ASPPA
WORKING FOR AMERICA'S RETIREMENT

4245 North Fairfax Drive, Suite 750
Arlington, VA 22203
P 703.516.9300 F 703.516.9308
www.asppa.org

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Mr. James E. Holland, Jr.
Manager, Employee Plans, Tax Exempt and Government Entities Division
Internal Revenue Service
SE:T:EP:RA:T
1111 Constitution Ave., NW
Washington, DC 20224

Re: Combined plan deduction limits under Notice 2007-28

The American Society of Pension Professionals & Actuaries (ASPPA) is writing to comment on, and request modifications to, the Internal Revenue Service's (IRS) guidance on deduction limits for retirement plans as set forth in Notice 2007-28 (the Notice). We appreciate the IRS' issuance of guidance on the 2006 deduction issues provided for in the Pension Protection Act of 2006 (PPA), and for the IRS' consideration of the importance of retaining adequate deduction limits for new small defined benefit plans as shown in Q&A 5 of the Notice.

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

Summary of Recommendation

The following is a summary of ASPPA's recommendation. It is described in greater detail in the Discussion of Issue section.

The IRS should expeditiously reconsider its interpretation taken in Q&A 9 of the Notice, which states that the combined plan deduction limits under Internal Revenue Code (Code) §404(a)(7) will continue to apply to defined benefit contributions for 2006 and 2007 for employers who make any deductible contributions to defined contribution plans, regardless of the size of the defined contribution deduction.[1] This interpretation is contrary to the plain language of PPA and Congressional intent in drafting PPA and represents poor public policy.

[1] For PBGC-covered plans, §404(a)(7) will disappear in 2008.

Discussion of Issue

One of the primary goals of PPA was to enhance the benefit security of defined benefit plan participants while, at the same time, reducing the financial burdens on the Pension Benefit Guaranty Corporation (PBGC). This was accomplished through the tightening of the minimum funding requirements by replacing Code §412 for single-employer plans with new Code §430. PPA further increased the deduction limits under Code §404 by providing a deduction of up to the amount that would fund the plan up to 150% of current liability for 2006 and 2007. For 2008 and later, a PBGC-covered defined benefit plan may fund its benefit liabilities plus a 50% cushion plus an allowance for future salary increase and increase in the Code §§401(a)(17) and 415 limits.

PPA also updated the combined plan deduction limit under Code §404(a)(7), which applies to the total defined benefit and defined contribution deduction. Section 803 of PPA added a new exemption under Code §404(a)(7)(c)(iii), which provides:

> In the case of employer contributions to 1 or more defined contribution plans, **this paragraph shall only apply to the extent that such contributions exceed 6 percent of the compensation** otherwise paid or accrued during the taxable year to the beneficiaries under such plans. (Emphasis added.)

Accordingly, the plain language of the statute provides that the combined plan deduction limit under Code §404(a)(7) does not apply unless contributions to the defined contribution plan exceed 6 percent of compensation. Further, the language makes it clear that where Code §404(a)(7) applies, it is only applicable to the portion of the contribution that is in excess of 6 percent of the compensation paid to the beneficiaries under the plans.

However, Q&A 9 of the Notice provides:

> When employer contributions to defined contribution plans (other than elective deferrals) do *not* exceed 6 percent of compensation of participants in those plans, the combined limit of §404(a)(7) does not apply to any employer contributions to defined contribution plans. In such a case, the combined limit of §404(a)(7)…applies only to contributions to the defined benefit plans.

The combined limit of §404(a)(7) specifically does *not* state, as indicated in Q&A 9, that the paragraph will continue to apply to the defined benefit plan when the defined contribution contributions do not exceed 6 percent. Rather, it provides that the paragraph—*all* of Code §404(a)(7)—shall only apply to the extent that DC contributions exceed 6 percent of pay.

Further, the title of Code §404(a)(7)(C), "Paragraph not to apply in certain cases," is consistent with this interpretation of the statute. While no binding authority can be taken from a section heading standing on its own, to the extent there is a question about the material that follows, the heading can be helpful in leading to an understanding that what follows is a list of circumstances under which Code §404(a)(7) does not apply.

By providing increased deduction limits in PPA, Congress sought to protect the funded status of defined benefit plans in bad market conditions by allowing employers to fund greater amounts in good years. The interpretation set forth in Q&A 9 for 2006 and 2007 contributions would impede this Congressional intent by limiting access to the increased Code §404(a)(7) deduction limit for the vast majority of defined benefit sponsors who also sponsor defined contribution plans. Under this interpretation, the combined deduction limit for employers who sponsor both defined benefit and defined contribution plans could actually be less than the deduction limit that would have applied to the defined benefit plan alone. This result runs contrary to the plain language in the statute that employers be able to make use of the increased deduction limits as long as their contributions to their defined contribution plans did not exceed 6 percent of pay.

The clear intent of Congress is evident from the Congressional Record. In the 109th Congress Senate discussion of PPA, Senator George Allen (R-VA) commented to Senator Charles Grassley (R-IA):

> "However, if an employer has both a defined benefit plan and a defined contribution plan, there is a separate deduction limit that applies to employers with a combination of plans. Thus, this legislation in [PPA] §803 also updates the limitation on deductions where an employer has a combination of such plans effective for contributions made for taxable years after December 31, 2005. The change in §803 eliminates the deduction limit for combinations of defined benefit and defined contribution plans for employers that do not contribute more than 6 percent of compensation to a defined contribution plan." (pp. S8755 - 56)

This language clearly demonstrates the intent of the drafters to eliminate the deduction limit for employers that sponsor both types of plans, as long as they do not contribute more than 6 percent of compensation to the defined contribution plan.

Consequently, ***ASPPA recommends*** that the IRS expeditiously reconsider its position taken in Q&A 9 of Notice 2007-28 to conform to Congressional intent and the plain language of the statute. We are available to discuss the issues with you and to assist in the formulation of a revised position.

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These comments were prepared by ASPPA's Defined Benefit Subcommittee of the Government Affairs Committee, and were primarily authored by Thomas J. Finnegan, MSPA, CPC, QPA, Chair. Please contact us if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO

/s/
Teresa T. Bloom, Esq., APM
Chief of Government Affairs

/s/
Ilene H. Ferenczy, Esq., CPC, Co-chair
Gov't Affairs Committee

/s/
David M. Lipkin, MSPA, Co-chair
Gov't Affairs Committee

/s/
Robert M. Richter, Esq., APM, Co-chair
Gov't Affairs Committee

/s/
Mark L. Lofgren, Esq., APM, Co-chair
Administration Relations Committee

/s/
Debra A. Davis, Esq., APM, Co-chair
Administration Relations Committee