ERIC

The ERISA Industry Committee

September 16, 2008

CC:PA:LPD:PR (REG 100464–08)
Room 5203
Internal Revenue Service
P.O. Box 7604
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Washington, DC 20044

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to submit this response to Prop. Treas. Reg. § 1.411(b)-1, which addresses the application of the anti-backloading rules for defined benefit plans under section 411(b)(1)(A)-(C) of the Internal Revenue Code (the "Code") and the parallel provisions under section 204(b)(1)(A)-(C) of Title I of ERISA. The proposed regulations were published in the Federal Register on June 18, 2008. 73 Fed. Reg. 34,665.

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

Executive Summary

Recently, the IRS has raised questions regarding the application of the anti-backloading rules to plans that provide employees with the greater of the benefits determined under two or more formulas. Such plans provide employees better benefits than they would receive if they were covered by only one of the formulas. Plan sponsors often adopt this approach to provide existing employees generous transition benefits when the sponsor changes a plan's benefit formula. Indeed, when plan sponsors have converted traditional pension plans to cash balance plans, Congress and Treasury have encouraged sponsors to keep the plan's prior traditional formula going for existing employees and to offer them the greater of the benefits under that formula and the plan's new cash balance formula. The IRS has routinely approved plans providing "greater of" benefits since the enactment of ERISA in 1974.

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Notwithstanding its long-standing administrative practice, the IRS in Revenue Ruling 2008-7 held that in many common circumstances plans with "greater of" formulas will fail the 133⅓ percent anti-backloading test in Code section 411(b)(1)(B), even though such plans frontload benefits rather than backload them. In recognition of its dramatic change in position, the IRS granted retroactive relief from the holding in the revenue ruling to some plans with greater of formulas. The relief applies for tax-qualification purposes, but not for purposes of Title I of ERISA. More recently, Treasury and IRS have issued proposed regulations to permit plans with "greater of" formulas to satisfy the 133⅓ percent rule under limited circumstances. The proposed regulations would cover only years beginning after 2008, but would apply for purposes of both tax-qualification and Title I of ERISA.

Courts have uniformly rejected the approach set forth in Revenue Ruling 2008-7, which serves as the premise of the proposed regulations, that "greater of" plans violate the existing anti-backloading rules. The most recent court to address this, the Ninth Circuit, found the reasoning in Revenue Ruling 2008-7 "unpersuasive," noting that the "greater of" approach does not "conflict with the objective of ERISA's anti–backloading provisions, which is to prevent a plan from being unfairly weighted against shorter–term employees." *Hurlic v. Southern Cal. Gas Co.*, --- F.3d ----, 2008 WL 3852685, *8-9 (9th Cir. Aug. 20, 2008). The proposed regulations therefore provide very limited relief from a supposed requirement that the courts have uniformly found does not exist.

Furthermore, the approach in the proposed regulations raises several significant concerns. Most importantly, the approach does not distinguish between the frontloading of benefits, which ERISA permits, and the backloading of benefits, which ERISA prohibits. As a result, the proposed regulations would continue to penalize plans merely because they frontload benefits. It should be self-evident that a plan ought not to fail the anti-backloading rules merely because it *frontloads* benefits. In addition, the approach in the proposed regulation sets forth a vague standard – a plan may provide the greater of two or more benefit formulas only if each formula has a different "basis." While not entirely clear, it appears that two formulas have a different basis if the elements of the formula differ substantially, such as a significant difference in the definition of compensation.

ERIC recommends an approach to test for backloading under the 133⅓% rule that permits "greater of" formulas. The approach distinguishes frontloading from backloading, and permits a plan to frontload benefits "without limit," as Congress intended. Under the ERIC approach, the growth in an employee's benefit in each future year cannot exceed by more than one-third the average growth in the employee's benefit measured as of each earlier year. By permitting the growth in an employee's benefit to be averaged over the employee's earlier years of service, this approach permits plans to frontload benefits as Congress intended, but bars plans from backloading benefits by more than a third in line with Congressional intent. To ensure that employees truly benefit from the frontloading of benefits, the ERIC approach takes into account benefits in earlier years only to the extent the employee can actually earn them.

In practice, the ERIC approach permits plans to offer employees "greater of" formulas without the need to test those formulas separately. For ease of administration, ERIC also recommends that the final regulations permit plans to test "greater of" formulas separately *without* the unnecessary restrictions in the proposed regulations. First, each formula should be permitted to satisfy any of the three anti-backloading tests in the statute. Second, each formula should be permitted to satisfy the same or a different test as the other formulas in the plan. And, third, no formula should be required to be aggregated with any other formula for testing purposes, even if some or all of the formulas are applied on the same "basis."

Finally, ERIC recommends that the final regulations clarify the anti-backloading rules retroactively as well as prospectively. The anti-backloading rules have not changed since ERISA was enacted in 1974. The IRS has approved plans with "greater of" formulas since ERISA's enactment, and, most importantly, plan sponsors should not be penalized either for frontloading benefits for employees or for granting them the greater of the benefits under two or more formulas. If this recommendation is not adopted, the relief under section 7805(b) should be available for all plans, and the effective date of the final regulations should permit sufficient time for plans to be amended, which, for collectively bargained plans, would be the first plan year to begin after all of the collective bargaining agreements under which the plan is maintained have expired.

Background

Congress added the vesting and anti-backloading requirements to the statute when ERISA was enacted in 1974 to address concerns that employees who terminate employment before normal retirement age would be deprived of meaningful pension benefits. The vesting rules ensured that long-service employees would have a vested right to pension benefits before normal retirement age. However, the vesting rules would serve little purpose if the benefit in which employees vest did not accrue until the end of an employee's career. Accordingly, the anti-backloading rules serve as a backstop to the vesting rules by ensuring that the benefits in which employees vest prior to normal retirement age are meaningful.

Consistent with the purpose of the vesting and anti-backloading rules, the anti-backloading rules permit the *frontloading* of benefits without limitation. When Congress enacted the anti-backloading rules as part of ERISA, it could not have been more emphatic about one thing: plans are permitted to *frontload* benefit accruals. The ERISA Conference Report said this three times.

First, the Conference Report made the following statement about the 3% test:

> "This test is to be applied on a cumulative basis (i.e., *any amount of 'front loading' is permitted).*" H.R. (Conf.) Rep. No. 1280, 93d Cong., 2d Sess. 273 (1974) (emphasis added).

The Conference Report also made a similar statement about the 133⅓% test:

> "Under this alternative, the plan is to qualify if the accrual rate for any participant for any later year is not more than 133⅓ percent of his accrual rate for the current year. Thus, (unlike the House bill) the conference substitute *permits an unlimited amount of 'front loading'* under this test." *Id.* at 274 (emphasis added).

The Conference Report made this point a third time in connection with the fractional rule:

> "This test is cumulative in the sense that *unlimited front loading is permitted.*" *Id.* at 274 (emphasis added).

It is difficult to imagine how Congress could have been more emphatic. Indeed, as noted above, the House bill proposed limits on front-loading, and these limits were rejected. The Secretaries of Treasury and Labor observed in written comments to the conferees: "Front-loading occurs when the employee accrues a benefit faster during his earlier years. Thus, the limitation on front-loading in the House bill runs counter to the intent of the bill to encourage the earliest possible pension." Administration Recommendations to the House and Senate Conferees on H.R. 2 to Provide for Pension Reform at 35 (Apr. 1974). Adhering to the recommendation of the Secretaries of Treasury and Labor, the conferees eliminated the restrictions on frontloading in the conference for ERISA.

Likewise, courts have frequently observed that the purpose of the anti-backloading rules (and the 133⅓ percent test in particular) is "to prevent the practice known as 'backloading of benefits.'" *Langman v. Laub*, 328 F.3d 68, 71 (2d Cir. 2003); *see also Hurlic v. Southern Cal. Gas Co.*, 2008 WL 3852685, at *9 (9th Cir. Aug. 20, 2008) ("the objective of ERISA's 'anti-backloading' provisions . . . is 'to prevent a plan from being unfairly weighted against shorter-term employees.'")(citing *Register v. PNC Fin. Servs. Group*, 477 F.3d 56, 72 (3d Cir. 2007)). Chief Judge Posner similarly observed:

> The purpose of section 204 [of ERISA] is to prevent the employer from defeating the vesting section, which immediately precedes it in the statute, by backloading benefits (that is, making benefits accrue very slowly until the employee is near retirement age) so that the employee's pension rights, even though vested after 10 years, have very little value until he has completed a much longer period of service.

Jones v. UOP, 16 F.3d 141, 143 (7th Cir. 1994) (Posner, C.J.).

It is hardly surprising that Congress sought to permit frontloading. The anti-backloading rules were designed to restrict the extent to which a plan may *defer* the accrual of benefits until late in an employee's career, thereby thwarting the objectives of ERISA's vesting standards. The *acceleration* of benefit accruals -- through frontloading -- advances the objectives Congress sought to achieve in enacting the anti-backloading rules: the accrual of pension rights *early* in an employee's career.

Given the purpose of the anti-backloading rules, each anti-backloading test must distinguish between frontloading and backloading. The Treasury and the IRS recognize that the 3% test and fractional rule test are both cumulative tests, which necessarily take into account accruals prior to the testing year. However, because the 133⅓% test tests *annual* rates of accrual, questions arise as to whether this test also must distinguish between frontloading and backloading. The purposes of all three rules is the same, however, and with respect to each rule, Congress expressly intended to allow frontloading. Moreover, there is more than one way to calculate annual rates of accrual, and one accepted method permits the averaging of accruals over a period of years ending in the test year. *See* Treas. Reg. § 1.401(a)(4)-3(d)(1)(iii)(B).

To illustrate, if the annual rate of a future accrual exceeds 133⅓% of the annual accrual rate in an earlier year, a proper test must find no violation if the earlier year's accrual is relatively low solely because benefits have been accelerated (that is, shifted to an even earlier year). A simple example illustrates the point: If a plan provides an accrual of 1% of pay for each year of service, the plan undoubtedly passes the 133⅓% test because each year's accrual is level. If the formula is changed to shift one year's accrual to an earlier year, the plan becomes frontloaded. Thus, if the plan is changed to provide an accrual of 2% of pay in year 1, 0% of pay in year 2, and 1% of pay in each later year, the second year's accrual has been transferred from year 2 to year 1, thereby frontloading benefits. By contrast, if the plan transfers an accrual to a later year, it becomes backloaded. Thus, if the plan is changed to provide an accrual of 1% of pay in year 1, 0% in year 2, and 2% in year 3, the second year's accrual has been postponed from year 2 to year 3, impermissibly backloading benefits. This is illustrated in the chart below:

CHART 1

	Year 1	**Year 2**	**Year 3**
Original Formula	1%	1%	1%
Frontloaded Formula	2%	0%	1%
Backloaded Formula	1%	0%	2%

The proper test for backloading should distinguish between the Frontloaded Formula (which should not fail on account of frontloading) and the Backloaded Formula (which should fail on account of backloading). The proposal ERIC sets forth below would accomplish this goal.

Proposal: Average Annual Accrual Approach

To distinguish between frontloading and backloading, the 133⅓ test should be able to take into account accruals in a year before the test year. This can be accomplished by testing each year of participation by ***comparing each future, annual accrual with the average annual accrual as of the test year***. For example, the test for the first plan year would consider the annual accrual for the first plan year with each later annual accrual. However, the test for the second plan year could compare (a) the average annual accrual of year 1 and year 2 to (b) each annual accrual after year 2. This approach tests annual rates of accrual, but it does so by calculating the rate for the test year under the accrued-to-date method. *See* Treas. Reg. § 1.401(a)(4)-3(d)(1)(iii)(B). This test would be applied to the "Frontloaded Formula" and the "Backloaded Formula" in Chart 2 as follows:

CHART 2

	Year 1	**Year 2**	**Year 3**
Frontloaded Formula	annual accrual: 2% cumulative accrual: 2% avg. annual accrual: 2%	annual accrual: 0% cumulative accrual: 2% avg. annual accrual: 1%	annual accrual: 1% cumulative accrual: 3% avg. annual accrual: 1%
Backloaded Formula	annual accrual: 1% cumulative accrual: 1% avg. annual accrual: 1%	annual accrual: 0% cumulative accrual: 1% avg. annual accrual: 1/2%	annual accrual: 2% cumulative accrual: 3% avg. annual accrual: 1%

Applying the test described above, the Frontloaded Formula passes. In particular, Year 2, when the annual accrual dips to 0% is tested as follows: The average annual accrual in Year 2 is 1% of pay, which takes into account the accelerated accrual in Year 1. The result is the accrual in Year 3 (and all future years) of 1% of pay is not more than 133⅓% higher than the average annual accrual in Year 2.

By contrast, the Backloaded Formula fails. The average annual accrual in Year 2 is 1/2% of pay (the average of 1% in Year 1 and 0% in Year 2), while the accrual in Year 3 is 2% pay, an amount far greater than 133⅓% of 1/2% of pay.

The preamble to the proposed regulation states that commentators who suggest a test that recognizes prior frontloading of benefits "should describe how that provision would fit within the statutory language of section 411(b)(1)(B), including the application of section 411(b)(1)(B)(i) (which requires that an amendment to the plan that is in effect for the current year be treated as in effect for all other plan years)." It appears that Treasury and the IRS are concerned that if a test takes into account accruals in prior years, the statute may require the test to take into account accruals that are only assumed to have occurred but that do not actually occur. We believe this concern is illustrated as follows:

> A plan that provides a benefit accrual each year of 1/2% of pay for each year of service is amended to provide for the "Frontloaded Formula" described above in which the accrual in the first year of service is 2% of pay, the accrual in the second year is 0% of pay, and the accrual in later years is 1% of pay. An employee who is in his second year of service on the date of the plan amendment would have received an accrual of 1/2% of pay in his first year of service under the prior formula and would receive an accrual of 0% of pay accrual for the second year of service under the new formula, and 1% of pay in his third year of service. If the amendment is considered to have always been in effect, the concern is that the employee will be assumed to have had an accrual of 2% of pay in his first year, which he did not receive, and therefore his average accrual in his second year would be assumed to be 1% of pay, enabling the formula to pass backloading, when actually his average accrual would have been 1/4% of pay (the average of 1/2% of pay in Year 1 and 0% of pay in Year 2), which would not pass the backloading test.

This concern, however, can be addressed by the following rule: *a plan is permitted to apply the 133⅓ test based on an employee's average annual accruals only to the extent that the employee can actually accrue them*. Thus, if the "Frontloaded Formula" were added to a plan as described above, the plan could not apply the 133⅓% test to the employee in Year 2 based on the employee's average annual accrual of 1% of pay unless the amendment actually provided such an accrual to the employee (by adding a 1-1/2% of pay accrual to the 1/2% of pay accrual the employee earned on the prior formula). On the other hand, if the amendment merely provided the employee with a 0% accrual in Year 2, the employee's average accrual would be only 1/4% of pay (because the prior formula provided only 1/2% of pay each year, and the Year 1 accrual of 1/2% of pay plus the Year 2 accrual of 0% of pay, divided by 2 years is 1/4% of pay). Thus, under both the annual approach (comparing 0% of pay to later annual accruals of 1% of pay) and the average annual approach (comparing 1/4% of pay to later annual accruals of 1% of pay), the plan would fail.

This approach is consistent with the rule that a plan amendment is treated as though it was always in effect: this rule merely shows that the 133⅓% test is prospective only. A plan amendment increasing benefits prospectively does not cause the plan to fail the backloading rules in prior years:

> In applying these rules, a plan amendment in effect for the current year is to be treated as though it were in effect for all plan years. (For example, if a plan provides a one percent rate of accrual for all participants in 1976, and is amended to provide a 2 percent rate of accrual for all participants in 1977, the plan will meet this test, even though 2 is more than 1 1/3 times 1). H.R. (Conf.) Rep. No. 1280, 93d Cong., 2d Sess. 274 (1974).

This rule is not intended to preclude a plan from being tested based on average accrual rates. Indeed, the same report discussing this rule notes, as discussed above, that the 133⅓% test is intended to permit unlimited frontloading.

We note that, to adopt the average annual accrual approach, *Example (3)* in Treas. Reg. § 1.411(b)-1(b)(2) should be amended to permit the frontloading of benefit accruals.

The average annual accrual approach addresses many of the concerns under the anti-backloading rules that have arisen in the context of plans that provide a benefit based on the greater of two formulas. In Revenue Ruling 2008-7, the IRS described how a "greater of" plan could fail the anti-backloading rules because the formulas must be tested together. However, this interpretation has been soundly rejected by the courts. Recently, the Ninth Circuit found the reasoning in Revenue Ruling 2008-7 "unpersuasive," noting that the "greater of" approach does not "conflict with the objective of ERISA's anti–backloading provisions, which is to prevent a plan from being unfairly weighted against shorter–term employees." *Hurlic v. Southern Cal. Gas Co.*, --- F.3d ----, 2008 WL 3852685, *8-9 (9th Cir. Aug. 20, 2008); *see also Tomlinson v. El Paso Corp.*, Civil Action No. 04-cv-02686-WDM-MEH, 2008 WL 762456 at *5 (D. Colo. March 19, 2008) ("greater of" formula does not violate the 133⅓% test); *Wheeler v. Pension Value Plan for Employees of the Boeing Co.*, Case No. 06-cv-500-DRH, 2007 WL 2608875 at *12-13 (S.D.Ill. Sept. 6, 2007)(same).

As Treasury and the IRS are aware, "greater of" plans provide generous benefits especially when employees are transitioned to new formulas. Many of the nation's largest defined benefit plans, including plans with long-standing, traditional benefit formulas and collectively bargained plans include "greater of" formulas. The following examples illustrate how "greater of" formulas are used:

- **Final Pay and Career Pay Formulas:** Many plans include both a final pay formula and a career pay formula and provide each employee with the benefit under the formula yielding the greater benefit.

- **Pay-Based and Dollar-Based Formulas:** Many plans (including many collectively bargained plans and other plans covering large numbers of hourly-paid workers) include both a pay-related formula and a dollar-based formula. The dollar-based formula might specify either a flat dollar benefit or a dollar benefit rate multiplied by the employee's years of service.

- **Grandfathered Formulas:** When a plan is amended to change its benefit formula, many plans allow some or all participants to continue to accrue benefits under the plan's prior benefit formula(s), either until retirement or for a limited number of years. For example, when defined benefit plans with traditional benefit formulas have been amended to include cash balance formulas, some plans have provided that some participants (for example, those at or near retirement age) receive the greater of (a) a cash balance benefit or (b) the benefit provided by the plan's prior formula. In some cases, the preservation of the plan's prior formula has been required by collective bargaining.

- **Avoiding Wear-Away:** When some employers amend their plans, they avoid putting participants in a position in which they do not accrue any benefits for a period of years by using the "extended wear-away" approach. Under this approach, a participant receives the greater of (1) his benefit under the new formula (based on all of the participant's years of service) or (2) the sum of his benefit under the old formula (based on his prior service) and his benefit under the new formula (based on his future service).

- **Mergers and Acquisitions:** Following a merger or acquisition, the pension plan of the acquired company is commonly merged into (and conformed with) the acquiring company's plan. In these circumstances, the acquiring company commonly uses the techniques described in the preceding paragraphs (*e.g.*, extended wear-away or the greater of the new and old formulas) to address transition issues.

- **Spin-Offs and Joint Ventures:** Following a spin-off or the creation of a joint venture, the plan of the spun-off company (or joint venture) may provide that some participants accrue benefits under either a new formula or the formula under which they previously participated, whichever yields the greater benefit.

ERIC notes, however, that the average annual accrual approach is not the only means to address "greater of" formulas. Another approach to address these plans is to permit plans to test each formula separately. The proposed regulations provide a means to test formulas separately, and, if modified as described below, such a test could be a useful addition to the 133⅓ test.

The Separate Testing Approach in the Proposed Regulations

Under the proposed regulations, a defined benefit plan providing the greater of the benefits determined under two or more formulas would be deemed to satisfy the anti-backloading rules if the plan meets certain conditions. One requirement is that each formula applies a "different basis" for determining benefits. Another requirement is the each formula separately satisfy the 133⅓ test. There are a number of concerns with this proposal:

1. <u>"Different basis" is vague and not grounded in the statute</u>. The proposed regulations would permit two formulas to be tested separately only "if each of the separate formulas uses a different basis for determining benefits." The proposed regulation offers two examples of plans with different bases: highest average pay versus career average pay, and highest average pay versus a statutory hybrid formula. These examples, however, do not begin to address the myriad of differences among formulas and leave tremendous uncertainty as to whether formulas have the same basis. For example, if a plan providing a benefit based on the highest pay over a five-year period is merged with a plan providing a benefit based on the highest pay over a three-year period, it is not clear whether the employer could offer participants the greater of the two benefits. Likewise, if two formulas are based on highest average pay, but each formula has a different definition of pay, it is not clear whether an employer could offer the greater of the two benefits. It is not even clear whether an employer could convert a career average pay formula to a cash balance formula and offer participants the greater of the two benefits.

Furthermore, some career average pay plans have been periodically amended for "pay updates." Following a "pay update," a participant may be eligible for the greater of a career average pay benefit or the sum of (a) a final average pay benefit based on service until the plan amendment, and (b) a career average pay benefit based on service after the plan amendment. In other cases, "pay updates" result in the greatest of a benefit determined based on all service and based on pay averaged over different periods.

More importantly, there is no basis in the statute for applying different backloading tests depending on whether formulas have "different bases." If a benefit can be expressed as two separate formulas, each of which satisfies the anti-backloading tests, the formulas necessarily do not backload benefits but frontload benefits. Separate testing therefore is consistent with the purpose of the anti-backloading rules.

2. <u>No formula in a "greater of" plan may rely on the fractional rule</u>. The proposed regulations would permit two formulas to be tested separately for anti-backloading only if each formula separately satisfies the 133⅓% test. By contrast, in Revenue Ruling 2008-7, the IRS offered relief under section 7805(b) of the Code, "provided that each such formula standing alone would satisfy an accrual rule of § 411(b)(1)(A), (B), or (C) for the years involved." Because each of the anti-backloading rules serves the same purpose, the final rules should be consistent with Revenue Ruling 2008-7 and not require both formulas to satisfy the 133⅓% test.

For example, if a plan provides benefits under a traditional final average pay formula that satisfies the fractional rule but not the 133⅓% test, and the plan is converted to a cash balance plan (which, because it takes into account more than 10 years of compensation might not comply with the fractional rule), the plan sponsor should be permitted to provide generous transition benefits to employees by offering the employees the greater of the benefits determined under each of the formulas. If each formula satisfies an anti-backloading test, the benefits will not be backloaded.

3. <u>The test does not distinguish between frontloading and backloading</u>. The separate testing approach in the proposed regulation does not permit unlimited frontloading. Indeed, the preamble recognizes, "The proposed regulations do not include a provision under the 133⅓ percent rule that recognizes prior frontloading of benefits." This means that the test cannot distinguish between frontloading and backloading (at least in many situations, such as the example shown in Chart 1, above). The separate testing approach may be useful if modified as described in paragraph 1 and 2, above, especially for plans that provide the greater of a benefit under a formula that relies on the fractional rule and a benefit under a formula that relies on the 133⅓ percent test. However, the separate testing approach should be provided in addition to the average annual accrual approach as described above.

Effective Date

The final regulations should be effective as of the effective date of the anti-backloading rules in ERISA. Congress has not changed these rules since 1974, and they have always permitted unlimited frontloading. The IRS has, for years, approved plans with "greater of" formulations; indeed, Revenue Ruling 2008-7 provides relief under section 7805(b) of the Code in part to plans with determination letters from the IRS on "greater of" formulations.

Most importantly, the plan sponsors should not be penalized for having provided plans with "greater of" formulations. As discussed above, "greater of" formulations are often provided to preserve expectations or provide generous transition relief when employees shift from one formula to another, whether as a result of plan amendment, a change in the employee's position with the company, or as a result of a corporate transaction. Employers converting plans to cash balance formulas have been encouraged to provide benefits equal to the greater of the benefits under the prior formula or the cash balance formula. In fact, Treasury proposed that plans converting to cash balance be required to provide the greater of benefits under the prior formula or the cash balance formula for at least five years following the conversion. General Explanations of the Administration's Fiscal Year 2006 Revenue Proposals at 83 (Feb. 2005); General Explanations of the Administration's Fiscal Year 2005 Revenue Proposals (Feb. 2004) at 105.[1]

In light of the clear policy promoting (and in some cases requiring) "greater of" formulations, the clarification of the anti-backloading rules should be retroactive, including for purposes of Title I of ERISA.

If, however, this recommendation is not adopted, the relief under section 7805(b) of the Code should be broad and cover all plans with respect to plan years beginning before the effective date of the final regulations.

Furthermore, if limitations are placed on "greater of" formulations (for example, by permitting separate testing only in limited circumstances), the effective date of the final rule should provide sufficient time for plans to be amended, including time to provide notice to participants. In particular, the final regulations should provide that the regulations will not take effect for collectively bargained plans until the first plan year to begin after all of the collective bargaining agreements under which the plan is maintained have expired. Other regulations have taken this approach, *see, e.g.,* Treas. Reg. § 1.401(k)-1(g)(3), and any restriction on "greater of" formulations requires the same flexibility.

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[1] Moreover, in many circumstances both Congress and the Treasury have required or encouraged the use of alternative benefit formulas, for example, in connection with the top-heavy requirements and in connection with changes in the Code's qualification requirements. *See, e.g.,* Code § 416; Tax Reform Act of 1986, Pub. L. No. 99- 514, § 1106(i)(3), 100 Stat. 2085, 2425-26 (1986); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 235(g)(4), 96 Stat. 324, 509 (1982); Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2004(d)(2), 88 Stat. 829, 987 (1974); *cf.* S. Rep. No. 575, 98th Cong., 2d Sess. 29 (1984) (a participant who meets the criteria for an early retirement subsidy that was previously eliminated by a plan amendment is entitled to the greater of the portion of the subsidy attributable to service before the amendment or the retirement benefit provided under the plan as amended); Treas. Reg. §§ 1.401(a)(4)-13(c)(4), 1.401(a)(17)-1(e); Notice 88-131, 1988-2 C.B. 546 (Alternative IID); Rev. Rul. 81-12, 1981-1 C.B. 228.

ERIC appreciates the opportunity to submit these comments. We will continue to solicit the views of our members on these important issues, and we will submit additional comments if we identify issues that should be addressed in the final regulations. If Treasury or the Service has any questions about our comments, or if we can otherwise be of assistance, please let us know.

Sincerely,

Mark Ugoretz
President
THE ERISA INDUSTRY COMMITTEE