

(v) Once the plan's effective interest rate has been determined, if that rate for the year is less than 6%, the amount of excess interest previously contributed is recharacterized as a section 430 contribution for the current plan year.

(g) *Rules of operation for periods prior to and after certification*—(1) *In general*. Section 436(h) and paragraph (h) of this section set forth a series of presumptions that apply before the enrolled actuary for a plan issues a certification of the plan's adjusted funding target attainment percentage for a plan year. This paragraph (g) sets forth rules for the application of limitations under sections 436(b), 436(c), 436(d), and 436(e) prior to and during the period those presumptions apply to a plan, and describes the interaction of those presumptions with plan operations after the plan's enrolled actuary has issued a certification of the plan's adjusted funding target attainment percentage for the plan year. Paragraph (g)(2) of this section sets forth rules that apply to periods during which a presumption under section 436(h) applies. Paragraph (g)(3) of this section sets forth rules that apply to periods during which no presumptions under section 436(h) apply but which are prior to the enrolled actuary's certification of the plan's adjusted funding target attainment percentage for the plan year. Paragraph (g)(4) of this section sets forth rules that apply after the enrolled actuary's certification of the plan's adjusted funding target attainment percentage for a plan year. Paragraph (g)(5) of this section sets forth additional rules that apply prior to the enrolled actuary's certification of the adjusted funding target attainment percentage for a plan year with respect to the limitations on unpredictable contingent event benefits and plan amendments that increase liabilities under paragraphs (b) and (c) of this section, respectively. Paragraph (g)(6) of this section sets forth rules for multiple unpredictable contingent events and amendments during a plan year. Paragraph (g)(7) of this section sets forth examples of the application of this paragraph (g).

(2) *Periods prior to certification during which a presumption applies*—(i) *Plan must follow presumptions*. A plan must provide that, for any period during which paragraph (h)(1), (2), or (3) of this section applies to the plan, the limitations applicable under paragraphs (b), (c), (d), and (e) of this section apply to the plan as if the actual adjusted funding target attainment percentage for the year were the presumed adjusted funding target attainment percentage determined under the rules of paragraph (h) of this section.

(ii) *Determination of amount of reduction in balances*—(A) *Valuation date adjustment*. During the period described in this paragraph (g)(2), the rules of paragraph (a)(5) of this section (relating to the deemed election to reduce the funding standard carryover balance and the prefunding balance) must be applied based on the presumed percentage with respect to the limitations under paragraphs (b), (c), (d), and (e) of this section. In order to determine the amount of the reduction in those balances that would apply in such a situation, a presumed adjusted funding target must be established, which is then compared to the interim value of adjusted plan assets as of the valuation date for the current plan year. For this purpose, the interim value of adjusted plan assets is equal to the value of adjusted plan assets as of the valuation date, determined

without regard to future contributions, future elections to add to the prefunding balance for the prior year, and future elections (including deemed elections under paragraph (a)(5) of this section) to reduce the prefunding and funding standard carryover balances for the current plan year, and the presumed adjusted funding target is equal to the interim value of adjusted plan assets for the plan year divided by the presumed adjusted funding target attainment percentage.

(B) *Change in presumed percentage in 4th month*. If the presumed adjusted funding target attainment percentage for the plan year changes during the year because of application of the presumption in paragraph (h)(2) of this section, the rules regarding the deemed election to reduce funding balances described in paragraph (a)(5) of this section must be reapplied based on the new presumed adjusted funding target attainment percentage. This will typically occur on the first day of the 4th month of a plan year, but could happen later if the enrolled actuary's certification of the adjusted funding target attainment percentage for a plan year occurs after the first day of the 4th month of the following plan year. In order to perform this reapplication, a new adjusted funding target must be determined based on the new presumed adjusted funding target attainment percentage and must be compared to an updated interim value of adjusted plan assets. For this purpose, the new presumed adjusted funding target is redetermined based on the new presumed adjusted funding target attainment percentage, and is compared to the adjusted plan assets updated to take into account the plan sponsor's contributions made for the prior plan year and section 430(f) elections with respect to the plan's prefunding and funding standard carryover balances since the earlier determination of the interim plan assets. This reapplication of the deemed election may require an additional reduction in funding balances if the amount of the reduction in funding balances that is necessary to reach the applicable threshold to avoid the application of the limitation under paragraph (d) or (e) of this section is greater than the amount that was initially reduced. Prior reductions of funding balances continue to apply in accordance with the rules of paragraph (g)(4)(i)(C) of this section.

(iii) *Bankruptcy of plan sponsor*. Pursuant to section 436(d)(2), during any period in which the plan sponsor of a plan is a debtor in a case under title 11, United States Code, or any similar Federal or State law (as described in paragraph (d)(2) of this section), if the plan's enrolled actuary has not yet certified the plan's adjusted funding target attainment percentage for the plan year to be at least 100 percent, no prohibited payments within the meaning of paragraph (d)(5) of this section may be paid. Thus, the presumption rules of paragraph (h) of this section do not apply for purposes of section 436(d)(2) and this paragraph (g)(2)(iii).

(iv) *Application to unpredictable contingent events and plan amendments*. For purposes of applying the limitations under paragraphs (b) and (c) of this section during the period described in this paragraph (g)(2), the presumed adjusted funding target under paragraph (g)(2)(ii) of this section is adjusted to reflect the increase in the funding target that would be attributable to the unpredictable contingent event or the plan amendment if the unpredictable contingent event benefits or the increase in liability attributable to the plan amendment were taken into account. See paragraph (g)(5)(i) of this section for related rules regarding funding balances that apply in the case of unpredictable contingent event benefits or plan amendments increasing benefit liabilities.

(3) *Periods prior to certification during which no presumption applies*—(i) *Accelerated benefit payments and benefit accruals*. If no presumptions under section 436(h) apply to a plan during a period and the plan's enrolled actuary has not yet issued the certification of the plan's actual adjusted funding target attainment percentage for the plan year, the plan is not permitted to limit the payment of accelerated benefits under paragraph (d) of this section or the accrual of benefits under paragraph (e) of this section based on an expectation that those paragraphs will apply to the plan once an actuarial certification is issued. However, see paragraph (g)(2)(iii) of this section for a restriction on prohibited payments during any period in which the plan sponsor of a plan is a debtor in a case under title 11, United States Code, or any similar Federal or State law.

(ii) *Unpredictable contingent event benefits and plan amendments increasing benefit liability*—(A) *In general*. If no presumptions under section 436(h) apply to a plan during a period and the plan's enrolled actuary has not yet issued a certification of the plan's adjusted funding target attainment percentage for the plan year, the limitations on unpredictable contingent event benefits under paragraph (b) of this section or plan amendments increasing benefit liability under paragraph (c) of this section during that period must be applied following the rules of paragraph (g)(5) of this section, based on the preceding year's certified adjusted funding target attainment percentage. Thus, if after application of those rules the plan would be treated as having an adjusted funding target attainment percentage below the applicable threshold under paragraph (b) or (c) of this section (taking into account the increase in the funding target attributable to the unpredictable contingent event benefits or the increase in liability attributable to the plan amendment), the unpredictable contingent event benefits are not permitted to be paid, and the plan amendment is not permitted to go into effect, unless the contribution described in paragraph (g)(5)(ii) of this section is made.

(B) *Recharacterization of contributions to avoid benefit limitations*. If, pursuant to paragraph (g)(3)(ii)(A) of this section, the plan sponsor makes contributions described in paragraph (g)(5)(ii) of this section to avoid application of the applicable benefit limitations, then, after the certification of the adjusted funding target attainment percentage for the current plan year is issued by the plan's enrolled actuary, those contributions are recharacterized as employer contributions under section 430 for the current plan year to the extent they exceed the amount necessary to avoid application of the applicable limitation under paragraph (b) or (c) of this section based on the certified percentage.

(4) *Periods after certification of adjusted funding target attainment percentage*—(i) *Plan must follow certified percentage*—(A) *In general*. The rules of paragraphs (g)(2) and (g)(3) of this section no longer apply for a plan year on and after the date the enrolled actuary for the plan issues a certification of the adjusted funding target attainment percentage of the plan for the current plan year, provided that the certification is issued before the first day of the 10th month of the plan

year. Thus, for example, the plan must provide that paragraph (d) of this section applies for distributions with annuity starting dates on and after the date of that certification using the certified adjusted funding target attainment percentage of the plan for the plan year. Similarly, the plan must provide that any prohibition on accruals under paragraph (e) of this section as a result of the enrolled actuary's certification that the adjusted funding target attainment percentage of the plan for the plan year is less than 60 percent is effective as of the date of the certification and that any prohibition on accruals ceases to be effective on the date the enrolled actuary issues a certification that the adjusted funding target attainment percentage of the plan for the plan year is at least 60 percent. In addition, in the case of a plan that has been issued a certification of the plan's adjusted funding target attainment percentage for a plan year by the plan's enrolled actuary, the plan sponsor must comply with the requirements of paragraphs (b) and (c) of this section for an unpredictable contingent event that occurs or a plan amendment that is effective on or after the date of the enrolled actuary's certification. Thus, the plan administrator must determine if the adjusted funding target attainment percentage is at or above the applicable threshold, taking into account the increase in the funding target that would be attributable to the unpredictable contingent event or plan amendment if the unpredictable contingent event benefits or the increase in liability attributable to the plan amendment were taken into account.

(B) *Application of rule for deemed election to reduce funding balances*. After the adjusted funding target attainment percentage for a plan year is certified by the plan's enrolled actuary, the deemed election to reduce funding balances under paragraph (a)(5) of this section must be reapplied based on the actual funding target for the year (provided the certification is issued before the first day of the 10th month of the plan year). This reapplication of the deemed election may require an additional reduction in funding balances if the amount of the reduction in funding balances that is necessary to reach the applicable threshold to avoid the application of the limitations under paragraph (d) or (e) of this section is greater than the amount that was reduced under paragraph (g)(2) or (g)(3) of this section.

(C) *Prior reductions continue to apply*. If the amount of the reduction in funding balances that is necessary to reach the applicable threshold to avoid the application of the benefit limitation is less than the amount that was reduced under paragraph (g)(2) or (g)(3) of this section, then the prior reduction continues to apply. Similarly, if the amount of the reduction in funding balances that is necessary to reach the applicable threshold to avoid the application of the corresponding benefit limitation exceeds the amount of the funding balances, then the prior reduction continues to apply and no further reduction under paragraph (a)(5) of this section is provided.

(ii) *Applicability to prior periods*—(A) *In general*. Except as provided in paragraph (g)(4)(ii)(B) of this section, the enrolled actuary's certification of the adjusted funding target attainment percentage for the plan for the plan year does not affect the application of the limitation under paragraph (b) of this section with respect to unpredictable contingent events that occur during the periods to which paragraphs (g)(2) and (g)(3) of this section apply. Except as provided in paragraph (g)(4)(ii)(B) of this section, the enrolled actuary's certification of the adjusted funding target attainment percentage for the plan for the plan year does not affect the application of the limitation under paragraph (c) of this section to a plan amendment that increases liability for benefits where the amendment is first effective during the periods to which paragraphs (g)(2) and (g)(3) apply. The enrolled actuary's certification of the adjusted funding target attainment percentage for the plan for the plan year does not affect the application of the limitation under paragraph (d) of this section for distributions with annuity starting dates before the certification. Similarly, the enrolled actuary's certification of the adjusted funding target attainment percentage for the plan for the plan year does not affect the application of the limitation under paragraph (e) of this section prior to the date of that certification. See paragraph (a)(4) of this section for rules relating to the period of time after benefits cease to be limited.

(B) *Special rule for unpredictable contingent event benefits and plan amendments that increase liability*. If a plan does not pay benefits attributable to an unpredictable contingent event or plan amendment because of the application of paragraph (g)(5)(ii) of this section, the plan must provide for benefits that were not previously paid (or accrued) if such benefits would be permitted under the rules of section 436 based on the certified actual adjusted funding target attainment percentage, taking into account the increase in the funding target that would be attributable to the unpredictable contingent event benefits or increase in liability due to the plan amendment.

(5) *Additional rules regarding limitations on unpredictable contingent event benefits and certain plan amendments based on presumed adjusted funding target prior to certification*—(i) *Reduction in funding balances*—(A) *Mandatory reduction for collectively bargained plans*. During the period described in paragraph (g)(2) or (g)(3) of this section, the rules of paragraph (a)(5) of this section (relating to the deemed election to reduce the funding standard carryover balance and the prefunding balance) must be applied based on the presumed percentage. In order to determine the amount of the reduction in those balances that would apply to a collectively bargained plan during that period with respect to an unpredictable contingent event or a plan amendment that increases liability for benefits, the rules of paragraph (g)(2)(ii) of this section are applied, except that the presumed adjusted funding target is increased to take into account the benefits attributable to the unpredictable contingent event or the plan amendment. For this purpose, if no presumption applies under the rules of paragraph (h) of this section (for example, because the plan's actual adjusted funding target attainment percentage for the prior year was certified to be at least 80 percent), then that prior year's actual adjusted funding target attainment percentage is substituted for the presumed adjusted funding target attainment percentage for the plan year in determining the presumed adjusted funding target.

(B) *Optional reduction for plans that are not collectively bargained plans*. A plan sponsor of a plan that is not a collectively bargained plan (and, thus, is not required to reduce the funding standard account carryover balance and the prefund-

ing balance under the rules of paragraph (a)(5) of this section) is permitted to reduce those balances in order to increase the interim value of adjusted plan assets (as defined in paragraph (g)(2)(ii)(A) of this section) that is compared to the presumed adjusted funding target determined under this paragraph (g)(5)(i).

(ii) *Plans funded below the threshold*. If, after application of paragraph (g)(5)(i) of this section, the ratio of the interim value of adjusted plan assets (as defined in paragraph (g)(2)(ii)(A) of this section) to the presumed adjusted funding target determined under that paragraph is less than the applicable threshold under section 436(b) or 436(c), as applicable, then the plan is not permitted to provide any benefits attributable to the unpredictable contingent event or plan amendment unless the plan sponsor makes a contribution that would allow payment of unpredictable contingent event benefits or would permit a plan amendment increasing benefit liabilities to go into effect under the rules of paragraph (b)(2) or (c)(2) of this section.

(iii) *Plans funded at or above the threshold*. If, after application of paragraph (g)(5)(i) of this section, the ratio of the interim value of adjusted plan assets (as defined in paragraph (g)(2)(ii)(A) of this section) to the presumed adjusted funding target is greater than or equal to the applicable threshold under section 436(b) or 436(c), as applicable, then the plan is not permitted to limit the payment of unpredictable contingent event benefits described in paragraph (b) of this section nor is the plan permitted to restrict a plan amendment increasing benefit liability described in paragraph (c) of this section from becoming effective based on an expectation that the limitations under paragraph (b) or (c) of this section will apply to the plan once an actuarial certification is received.

(6) *Application to multiple events and amendments*. For purposes of this paragraph (g), if a plan is providing benefits with respect to one or more unpredictable contingent events occurring within the plan year or amendments taking effect within the plan year, then paragraphs (b) and (c) of this section are applied with respect to a subsequent unpredictable contingent event or amendment by treating the increase in the funding target attributable to the subsequent event or amendment as if it included the increases in the funding target attributable to all such earlier events or amendments.

(7) *Examples*. The following examples illustrate the application of this paragraph (g). Unless otherwise indicated, these examples are based on the following facts: each plan has a plan year that is the calendar year and a valuation date of January 1; the first effective plan year is 2008; the plan sponsor is not in bankruptcy; and no annuity purchases have been made from the plan. No plan is in at-risk status for the years discussed in the examples.

Example 1. (i) As of January 1, 2011, Plan A has assets of $3,300,000 and a prefunding balance of $300,000. Plan A has no funding standard carryover balance. Beginning on January 1, 2011, Plan A's AFTAP for 2011 is presumed to be 75%, under the rules of paragraph (h) of this section and based on the certified AFTAP for 2010.

(ii) Based on Plan A's presumed AFTAP of 75%, Plan A would be subject to the restriction on prohibited payments in paragraph (d)(3) of this section as of January 1, 2011. However, under the provisions of paragraph (a)(5) of this section, if the prefunding balance is large enough, Plan A's sponsor is deemed to elect to reduce the prefunding balance to the extent needed to avoid this restriction.

(iii) The amount needed to avoid the restriction in paragraph (d)(3) of this section is determined by comparing the presumed adjusted funding target for Plan A with the interim value of adjusted plan assets as of the valuation date. The interim value of plan assets for Plan A is $3,000,000 (that is, the asset value of $3,300,000 reduced by the prefunding balance of $300,000). The presumed adjusted funding target for Plan A is the interim value of the adjusted plan assets divided by the presumed AFTAP, or $4,000,000 (that is, $3,000,000 divided by 75%).

(iv) In order to avoid the restriction on prohibited payments in paragraph (d)(3) of this section, Plan A's presumed AFTAP must be increased to 80%. This requires an increase in Plan A's adjusted plan assets of $200,000 (that is, 80% of the presumed adjusted funding target of $4,000,000, minus the interim value of the adjusted plan assets of $3,000,000). Plan A's prefunding balance as of January 1, 2011, is reduced by $200,000 under the deemed election provisions of paragraph (a)(5) of this section. Accordingly, Plan A's prefunding balance is $100,000 (that is, $300,000 minus $200,000) and the interim value of adjusted plan assets is increased to $3,200,000 (that is, $3,300,000 minus the reduced prefunding balance of $100,000). Plan A must pay the full amount of the accelerated benefit distributions elected by participants with an annuity starting date of January 1, 2011, or later.

Example 2. [Reserved].

Example 3. (i) The facts are the same as in *Example 1*. On July 1, 2011, the enrolled actuary for Plan A calculates the actual adjusted funding target as $3,700,000 as of January 1, 2011. Therefore, the 2011 AFTAP would have been 81.08% without reducing the prefunding balance (that is, plan assets of $3,300,000 minus the prefunding balance of $300,000, divided by the adjusted funding target of $3,700,000), and Plan A would not have been subject to the restrictions under paragraph (d)(3) of this section.

(ii) However, paragraph (g)(4)(i)(C) of this section requires that any prior reductions in the prefunding or funding standard carryover balances continue to apply, and so Plan A's prefunding balance remains at the reduced amount of $100,000 as of January 1, 2011. The enrolled actuary certifies that the 2011 AFTAP is 86.49% (that is, plan assets of $3,300,000 reduced by the prefunding balance of $100,000, divided by the adjusted funding target of $3,700,000).

Example 4. (i) Plan B is a collectively bargained plan with assets of $2,500,000 and a prefunding balance of $150,000 as of January 1, 2011. Plan B has no funding standard carryover balance. Beginning on January 1, 2011, Plan B's AFTAP for 2011 is presumed to be 83% under the rules of paragraph (g)(3) of this section and based on the certified AFTAP for 2010.

(ii) On January 10, 2011, Plan B's sponsor amends the plan to increase benefits effective on February 1, 2011. The amendment would increase Plan B's funding target by $350,000. Under the rules of paragraph (g)(5) of this section, the presumed adjusted funding target is calculated, and then the presumed adjusted funding target is increased to take into account the benefits attributable to the plan amendment.

(iii) Plan B's interim value of adjusted plan assets as of the valuation date is $2,350,000 (that is, $2,500,000 minus the prefunding balance of $150,000). Prior to reflecting the amendment, Plan B's presumed adjusted funding target as of January 1, 2011, is $2,831,325, which is equal to the interim value of adjusted plan assets as of the valuation date of $2,350,000, divided by the presumed AFTAP of 83%. Increasing Plan B's presumed adjusted funding target by $350,000 to reflect the amendment results in a presumed adjusted funding target of $3,181,325 and a presumed AFTAP of 73.87% (that is, the interim value of adjusted plan assets as of the valuation date of $2,350,000 divided by the presumed adjusted funding target of $3,181,325).

(iv) Because Plan B's presumed AFTAP was over 80% prior to taking the amendment into account but less than 80% when the amendment is reflected, section 436(c) and paragraph (c) of this section prohibit the plan amendment from taking effect unless the adjusted plan assets are increased so that the presumed AFTAP (reflecting the increase due to the amendment) is increased to 80%. This would require an additional amount of $195,060 (that is, 80% of the presumed adjusted funding target of $3,181,325 less the interim value of adjusted plan assets of $2,350,000).

(v) Plan B's prefunding balance of $150,000 is not large enough for Plan B to avoid the restriction on plan amendments, and therefore the deemed election to reduce the prefunding balance under paragraph (a)(5) of this section does not apply and the amendment cannot take effect.

Example 5. (i) The facts are the same as in *Example 4*, except that Plan B's sponsor decides to make a contribution on February 1, 2011, to avoid the benefit limitation as provided in paragraph (f)(2) of this section. Pursuant to paragraph (f)(2)(i)(A)(*2*) of this section, Plan B's effective rate of interest for 2011 is treated as 5.25%.

(ii) The amount of the contribution as of January 1, 2011, needed to avoid the restriction on plan amendments under paragraph (c) of this section is $195,060. However, because the contribution is not paid until February 1, 2011, the necessary contribution amount must be adjusted to reflect interest that would otherwise have accrued between the valuation date and the date of the contribution, at Plan B's effective rate of interest for the 2011 plan year. The amount of the required contribution after adjustment is $195,894, determined as $195,060 increased for one month of compound interest at an effective annual interest rate of 5.25%.

(iii) As of April 1, 2011, the enrolled actuary for the plan has not certified the 2011 AFTAP. Therefore, beginning April 1, 2011, Plan A's presumed AFTAP is presumed to be 73%, 10 percentage points lower than the 2010 AFTAP, in accordance with paragraph (h)(2) of this section. However, paragraph (g)(2)(ii)(B) of this section does not require reapplication of the deemed election if necessary to avoid the application of benefit restrictions under paragraph (c) of this section. Therefore, since the effective date of the plan amendment occurred prior to April 1, 2011, no additional reduction in the prefunding balance is required and no additional contribution is required for the plan amendment to remain in effect.

(iv) On July 1, 2011, the enrolled actuary for the plan calculates the actual adjusted funding target, prior to taking the plan amendment into account, as $2,700,000 and certifies the actual AFTAP for 2011 (prior to taking the amendment into account) as 87.04% (that is, adjusted assets of $2,350,000 divided by the adjusted funding target of $2,700,000). Reflecting the $350,000 increase in funding target due to the plan amendment would increase the adjusted funding target to $3,050,000 and would decrease Plan B's AFTAP to 77.05%.

(v) Based on the certified AFTAP, the amount necessary to avoid the benefit restriction under paragraph (c) of this section is $90,000 (that is, 80% of the adjusted funding target reflecting the plan amendment (or $3,050,000), minus the adjusted value of plan assets of $2,350,000). This amount must be adjusted for interest between the valuation date and the date the contribution was made using the effective interest rate for Plan B. Therefore, the amount required on the payment date of February 1, 2011, is $90,385 (that is, $90,000 adjusted for compound interest for one month at Plan B's effective interest rate of 5.25% per year).

(vi) Under paragraph (g)(3)(ii)(B) of this section, the contribution made under paragraph (g)(5)(ii) of this section is recharacterized as an employer contribution under section 430 to the extent that it exceeds the amount necessary to avoid application of the restriction on plan amendments under paragraph (c) of this section. Therefore, $105,509 (that is, the $195,894 actual contribution paid on February 1, 2011, minus the $90,385 required contribution based on the actual certified AFTAP) is recharacterized as an employer contribution under section 430 for the 2011 plan year. As such, it may be applied toward the minimum required contribution for 2011, or the plan sponsor can elect to credit the contribution to Plan B's prefunding balance to the extent that the contributions for the 2011 plan year exceed the minimum required contribution.

Example 6. (i) The facts are the same as in *Example 5*, except that on July 1, 2011, the enrolled actuary for Plan B calculates the actual adjusted funding target (before reflecting the plan amendment) as $3,000,000 and certifies the actual AFTAP as 78.33% prior to reflecting the plan amendment (that is, adjusted plan assets of $2,350,000 divided by the actual adjusted funding target of $3,000,000). Based on the provisions of paragraph (c) of this section, because the AFTAP prior to reflecting the amendment is less than 80%, the contribution required to avoid the restriction on plan amendments would have been the amount equal to the increase in funding target due to the plan amendment, or $350,000.

(ii) However, according to paragraph (g)(4)(ii)(A) of this section, the enrolled actuary's certification of the 2011 AFTAP does not affect the application of the limitation under paragraph (c) of this section regardless of the extent to which the certified percentage varies from the presumed percentage, because the amendment to Plan B was effective prior to the date of the certification. Therefore, it is not necessary for Plan B's sponsor to contribute an additional amount in order for the plan amendment to remain in effect.

(h) *Presumed underfunding for purposes of benefit limitations*—(1) *Presumption of continued underfunding*—(i) *In general.* This paragraph (h)(1) applies to a plan for which a limitation under paragraph (b), (c), (d), or (e) of this section applied to the plan on the last day of the plan year preceding the current plan year. If this paragraph (h)(1) applies to a plan, the first day of the plan year is a section 436 measurement date and the presumed adjusted funding target attainment percentage for the plan is the percentage under paragraph (h)(1)(ii) or (iii) of this section, whichever applies to the plan, beginning on that first day until it is changed under this paragraph (h).

(ii) *Rule where preceding year certification issued during preceding year.* In any case in which the plan's enrolled actuary has issued a certification under paragraph (h)(4) of this section of the adjusted funding target attainment percentage for the plan year preceding the current year before the first day of the current year, the adjusted funding target attainment percentage of the plan for the current plan year is presumed to be equal to the preceding year's actual adjusted funding target attainment percentage until the plan's enrolled actuary issues a certification of the adjusted funding target attainment percentage of the plan for the current plan year under paragraph (h)(4) of this section or until changed under paragraph (h)(2) or (h)(3) of this section.

(iii) *No certification for preceding year issued during preceding year*—(A) *Deemed percentage under 60 percent.* In any case in which the plan's enrolled actuary has not issued a certification under paragraph (h)(4) of this section of the adjusted funding target attainment percentage of the plan for the plan year preceding the current year during that prior plan year, the adjusted funding target attainment percentage of the plan for the current plan year is presumed to be less than 60 percent until changed under paragraph (h)(1)(iii)(B) or (h)(2)(iii) of this section or where the plan's enrolled actuary issues the certification of the adjusted funding target attainment percentage for the current year under paragraph (h)(4) of this section.

(B) *Enrolled actuary's certification in first 3 months of following year.* In any case in which the plan's enrolled actuary has issued the certification under paragraph (h)(4) of this section of the adjusted funding target attainment percentage of the plan for the plan year preceding the current year on or after the first day of the current year but before the first day of the 4th month of that year, the date of that prior year certification is a new section 436 measurement date for the plan year. In such a case, until it is changed by a certification of the current year's adjusted funding target attainment percentage under paragraph (h)(4) of this section or otherwise changed under paragraph (h)(2) or (h)(3) of this section, the presumed percentage for the current year beginning on the date of certification is equal to the certified percentage for the preceding year.

(2) *Presumption of underfunding after first day of 4th month for nearly underfunded plans*—(i) *In general.* This paragraph (h)(2) applies to a plan for which the actual adjusted funding target attainment percentage for the plan year preceding the current plan year was certified for that prior plan year to be at least 60 percent but less than 70 percent, or was certified for that prior plan year to be at least 80 percent but less than 90 percent (or, if that prior plan year is the pre-effective plan year, was certified to be less than 90 percent), and where the enrolled actuary for the plan has not issued a certification of the adjusted funding target attainment percentage for the plan year by the first day of the 4th month of the plan year. If this

paragraph (h)(2) applies to a plan, the presumed adjusted funding target attainment percentage for the plan is the percentage under paragraph (h)(2)(ii) or (iii) of this section, as applicable.

(ii) *Presumed adjusted funding target attainment percentage*. If this paragraph (h)(2) applies to a plan, and the date of the enrolled actuary's certification under paragraph (h)(4) of this section for the plan year preceding the current year occurred before the first day of the 4th month of the current plan year, then, commencing on the first day of the 4th month of the current plan year and continuing until the earlier of the date the enrolled actuary issues a certification under paragraph (h)(4) of this section of the adjusted funding target attainment percentage for the plan year or the first day of the 10th month of the plan year as described in paragraph (h)(3) of this section—

(A) The adjusted funding target attainment percentage of the plan as of the valuation date for the plan year is presumed to be equal to 10 percentage points less than the actual adjusted funding target attainment percentage of the plan for the preceding plan year; and

(B) The first day of the 4th month of the plan year is treated as a section 436 measurement date.

(iii) *Certification for prior year*. If this paragraph (h)(2) applies to a plan, and the date of the enrolled actuary's certification under paragraph (h)(4) of this section of the actual adjusted funding target attainment percentage for the plan year preceding the current year occurs on or after the first day of the 4th month of the current plan year, then, commencing on the date of that prior year certification and continuing until the earlier of the date the enrolled actuary issues a certification under paragraph (h)(4) of this section of the adjusted funding target attainment percentage for the plan year or the first day of the 10th month of the plan year as described in paragraph (h)(3) of this section—

(A) The adjusted funding target attainment percentage of the plan as of the valuation date for the plan year is presumed to be equal to 10 percentage points less than the actual adjusted funding target attainment percentage of the plan for the preceding plan year; and

(B) The date of the prior year certification is treated as a section 436 measurement date.

(3) *Presumption of underfunding on and after first day of 10th month*—(i) *Section 436 measurement date*. In any case in which no certification of the specific adjusted funding target attainment percentage for the current plan year under paragraph (h)(4) of this section is made with respect to the plan before the first day of the 10th month of the plan year, that first day is treated as a section 436 measurement date.

(ii) *Presumed percentage under 60 percent*. In any case in which no certification of the specific adjusted funding target attainment percentage for the current plan year under paragraph (h)(4) of this section is made with respect to the plan before the first day of the 10th month of the plan year, the plan's adjusted funding target attainment percentage is presumed to be less than 60 percent beginning on that date and continuing through the remainder of the plan year.

(4) *Certification of adjusted funding target attainment percentage*—(i) *Rules generally applicable to certifications*—(A) *In general*. The enrolled actuary's certification referred to in this section must be made in writing, must be provided to the plan administrator, and, except as provided in paragraph (h)(4)(ii) of this section, must certify the plan's adjusted funding target attainment percentage for the plan year (including setting forth the aggregate amount of annuity purchases taken into account under paragraph (j)(3)(ii) of this section).

(B) *Determination of plan assets*. For purposes of making any determination of the adjusted funding target attainment percentage under this section, the determination is not permitted to take into account assets that have not been contributed to the plan by the certification date. For example, the enrolled actuary's certification of the adjusted funding target attainment percentage for a plan year cannot take into account contributions that are expected to be made after the certification date. Notwithstanding the foregoing, for plan years beginning before January 1, 2009, the enrolled actuary's certification of the adjusted funding target attainment percentage is permitted to take into account employer contributions for the prior plan year that are reasonably expected to be made for that prior plan year but have not been contributed by the date of the enrolled actuary's certification. See paragraph (h)(4)(iii) of this section for rules relating to changes in the certified percentage.

(ii) *Special rules for certification within range*—(A) *In general*. Under this paragraph (h)(4)(ii), the plan's enrolled actuary is permitted to certify during the first nine months of a plan year that the plan's adjusted funding target attainment percentage for that plan year either is 60 percent or higher (but is less than 80 percent), is 80 percent or higher, or is 100 percent or higher. If the enrolled actuary has issued such a range certification for a plan year and the enrolled actuary subsequently issues a certification of the specific adjusted funding target attainment percentage for the plan before the first day of the 10th month of that plan year, the certification of the specific adjusted funding target attainment percentage is treated as a change in the applicable percentage to which paragraph (h)(4)(iii) of this section applies. If the enrolled actuary has issued a range certification for a plan year but no specific certification of the adjusted funding target attainment percentage of the plan for the plan year is issued by the plan's enrolled actuary before the first day of the 10th month of that plan year, then the rules of paragraph (h)(3) of this section apply and the change in the applicable percentage to under 60 percent on that date is treated as a change in the applicable percentage which is subject to the rules of paragraph (h)(4)(iii) of this section.

(B) *Effect of range certification*—(*1*) *Before certification of specific percentage*. If a plan's enrolled actuary issues a range certification pursuant to this paragraph (h)(4)(ii), then, for all purposes under this section (for example, applying the limitations of sections 436(b) and (c), making contributions described in sections 436(b)(2), 436(c)(2), and 436(e)(2), and the mandatory reduction of funding balances under paragraph (a)(5) of this section), the plan is treated as having a certified percentage at the smallest value within the applicable range.

(*2*) *On and after certification of specific percentage*. Once the certification of the specific adjusted funding target attainment percentage is issued by the plan's enrolled actuary (before the first day of the

10th month of the plan year), that certified percentage applies for all purposes of this section on and after the date of that certification. If the plan sponsor made section 436 contributions to avoid application of a benefit limitation during the period a range certification was in effect, those section 436 contributions will be recharacterized as employer contributions under section 430 to the extent the contributions exceed the amount necessary to avoid application of a limitation based on the specific adjusted funding target attainment percentage as certified by the plan's enrolled actuary before the first day of the 10th month of the plan year.

(iii) *Change of certified percentage*—(A) *Application of new percentage*. If the enrolled actuary for the plan provides a certification of the adjusted funding target attainment percentage of the plan for the plan year under this paragraph (h)(4) (including a range certification) and that certified percentage is superseded by a subsequent determination of the adjusted funding target attainment percentage for that plan year, that later percentage must be applied.

(B) *Determination of materiality*—(*1*) *In general*. With respect to the effect of that subsequent determination of the adjusted funding target attainment percentage on the plan for the period during which the plan's operation was based on the prior percentage, a determination must be made whether the change in the applicable percentage is a material change or an immaterial change.

(*2*) *Definition of material change*. For this purpose, there is a material change in a plan's certified adjusted funding target attainment percentage if plan operations with respect to benefits that are addressed by section 436, taking into account any actual contributions and elections under section 430(f) made by the plan sponsor based on the prior certified percentage, would have been different based on the subsequent determination of the plan's adjusted funding target attainment percentage for the plan year. However, if the difference between the adjusted funding target attainment percentage for a plan year and the later revised determination of that percentage is the result of additional contributions for the preceding year that are made by the plan sponsor after the date of the enrolled actuary's certification or results from the plan sponsor's election to reduce the prefunding balance or funding standard carryover balance after the date of the certification, such change is not treated as a material change.

(*3*) *Definition of immaterial change*. An immaterial change is any change in an adjusted funding target attainment percentage for a plan year that is not a material change.

(C) *Effect of change in percentage*—(*1*) *Material change*. In the case of a material change where the plan was operated in accordance with the prior certification of the adjusted funding target attainment percentage for the plan year, the plan will not have satisfied the requirements of section 401(a)(29) and section 436. In the case of a material change where the plan was operated in accordance with the subsequent certification of the adjusted funding target attainment percentage during the period of time the prior certification applied, the plan will not have been operated in accordance with its terms. In addition, in the case of a material change, the rules requiring application of a presumed adjusted funding target attainment percentage under paragraphs (h)(1) through (h)(3) of this section continue to apply from and after the date of the prior certification until the date of the subsequent certification.

(*2*) *Effect of immaterial change*. If the enrolled actuary for a plan provides a certification of the adjusted funding target attainment percentage of the plan for the plan year under this paragraph (h)(4) and that certified percentage is superseded by a subsequent determination of the adjusted funding target attainment percentage for that plan year that does not result in a material change under paragraph (h)(4)(iii)(B) of this section, the revised percentage does not change the inapplicability of the presumptions under paragraphs (h)(1), (2), and (3) of this section prior to the date of the later certification.

(5) *Application to plan with valuation date after first day of plan year*. [Reserved].

(6) *Examples of application of paragraphs (h)(1), (h)(2), and (h)(3) of this section*. The following examples illustrate the application of paragraphs (h)(1), (h)(2), and (h)(3) of this section. Unless otherwise indicated, the examples in this section are based on the information in this paragraph. Each plan is a non-collectively bargained defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. The first effective plan year is 2008. The plan does not have a funding standard carryover balance or a prefunding balance as of any of the dates mentioned, and the plan sponsor does not elect to utilize any of the methods in paragraph (f) of this section to avoid applicable benefit restrictions. No range certification under paragraph (h)(4) of this section has been issued. The plan sponsor is not in bankruptcy.

Example 1. (i) On July 15, 2010, the adjusted funding target attainment percentage ("AFTAP") for Plan T is certified to be 65%. Based on this AFTAP, Plan T is subject to the restriction on prohibited payments in paragraph (d)(3) of this section for the remainder of 2010.

(ii) Beginning January 1, 2011, Plan T's AFTAP for 2011 is presumed to be equal to the AFTAP for 2010, or 65%, under the provisions of paragraph (h)(1)(ii) of this section. Accordingly, the restriction on accelerated benefit distributions in paragraph (d)(3) of this section continues to apply.

(iii) On March 1, 2011, the enrolled actuary for the plan certifies that the actual AFTAP for 2011 is 80%. Therefore, beginning March 1, 2011, Plan T is no longer subject to the restriction under paragraph (d)(3) of this section, and so Plan T resumes paying the full amount of any accelerated benefit distributions elected by participants with an annuity starting date of March 1, 2011, or later.

Example 2. (i) The facts are the same as in *Example 1*, except that the enrolled actuary for the plan does not certify the AFTAP for 2011 until June 1, 2011. Accordingly, Plan T's AFTAP for 2011 is presumed to be equal to the AFTAP for 2010 of 65% from January 1, 2011, through March 31, 2011, and Plan T is subject to the restriction on accelerated benefit distributions under paragraph (d)(3) of this section during this period.

(ii) Beginning April 1, 2011, the provisions of paragraph (h)(2)(ii) of this section apply because the enrolled actuary for the plan still has not certified the actual AFTAP as of January 1, 2011. Under the provisions of paragraph (h)(2)(ii) of this section, the AFTAP for Plan T is presumed to be 10 percentage points lower, or 55%, beginning April 1, 2011. Accordingly, Plan T is now subject to the restriction in paragraph (d)(1) of this section, and so cannot pay any accelerated benefit distributions otherwise payable to plan participants who have annuity starting dates on or after April 1, 2011.

(iii) On June 1, 2011, the enrolled actuary for the plan certifies that the AFTAP for 2011 for Plan T is 66%. Accordingly, Plan T is no longer subject to the restriction under paragraph (d)(1) of this section, but it is subject to the restriction under paragraph (d)(3) of this section.

(iv) Since Plan T is no longer subject to the restriction on payment of accelerated benefit distributions under paragraph (d)(1) of this section, Plan T must resume paying the accelerated benefit distributions, as restricted under paragraph (d)(3) of this section, for participants who elect benefits in accelerated

forms of payment and who have an annuity starting date of June 1, 2011, or later.

Example 3. (i) The facts are the same as in *Example 1*, except that the enrolled actuary for the plan does not certify the 2011 AFTAP until November 15, 2011. Beginning October 1, 2011, Plan T is conclusively presumed to have an AFTAP of less than 60%, in accordance with the provisions of paragraph (h)(3) of this section. Accordingly, Plan T is subject to the restriction in paragraph (d)(1) of this section, and cannot pay any accelerated benefit distributions to participants whose annuity starting date occurs on or after October 1, 2011.

(ii) On November 15, 2011, the enrolled actuary for the plan certifies that the AFTAP for 2011 is 72%. However, because the certification occurred after October 1, 2011, the certification does not constitute a new section 436 measurement date, and Plan T continues to be subject to the restrictions on accelerated benefit distributions and benefit accruals under paragraphs (d)(1) and (e) of this section.

(iii) Beginning January 1, 2012, the 2012 AFTAP for Plan T is presumed to be equal to the 2011 AFTAP of 72%. Because the presumed 2012 AFTAP is between 70% and 80% and, therefore, paragraph (h)(2) of this section (which provides for a 10 percentage point reduction in a plan's AFTAP in certain cases) will not apply, the presumed AFTAP will remain at 72% until the plan's enrolled actuary certifies the AFTAP for 2012 or until paragraph (h)(3) of this section applies on the first day of the 10th month of the plan year. Because the presumed AFTAP is 72%, Plan T is no longer subject to the restrictions on accelerated benefit distributions under paragraph (d)(1) of this section, and Plan T must resume paying accelerated benefit distributions, as restricted under paragraph (d)(3) of this section, that are elected by participants with annuity starting dates on or after January 1, 2012. Similarly, Plan T is no longer subject to the restriction on benefit accruals under paragraph (e) of this section, and benefit accruals resume under Plan T beginning January 1, 2012, unless Plan T provides otherwise.

Example 4. (i) The facts are the same as in *Example 3*, except that the enrolled actuary for the plan does not issue a certification of the AFTAP for 2011 for Plan T until February 1, 2012.

(ii) Beginning on January 1, 2012, the presumptions in paragraph (h)(1)(iii) of this section apply for the 2012 plan year. Because the enrolled actuary for the plan has not certified the AFTAP for 2011, the presumed AFTAP as of October 1, 2011, continues to apply for the period beginning January 1, 2012. Therefore, the AFTAP as of January 1, 2012, is presumed to be less than 60%, and Plan T continues to be subject to the restriction on accelerated benefit distributions in paragraph (d)(1) of this section and the restriction on benefit accruals under paragraph (e) of this section.

(iii) On February 1, 2012, the enrolled actuary for the plan certifies that the AFTAP for 2011 for Plan T is 65%. Because the enrolled actuary for the plan has not issued a certification of the AFTAP for 2012, the provisions of paragraph (h)(1)(iii)(B) of this section apply. Accordingly, the certification date for the 2011 AFTAP (February 1, 2012) is a section 436 measurement date and 65% is the presumed AFTAP for 2012 beginning on that date.

(iv) Because the presumed AFTAP is over 60% but less than 80%, the full restriction on accelerated benefit distributions under paragraph (d)(1) of this section no longer applies; however the partial restriction on accelerated benefit distributions under paragraph (d)(3) of this section applies beginning on February 1, 2012. Therefore, Plan T must pay a portion of accelerated benefit distributions elected by participants with annuity starting dates on or after February 1, 2012. Furthermore, based on the presumed AFTAP of 65%, the restriction on benefit accruals under paragraph (e) of this section no longer applies, and unless Plan T provides otherwise, benefit accruals will resume as of February 1, 2012.

Example 5. (i) The facts are the same as in *Example 3*, except that the enrolled actuary for the plan does not issue a certification of the actual AFTAP for Plan T as of January 1, 2011, until May 1, 2012.

(ii) Beginning on January 1, 2012, the presumptions in paragraph (h)(1)(iii) of this section apply for the 2012 plan year. Because the enrolled actuary for the plan has not certified the actual AFTAP as of January 1, 2011, the presumed AFTAP as of October 1, 2011, continues to apply for the period beginning January 1, 2012. Therefore, the AFTAP as of January 1, 2012, is presumed to be less than 60%, and Plan T continues to be subject to the restriction on accelerated benefit distributions in paragraph (d)(1) of this section and the restriction on benefit accruals under paragraph (e) of this section.

(iii) Since the enrolled actuary for the plan has not issued a certification of the actual AFTAP as of January 1, 2011, the rules of paragraph (h)(1)(iii) of this section apply beginning April 1, 2012, and the AFTAP is presumed to remain less than 60%. Plan T continues to be subject to the restriction on accelerated benefit distributions and benefit accruals under paragraphs (d)(1) and (e) of this section.

(iv) On May 1, 2012, the enrolled actuary for the plan certifies that the actual AFTAP for 2011 for Plan T is 65%. Because the enrolled actuary for the plan has not issued a certification of the actual AFTAP as of January 1, 2012, the provisions of paragraph (h)(2)(iii) of this section apply. Accordingly, on May 1, 2012, the 2012 AFTAP is presumed to be 10 percentage points less than the 2011 AFTAP, or 55%, so that the restrictions under paragraphs (d) and (e) of this section continue to apply.

Example 6. (i) The enrolled actuary for Plan V certifies the plan's AFTAP for 2010 to be 69%. Based on this AFTAP, Plan V is subject to the restriction in paragraph (d)(3) of this section, and can only pay a portion (generally 50%) of accelerated benefit distributions otherwise due to plan participants who commence benefits while the restriction is in effect. The enrolled actuary for the plan does not issue a certification of the AFTAP for 2011 until June 1, 2011.

(ii) Beginning January 1, 2011, Plan V's 2011 AFTAP is presumed to be equal to the 2010 AFTAP, or 69%, under the provisions of paragraph (h)(1)(ii) of this section. Accordingly, the restriction on accelerated benefit distributions in paragraph (d)(3) of this section continues to apply from January 1, 2011, through March 31, 2011, and Plan T may only pay a portion of accelerated benefit distributions otherwise due to participants who commence benefit payments during this period.

(iii) Beginning April 1, 2011, the provisions of paragraph (h)(2)(ii) of this section apply. Under those provisions, the AFTAP beginning April 1, 2011, is presumed to be 10 percentage points lower than the presumed 2011 AFTAP, or 59%. Because Plan V's presumed AFTAP for 2011 is less than 60%, the restriction on the payment of accelerated benefit distributions under paragraph (d)(1) of this section and the restriction on benefit accruals under paragraph (e) of this section apply. Accordingly, Plan V cannot pay any accelerated benefit distributions to participants with an annuity starting date on or after April 1, 2011, and benefit accruals cease as of March 31, 2011.

(iv) On June 1, 2011, Plan V's enrolled actuary certifies that the plan's AFTAP for 2011 is 71%. Therefore, the restrictions on accelerated benefit distributions and benefit accruals in paragraphs (d)(1) and (e) of this section no longer apply, but the partial restriction on benefit payments in paragraph (d)(3) of this section does apply. Accordingly, Plan V begins paying a portion of the accelerated benefit distributions elected by participants with an annuity starting date on or after June 1, 2011, and benefit accruals previously restricted under paragraph (e) of this section resume effective June 1, 2011, unless Plan V provides otherwise.

(v) Participants who were not able to elect an accelerated form of payment during the period from April 1, 2011, through May 31, 2011, would be able to elect a new annuity starting date with a partial distribution of accelerated benefits effective June 1, 2011, if Plan V contained a preexisting provision permitting such an election after the restriction in paragraph (d)(1) of this section no longer applies. This is permitted because, under paragraph (a)(4)(ii)(A) of this section, a preexisting provision of this type is not considered a plan amendment and is therefore not subject to the plan amendment restriction in paragraph (c) of this section even though Plan V's AFTAP for 2011 is less than 80%.

(vi) Benefit accruals for the period beginning April 1, 2011, through May 31, 2011, would be automatically restored if Plan V contained a preexisting provision to retroactively restore benefit accruals restricted under paragraph (e) of this section after the restriction no longer applies. This is permitted because under paragraph (a)(4)(ii)(A) of this section, a preexisting provision of this type is not considered to be a plan amendment and is therefore not subject to the plan amendment restriction in paragraph (c) of this section even though Plan V's AFTAP for 2011 is less than 80%, because the period of the restriction did not exceed 12 months.

(7) *Examples of application of paragraph (h)(4) of this section.* The following examples illustrate the application of paragraph (h)(4) of this section:

Example 1. (i) Plan Y is a non-collectively bargained defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. Plan Y does not have a funding standard carryover balance or a prefunding balance. Plan Y's sponsor is not in bankruptcy. In June of 2010, the actual AFTAP for 2010 for Plan Y is certified as 65%. On the last day of the 2010 plan year, Plan Y is subject to the restrictions in paragraph (d)(3) of this section.

(ii) The enrolled actuary for the plan issues a range certification on March 21, 2011, certifying that the AFTAP for 2011 is at least 60% and less than 80%. Because the certification was issued before the

first day of the 4th month of the plan year, the 10 percentage point reduction in the presumed AFTAP under paragraph (h)(2) of this section does not apply. In addition, because the enrolled actuary for the plan has certified that the AFTAP is within this range, Plan Y is not subject to the full restriction on accelerated benefit payments in paragraph (d)(1) of this section or the restriction on benefit accruals under paragraph (e) of this section.

(iii) On August 1, 2011, the enrolled actuary for the plan certifies that the actual AFTAP as of January 1, 2011, is 75.86%. This AFTAP falls within the previously certified range. Thus, the change is immaterial under paragraph (h)(4)(iii) of this section and the new certification does not change the applicability or inapplicability of the restrictions in this section.

Example 2. (i) The facts are the same as in *Example 1*, except that the plan sponsor makes an additional contribution for the 2010 plan year on September 1, 2011, that is not added to the prefunding balance. Reflecting this contribution, the enrolled actuary for the plan issues a revised certification stating that the AFTAP for 2011 is 81%, and Plan Y is no longer subject to the restriction on accelerated benefit payments under paragraph (d)(3) of this section on that date.

(ii) Although the revised certification changes the applicability of the restriction under paragraph (d)(3) of this section, the change not a material change under paragraph (h)(4)(iii)(B)(*2*) of this section because it changed only because of additional contributions for the preceding year made by the plan sponsor after the date of the enrolled actuary's initial certification.

(i) [Reserved].

(j) *Definitions*. For purposes of this section—

(1) *Funding target*. For purposes of section 436, the *funding target* means the funding target under section 430(d) or 430(i), as applicable to the plan for the plan year.

(2) *Funding target attainment percentage*—(i) *In general.* For purposes of section 436, the *funding target attainment percentage* for any plan year is the fraction (expressed as a percentage), the numerator of which is the value of net plan assets for the plan year, and the denominator of which is the plan's funding target for the plan year (but determined without regard to the at-risk rules under section 430(i) even in the case of a plan that is in at-risk status). For this purpose, pursuant to section 430(f)(4), the value of net plan assets for the plan year is generally determined by subtracting the plan's funding standard carryover balance and prefunding balance (if any) for the plan year from the value of plan assets. A plan with a value of net plan assets for a plan year of zero is treated as having a funding target attainment percentage of zero, regardless of the amount of the plan's funding target.

(ii) *Application to plans that are fully funded without regard to subtraction of funding balances from plan assets*—(A) *In general*. If the funding target attainment percentage for a plan year, determined without regard to the section 430(f)(4) subtraction of the funding standard carryover balance and the prefunding balance from the value of plan assets, would be 100 percent or more, then, solely for purposes of section 436 and this section (but not section 430(d)), the value of net plan assets used in the determination of the funding target attainment percentage described in this paragraph (j)(2) (and the adjusted funding target attainment percentage described in paragraph (j)(3) of this section) is determined without regard to any subtraction of funding balances under section 430(f)(4).

(B) *Transition rule*. Paragraph (j)(2)(ii)(A) of this section is applied to plan years beginning after 2007 and before 2011 by substituting for "100 percent" the applicable percentage determined in accordance with the following table:

In the case of a plan year beginning in calendar year:	The applicable percentage is:
2008	92
2009	94
2010	96

(C) *Limitation*. Paragraph (j)(2)(ii)(B) of this section does not apply with respect to any plan year after 2008 unless the funding target attainment percentage (determined without regard to the section 430(f)(4) subtraction of the funding standard carryover balance and the prefunding balance from the value of plan assets) of the plan for each preceding plan year (after 2007) was not less than the applicable percentage with respect to such preceding plan year determined under paragraph (j)(2)(ii)(B) of this section.

(iii) *Special rules for first effective plan year*—(A) *In general*. In the case of the plan's first effective plan year, the funding target attainment percentage under section 436 for the plan's pre-effective plan year is determined as the fraction (expressed as a percentage), the numerator of which is the net plan assets determined under paragraph (j)(2)(iii)(B) of this section, and the denominator of which is the plan's current liability determined pursuant to section 412(l)(7) on the valuation date for the plan's pre-effective plan year.

(B) *General determination of value of net plan assets*—(*1*) *In general*. The value of net plan assets for purposes of this paragraph (j)(2)(iii) is determined under section 412(c)(2) as in effect for the plan's pre-effective plan year, except that the value of plan assets prior to subtracting the plan's funding standard account credit balance described in paragraph (j)(2)(iii)(B)(*2*) of this section can neither be less than 90 percent of the fair market value of plan assets nor greater than 110 percent of the fair market value of plan assets on the valuation date for that plan year.

(*2*) *Subtraction of credit balance*. If a plan has a funding standard account credit balance as of the valuation date for the plan's pre-effective plan year, that balance is subtracted from the net asset value described in paragraph (j)(2)(iii)(B)(*1*) of this section as of that valuation date. However, the subtraction does not apply if the value of plan assets determined in paragraph (j)(2)(iii)(B)(*1*) of this section is greater than or equal to 90 percent of the plan's current liability as of the valuation date for the plan determined under paragraph (j)(2)(iii)(A) of this section.

(*3*) *Effect of funding standard carryover balance reduction for first effective plan year*. Notwithstanding paragraph (j)(2)(iii)(B)(*2*) of this section, if, for the first effective plan year, the employer has made an election to reduce some or all of the funding standard carryover balance as

of the first day of that year in accordance with §1.430(f)–1(e), then the present value (determined as of the valuation date for the pre-effective plan year using the valuation interest rate for that pre-effective plan year) of the amount so reduced is not treated as part of the funding standard account credit balance when that balance is subtracted from the asset value under paragraph (j)(2)(iii)(B)(*2*) of this section.

(3) *Adjusted funding target attainment percentage*—(i) *In general*. The *adjusted funding target attainment percentage* for any plan year is the fraction (expressed as a percentage), the numerator of which is the adjusted plan assets described in paragraph (j)(3)(ii) of this section and the denominator of which is the adjusted funding target described in paragraph (j)(3)(iii) of this section.

(ii) *Adjusted plan assets*. The adjusted plan assets equals the net plan assets (determined under paragraph (j)(2) of this section), increased by the aggregate amount of purchases of annuities for employees other than highly compensated employees (as defined in section 414(q)) which were made by the plan during the preceding 2 plan years.

(iii) *Adjusted funding target*—(A) *In general*. The adjusted funding target equals the funding target for the plan year (determined in accordance with paragraph (j)(1) of this section but without regard to the at-risk rules under section 430(i)), increased by the aggregate amount of purchases of annuities for employees other than highly compensated employees (as defined in section 414(q)) which were made by the plan during the preceding 2 plan years.

(B) *Special rule for first effective plan year*. In the case of the plan's first effective plan year, for purposes of determining the adjusted funding target attainment percentage for the pre-effective plan year, the adjusted funding target is equal to the current liability determined pursuant to section 412(l)(7) as of the plan's valuation date for the pre-effective plan year, increased by the aggregate amount of purchases of annuities for employees other than highly compensated employees (as defined in section 414(q)) which were made by the plan during the preceding 2 plan years.

(iv) *Special rule where current liability not certified for pre-effective plan year*. In any case in which the plan's enrolled actuary has not issued a certification under paragraph (h)(4)(i) of this section of the adjusted funding target attainment percentage of the plan for the pre-effective plan year, the adjusted funding target attainment percentage of the plan for the first effective plan year is presumed to be less than 60 percent until the adjusted funding target attainment percentage of the plan for the pre-effective plan year has been certified. The preceding sentence applies for purposes of paragraphs (b) and (c) of this section at the beginning of the first effective plan year and applies for purposes of paragraphs (d) and (e) of this section as of the first day of the 4th month of the first effective plan year. See paragraph (h) of this section for rules that apply after the adjusted funding target attainment percentage for the plan has been certified for either the pre-effective plan year or the first effective plan year.

(4) *Section 436 measurement date*. The section 436 measurement date is the date that is used to stop or start the application of the limitations of sections 436(d) and 436(e), and is also used for calculations with respect to applying the limitations of paragraphs (b) and (c) of this section. See paragraph (h) of this section regarding section 436 measurement dates that result from application of the presumptions under that paragraph (h) of this section.

(5) *Examples*. The following examples illustrate the application of this paragraph (j):

Example 1. (i) Plan S is a non-collectively bargained defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. The first effective plan year is 2008.

(ii) As of January 1, 2008, Plan S has a value of plan assets (equal to the market value of assets) of $2,100,000 and a funding standard carryover balance of $200,000. During 2006, assets from Plan S were used to purchase a total of $100,000 in annuities for employees other than highly compensated employees. No annuities were purchased during 2007. On May 1, 2008, the enrolled actuary for the plan determines that the funding target as of January 1, 2008, is $2,500,000.

(iii) The adjusted value of assets for Plan S as of January 1, 2008, is $2,000,000 (that is, plan assets of $2,100,000 plus annuity purchases of $100,000 minus the funding standard carryover balance of $200,000). The adjusted funding target is $2,600,000 (that is, the funding target of $2,500,000, increased by the annuity purchases of $100,000).

(iv) Based on the above adjusted plan assets and adjusted funding target, the AFTAP as of January 1, 2008, would be 76.92%. Since the AFTAP is less than 80% but is at least 60%, Plan S is subject to the restrictions in paragraph (d)(3) of this section.

Example 2. (i) The facts are the same as in *Example 1*, except that it is reasonable to expect that the plan sponsor will make a contribution of $80,000 to Plan S for the 2007 plan year by September 15, 2008. This amount is in excess of the minimum required contribution for 2007. The plan sponsor elects to reduce the funding standard carryover balance by $80,000.

(ii) Because it is reasonable to expect that the $80,000 will be contributed by the plan sponsor, that amount is taken into account when the enrolled actuary certifies the 2008 AFTAP under the special rule in paragraph (h)(4)(i)(B) of this section for plan years beginning before 2009. Accordingly, the enrolled actuary for the plan certifies the 2008 AFTAP as 80% (that is, adjusted plan assets of $2,080,000, reflecting the $80,000 in contributions receivable, divided by the adjusted funding target of $2,600,000).

(iii) The ability to take contributions into account before they are actually paid to the plan is available only for plan years beginning before 2009. Furthermore, if the employer does not actually make the contribution and the difference between the incorrect certification and the corrected AFTAP constitutes a material change, the plan will have violated section 401(a)(29) or will not have been operated in accordance with its terms.

Example 3. (i) Plan R is a defined benefit plan with a plan year that is the calendar year and a valuation date of January 1. The first effective plan year for Plan R is 2008. The valuation interest rate for the 2007 plan year for Plan R is 7%. The fair market value of assets of Plan R as of January 1, 2007, is $1,000,000. The actuarial value of assets of Plan R as of January 1, 2007, is $1,200,000. The current liability of Plan R as of January 1, 2007, is $1,500,000. The funding standard account credit balance as of January 1, 2007, is $80,000. The funding standard carryover balance of Plan R is $50,000 as of the beginning of the 2008 plan year. The sponsor of Plan R, Sponsor T, elects in 2008 to reduce the funding standard carryover balance in accordance with §1.430(f)–1 by $45,000.

(ii) Pursuant to paragraph (j)(2)(iii)(B)(*1*) of this section, the asset value used to determine the funding target attainment percentage (FTAP) for the 2007 plan year is limited to 110% of the fair market value of assets on January 1, 2007, or $1,100,000 (110% of $1,000,000).

(iii) Pursuant to paragraph (j)(2)(iii)(B)(*2*) of this section, the funding standard account credit balance as of January 1, 2007, is subtracted from the asset value used to determine the FTAP for the 2007 plan year. However, pursuant to paragraph (j)(2)(iii)(B)(*3*) of this section, the present value of the amount by which Sponsor T elected to reduce the funding standard carryover balance in 2008 is not subtracted.

(iv) The present value, determined at an interest rate of 7%, of the $45,000 reduction in the funding standard account carryover balance elected by Sponsor T in 2008 is $42,056. Thus, $42,056 is not subtracted from the 2007 plan year asset value. Accordingly, the funding standard account credit balance that is subtracted from the 2007 plan year asset value is $37,944 (that is, $80,000 less $42,056).

(v) Thus, the asset value that is used to determine the FTAP for the 2007 plan year is $1,100,000 less $37,944, or $1,062,056. Accordingly, for purposes of this section, the FTAP for the 2007 plan year for Plan R is 70.8% (that is, $1,062,056 divided by $1,500,000).

(k) *Effective/applicability dates*—(1) *In general*. In general, this section applies to plan years beginning on or after January 1, 2008.

(2) *Plans with delayed effective/applicability date*. In the case of a plan for which the effective date of section 436 is delayed in accordance with sections 104 through 106 of the Pension Protection Act of 2006, Public Law 109–280, 120 Stat. 780, this section applies to plan years beginning on or after the effective date of section 436 with respect to the plan.

(3) *Collective bargaining exception*—(i) *In general*. In the case of a collectively bargained plan that is maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before January 1, 2008, this section does not apply to plan years beginning before the earlier of—

(A) The date described in paragraph (k)(3)(ii) of this section; or

(B) January 1, 2010.

(ii) *Termination of collective bargaining agreement*. The date described in this paragraph (k)(3)(ii) is the later of—

(A) The date on which the last collective bargaining agreement relating to the plan terminates (determined in accordance with paragraph (k)(3)(iii) of this section and without regard to any extension thereof agreed to after August 17, 2006); or

(B) The first day of the first plan year to which this section would (but for this paragraph (k)(3)) apply.

(iii) *Treatment of certain plan amendments*. Any plan amendment made pursuant to a collective bargaining agreement relating to the plan which amends the plan solely to conform to any requirement added by section 436 is not treated as a termination of the collective bargaining agreement.

(iv) *Treatment of plans with both collectively bargained and non-collectively bargained employees*. In the case of a plan with respect to which a collective bargaining agreement applies to some, but not all, of the plan participants, the plan is considered a collectively bargained plan for purposes of this paragraph (k)(3) if it is considered a collectively bargained plan under the rules of paragraph (a)(5)(ii)(B) of this section.

(4) *First effective plan year*. For purposes of this section, the first effective plan year for a plan is the first plan year to which this section applies under paragraph (k)(1), (k)(2), or (k)(3) of this section.

(5) *Pre-effective plan year*. For purposes of this section, the pre-effective plan year for a plan is the last plan year beginning before the effective date applicable under paragraph (k)(1), (k)(2), or (k)(3) of this section. Thus, except for plans with a delayed effective date under paragraph (k)(2) or (k)(3) of this section, the pre-effective plan year for a plan is the last plan year beginning before January 1, 2008.

Kevin M. Brown,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on August 28, 2007, 8:45 a.m., and published in the issue of the Federal Register for August 31, 2007, 72 F.R. 50543)

Temporary Closing of the Determination Letter Program for Adopters of Pre-Approved Defined Contribution Plans

Announcement 2007–90

On December 18, 2007, the Service will temporarily stop accepting applications for determination letters for defined contribution plans that are filed on Form 5307, *Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans*. The Service is taking this action because all pre-approved (*i.e.*, master and prototype and volume submitter) defined contribution plans are required to be restated to comply with the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16, ("EGTRRA") and to be submitted to the Service for a determination letter (if needed) using Form 5307 during the approximately two-year period which the Service expects to announce early in 2008. The temporary hiatus in accepting Form 5307 applications will allow the Service to prepare to receive the EGTRRA applications.

Rev. Proc. 2007–44, 2007–28 I.R.B. 54, and Rev. Proc. 2005–16, 2005–1 C.B. 674, describe a staggered remedial amendment system for plans that are qualified under § 401(a) of the Internal Revenue Code, with five-year amendment/approval cycles for individually designed plans and six-year cycles for pre-approved plans. The submission period for the initial six-year cycle for pre-approved defined contribution plans ran from February 17, 2005, to January 31, 2006. Sponsors and practitioners were required to restate their pre-approved defined contribution plans for EGTRRA and other changes in plan qualification requirements described in Notice 2004–84, 2004–2 C.B. 1030, the "2004 Cumulative List," and apply for new opinion or advisory letters during this submission period. As provided in Rev. Proc. 2007–44, when the review of the pre-approved defined contribution plans is near completion, the Service will publish an announcement providing the date by which adopting employers must adopt the newly approved plans. This date will also be the deadline for adopting employers to file Form 5307 determination letter applications for their EGTRRA-restated pre-approved defined contribution plans. The Service expects to publish this announcement early next year and anticipates that adopting employers will have approximately two years to adopt the restated plans and request determination letters.

In order to prepare to receive the Form 5307 applications for the EGTRRA-restated defined contribution plans that will be filed starting next year, the Service will temporarily stop accepting determination letter applications for defined contribution plans filed on Form 5307, beginning December 18, 2007. The Service will continue to process determination letter applications for defined contribution plans filed on Form 5307 before December 18, 2007, provided the plan has a favorable

GUST[1] opinion or advisory letter. Any determination letter application for a defined contribution plan filed on Form 5307 on or after December 18, 2007 and before the opening of the approximately two-year period for adopting EGTRRA-restated pre-approved defined contribution plans will be returned to the applicant.

This announcement does not affect the ability of adopting employers to apply for determination letters on Form 5307 for pre-approved defined benefit plans. The Service will continue to accept and process such applications until further notice. This announcement also does not affect the ability of adopting employers of pre-approved plans (whether defined contribution or defined benefit) to apply on Form 5307 for a determination letter for plan amendments related to a voluntary correction program (VCP) submission or as required under the correction on audit program (Audit CAP), under the procedures described in Rev. Proc. 2006–27, 2006–1 C.B. 945.

Employee Benefits—Cafeteria Plans; Hearing

Announcement 2007–91

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Change of location for public hearing.

SUMMARY: This document provides a change of location for a public hearing on proposed regulations (REG–142695–05, 2007–39 I.R.B. 681) providing guidance on cafeteria plans.

DATES: The public hearing is being held on Thursday, November 15, 2007, at 10 a.m.

ADDRESSES: The public hearing was originally being held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. The hearing location has changed. The public hearing will be held in room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: LaNita Van Dyke, (202) 622–3215 or Oluwafunmilayo Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

The subject of the public hearing is a notice of proposed rulemaking (REG–142695–05) that was published in the **Federal Register** on Monday, August 6, 2007 (72 FR 43938).

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons, who submit outlines and written comments by October 25 and November 5, 2007 respectively, may present oral comments at the hearing.

A period of 10 minutes is allotted to each person for presenting oral comments. The IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing.

LaNita Van Dyke,
Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

(Filed by the Office of the Federal Register on September 20, 2007, 8:45 a.m., and published in the issue of the Federal Register for September 21, 2007, 72 F.R. 53977)

Section 67 Limitations on Estates or Trusts; Hearing

Announcement 2007–92

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Change of location for public hearing.

SUMMARY: This document provides a change of location for a public hearing on proposed regulations (REG–128224–06, 2007–36 I.R.B. 551) providing guidance on which costs incurred by estates or non-grantor trusts are subject to the 2-percent floor for miscellaneous itemized deductions under section 67(a).

DATES: The public hearing is being held on Wednesday, November 14, 2007, at 10 a.m.

ADDRESSES: The public hearing was originally being held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. The hearing location has changed. The public hearing will be held in room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: LaNita Van Dyke, (202) 622–3215 or Richard Hurst at *Richard.A.Hurst@irscounsel.treas.gov*.

SUPPLEMENTARY INFORMATION:

The subject of the public hearing is a notice of proposed rulemaking (REG–128224–06) that was published in the **Federal Register** on Friday, July 27, 2007 (72 FR 41243).

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons, who submit outlines and written comments by October 24 and 25, 2007 respectively, may present oral comments at the hearing.

A period of 10 minutes is allotted to each person for presenting oral comments. The IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing.

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[1] The term "GUST" refers to the following:
- the Uruguay Round Agreements Act, Pub. L. 103–465;
- the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103–353;
- the Small Business Job Protection Act of 1996, Pub. L. 104–188;
- the Taxpayer Relief Act of 1997, Pub. L. 105–34;
- the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105–206; and
- the Community Renewal Tax Relief Act of 2000, Pub. L. 106–554.

LaNita Van Dyke,
Chief, Publications and Regulations Branch,
Legal Processing Division,
Associate Chief Counsel
(Procedure and Administration).

(Filed by the Office of the Federal Register on September 20, 2007, 8:45 a.m., and published in the issue of the Federal Register for September 21, 2007, 72 F.R. 53977)

Change to Office to Which Notices of Nonjudicial Sale and Requests for Return of Wrongfully Levied Property Must Be Sent; Correction

Announcement 2007–93

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final and temporary regulations.

SUMMARY: This document contains corrections to final and temporary regulations (T.D. 9344, 2007–36 I.R.B. 535) that were published in the Federal Register on Friday, July 20, 2007 relating to the discharge of liens under section 7425 and return of wrongfully levied property under section 6343.

FOR FURTHER INFORMATION CONTACT: Robin M. Ferguson at (202) 622–3630.

SUPPLEMENTARY INFORMATION:

Background

The final and temporary regulations (T.D. 9344) that are the subject of these corrections are under sections 7425 and 6343 of the Internal Revenue Code.

Need for Correction

As published, the final and temporary regulations (T.D. 9344) contain errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the final and temporary regulations (T.D. 9344) that were the subject of FR. Doc. E7–14053 are corrected as follows:

1. On page 39738, column 1, in the preamble, under the caption "FOR FURTHER INFORMATION CONTACT:", line 2, the language "Robin M. Ferguson, (202) 622–3610 (not" is corrected to read "Robin M. Ferguson, (202) 622–3630 (not".

2. On page 39739, column 1, in the preamble, under paragraph heading "Drafting Information", lines 4 and 5, the language "and Administration (Collection, Bankruptcy and Summonses Division)" should be corrected to read "and Administration."

LaNita Van Dyke,
Branch Chief,
Publications and Regulations Branch,
Legal Processing Division,
Associate Chief Counsel
(Procedure and Administration).

(Filed by the Office of the Federal Register on August 22, 2007, 8:45 a.m., and published in the issue of the Federal Register for August 23, 2007, 72 F.R. 48236)

Change to Office to Which Notices of Nonjudicial Sale and Requests for Return of Wrongfully Levied Property Must Be Sent; Correction

Announcement 2007–94

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: This document contains corrections to notice of proposed rulemaking (REG–148951–05, 2007–36 I.R.B. 550) by cross-reference to temporary regulations that was published in the Federal Register on Friday, July 20, 2007 relating to the discharge of liens under section 7425 and return of wrongfully levied property under section 6343.

FOR FURTHER INFORMATION CONTACT: Robin M. Ferguson at (202) 622–3630.

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking by cross-reference to temporary regulations (REG–148951–05) that is the subject of these corrections is under sections 7425 and 6343 of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking by cross-reference to temporary regulations (REG–148951–05) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the notice of proposed rulemaking by cross-reference to temporary regulations (REG–148951–05) that was the subject of FR. Doc. E7–14051 is corrected as follows:

1. On page 39771, column 3, in the preamble, under the caption "FOR FURTHER INFORMATION CONTACT:", line 1, the language "Robin M. Ferguson, (202) 622–3610; is corrected to read "Robin M. Ferguson, (202) 622–3630;".

2. On page 39772, column 1, in the preamble, under paragraph heading "Drafting Information", lines 4 and 5, the language "and Administration (Collection, Bankruptcy and Summonses Division)" should be corrected to read "and Administration."

LaNita Van Dyke,
Branch Chief,
Publications and Regulations Branch,
Legal Processing Division,
Associate Chief Counsel
(Procedure and Administration).

(Filed by the Office of the Federal Register on August 22, 2007, 8:45 a.m., and published in the issue of the Federal Register for August 23, 2007, 72 F.R. 48249)

Deletions From Cumulative List of Organizations Contributions to Which are Deductible Under Section 170 of the Code

Announcement 2007–96

The Internal Revenue Service has revoked its determination that the organizations listed below qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1986.

Generally, the Service will not disallow deductions for contributions made to a listed organization on or before the date of announcement in the Internal Revenue Bulletin that an organization no longer qualifies. However, the Service is not precluded from disallowing a deduction for any contributions made after an organization ceases to qualify under section 170(c)(2) if the organization has not timely filed a suit for declaratory judgment under section 7428 and if the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for or was aware of the activities or omissions of the organization that brought about this revocation.

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organizations described in section 170(c)(2) that are otherwise allowable will continue to be deductible. Protection under section 7428(c) would begin on October 15, 2007, and would end on the date the court first determines that the organization is not described in section 170(c)(2) as more particularly set forth in section 7428(c)(1). For individual contributors, the maximum deduction protected is $1,000, with a husband and wife treated as one contributor. This benefit is not extended to any individual, in whole or in part, for the acts or omissions of the organization that were the basis for revocation.

The Georgetown Foundation
Sandy, UT

Lumberton Family Life Center, Inc.
Lumberton, MS

Truth in Youth & Family Services, Inc.
Leland, NC

Cunningham Charitable Group
Los Angeles, CA

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D. —Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z —Corporation.

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