AMERICAN BENEFITS COUNCIL

June 3, 2022

Submitted via www.regulations.gov

Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: 2022-2023 Priority Guidance Plan Recommendation (Notice 2022-21)

Dear Sir or Madam,

I write on behalf of the American Benefits Council ("the Council"), in connection with the solicitation of recommendations for the U.S. Treasury Department and Internal Revenue Service (IRS) 2022-2023 priority guidance plan (Notice 2022-21), to strongly urge that Treasury and the IRS take action to provide employers with the certainty needed to enable them to use substantial welfare benefit fund assets – oftentimes hundreds of millions of dollars or more, which currently sit untouched and unusable indefinitely – to provide benefits to employees and their beneficiaries. More specifically, we are writing to request that Treasury and the IRS publish official guidance affirming that the 100% excise tax under Internal Revenue Code Section 4976 does not apply to an employer's reallocation or repurposing of surplus welfare benefit fund assets to provide other health and welfare benefits to employees. We also recommend, at least in the interim, that Treasury and the IRS begin again to issue private letter rulings (PLRs) on the same and related issues, as needed.

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or administer health and retirement benefits for virtually all Americans covered by employer-sponsored plans.

We are following up on the similar letters we have submitted in the last two years[1] due to the substantial importance of this issue to our members and their employees. This is an issue we hear about from our members almost weekly and this is why we have constantly continued to advocate for guidance on this issue separately, formally and informally.

We understand that for at least the past three years, Treasury and the IRS have been analyzing this issue and considering how to proceed while at the same time responding to numerous other legislative and regulatory initiatives. We greatly appreciate your efforts on various competing priorities and thank you for beginning to prioritize this project in the last year. We are greatly encouraged to hear that Treasury and IRS are in the process of drafting responsive guidance and we strongly support the release of guidance as soon as possible.

As we have said many times before, we are available to help in any way we can to support your ongoing efforts so that urgently needed guidance on this topic is available as quickly as possible. Below we provide pertinent background information, as well as additional context for why such guidance is necessary and proper and advances the goals of sound tax policy and administration, including for the benefit of millions of employees and beneficiaries who receive health and welfare benefits through their employers.

BACKGROUND

Employers commonly contribute assets in welfare benefit funds to provide a reserve for future employee benefits, such as post-retirement medical benefits. However, many welfare benefit funds have accumulated surplus assets over periods of time for various reasons, such as changes in benefit designs, changes in participant demographics, and strong investment performance. A substantial number of employers, including many Council members, would like to repurpose such surplus assets to fund other welfare benefits for employees and their beneficiaries, such as active medical benefits, but are concerned that the IRS could consider such repurposing an employer "reversion."

This concern relates to the fact that since 1986, Code Section 4976(b)(1)(C) has imposed a 100% excise tax on "any portion of a welfare benefit fund reverting to the benefit of the employer." Treasury and the IRS have not published any broad-based guidance as to whether this provision applies to the repurposing of welfare benefit fund assets to provide other employee welfare benefits, although, as discussed later, relevant legislative history, several IRS PLRs, and informal statements indicate that it should not.

[1] https://www.americanbenefitscouncil.org/pub/12D63F1A-1866-DAAC-99FB-87CD2F4CB298 and https://www.americanbenefitscouncil.org/pub/?id=0B7428A4-1866-DAAC-99FB-CF8DF7480315

Indeed, over 25 years ago, the IRS began to issue PLRs stating that the 100% excise tax on welfare benefit fund reversions does not apply when an employer repurposes welfare benefit fund assets for the same type of benefit.[2] In 2015, the IRS helpfully also began issuing PLRs affirming that the 100% excise tax does not apply where an employer repurposes surplus welfare benefit fund assets to provide other types of welfare benefits. Since then, the IRS has issued at least six similar PLRs, most recently PLR 201927001 (dated March 28, 2019; released July 5, 2019).[3]

While such PLRs have noted there may be income tax consequences (due to the difference in the deduction rules for the original purpose of the assets as compared to the new purpose of the assets) and have addressed some related tax issues, they also provided welcome confirmation that the 100% excise tax would not apply to these transactions, which commonly involve tens or hundreds of millions of dollars of surplus retiree medical assets, and therefore raise the potential for an excise tax of the same magnitude. Obviously, if the excise tax did apply, it would dissuade any employer from repurposing surplus assets because it would completely eliminate any benefit for plan participants. As such, the agency's issuance of PLRs was essential to enabling these reallocations which allow for benefits to significant numbers of employees and their beneficiaries.

In mid-2019, however, the IRS unexpectedly told employers with pending PLR requests to repurpose welfare benefit fund assets that the IRS would cease issuing PLRs pending further examination of certain matters, including the potential that in some narrow instances the reallocation could be considered a reversion to the extent that it was considered to be satisfying an existing "obligation" of the employer.

Subsequently, in January 2020, the IRS formally added to its "no ruling" list an item regarding whether a transfer of assets between welfare benefit funds or a new or different use of assets of a welfare benefit fund results in a reversion to the employer.[4] And in January 2021 and January 2022, despite repeated ongoing requests for guidance, IRS retained this item on its "no ruling" list.[5]

NEED FOR GUIDANCE

Due to the IRS' "no rule" position, affected employers are now effectively handcuffed, perhaps indefinitely, in their ability to use significant surplus welfare benefit fund assets to provide important benefits to their employees and beneficiaries

[2] *See*, *e.g.*, PLR 9438017.

[3] *See also* PLRs 201530022, 201625019, 201702029, 201825012, and 201833014.

[4] IRS Revenue Procedure 2020-3 § 3.01(128).

[5] IRS Revenue Procedure 2021-3 § 3.01(128), IRS Revenue Procedure 2022-3 § 3.01(133).

unless they are willing to face a potential 100% excise tax on up to tens or hundreds of millions of dollars. This potential exposure to the 100% excise tax precludes the use of these otherwise stranded welfare benefit fund assets for no apparent policy or other reason.

As a result, the lack of IRS guidance substantially limits the use of a significant potential funding source that would directly benefit plan participants, particularly at a time when employers are exploring all possible options to fund employee benefits and help reduce employees' direct costs through lower premiums and out-of-pocket expenses. These concerns predate the COVID-19 pandemic and related economic impacts and will remain significant concerns long after the pandemic ends, in part, because such assets remain unavailable for use. The IRS' position has had a particularly adverse impact on employers and employees during the pandemic, but also now as we approach its aftermath, when many employers and employees continue to struggle financially and are exploring ways to use assets most efficiently while at the same time making every effort to continue providing existing health and welfare benefits. The continued lack of guidance (or, alternatively, issuance of PLRs) undercuts these critical efforts to the detriment of benefit plan participants and is inconsistent with sound public policy.

The legislative history of Code Section 4976 clearly indicates that transfers of assets between welfare benefit funds or reallocations of assets within welfare benefit funds do not involve "reversions" as long as the assets are used to pay welfare benefits to employees or their beneficiaries. Indeed, less than five years after the enactment of Code Section 4976, the IRS opined in a General Counsel Memorandum (GCM) that the excise tax does not apply to a transfer of assets between welfare benefit funds, even though the transfer would reduce the need to use corporate assets to provide medical benefits.[6] In its analysis, the IRS relied in part on the following legislative history:

- "[A] portion of a welfare benefit fund is not considered to revert to the benefit of the employer merely because it is applied, in accordance with the plan, to provide welfare benefits to employees or their beneficiaries."[7]

- "If an amount is paid by a fund to another fund, for the purpose of providing welfare benefits to employees of the employer, then the payment is not to be considered a reversion."[8]

[6] General Counsel Memorandum 39774 (1989).

[7] H.R. Rep. No. 426, 99th Cong., 1st Sess. (1985), 1986-3 C.B. (Vol. 2) at 985.

[8] Staff of the Joint Committee on Taxation, *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, 98th Cong., 2d Sess. at 794 (1985).

Although this language is clear and instructive, the position taken in the GCM is not considered official IRS guidance.

The current IRS "no rule" position and policy to deny employers the opportunity to seek PLRs confirming that this excise tax does not apply are inconsistent with sound tax administration and puts employers in the untenable position of either (1) not being able to use existing surplus welfare benefit fund assets for the benefit of employees (with the possibility of having to reduce health and welfare benefits provided to active employees); or (2) moving forward with repurposing assets in an uncertain landscape of prior IRS approvals and the current no-rule position with risk of incurring a potential 100% excise tax.

RECOMMENDATIONS

In furtherance of congressional intent, as demonstrated by the legislative history described above, we recommend that Treasury and the IRS issue a revenue ruling or proposed regulations confirming that the Code Section 4976(b)(1)(C) 100% excise tax does not apply to transactions involving the repurposing of surplus welfare benefit fund assets to pay for other company-sponsored welfare benefits. While we do not see any reasonable tax basis or policy rationale to apply the 100% excise tax to any such transactions, if Treasury and the IRS determine that there is any set of facts to which the repurposing of surplus welfare benefit fund assets could give rise to a reversion, we recommend that aspect of the guidance be specifically identified and only apply prospectively.

Such guidance meets the relevant criteria listed in Notice 2022-21, including that the recommended guidance:

- resolves significant issues relevant to a broad class of taxpayers;
- reduces controversy and lessens the burden on taxpayers or the IRS; and
- promotes sound tax administration.

In addition, for the reasons noted above, we also recommend that the IRS remove welfare benefit fund repurposing from the "no rule" list and continue to issue PLRs confirming the excise tax does not apply.

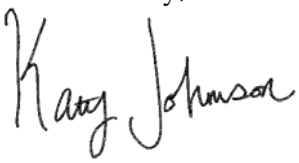
* * * * *

Thank you for the opportunity to submit these recommendations for the priority guidance plan. We greatly appreciate your attention to this request among the many other essential matters before you. We also want to note that to the extent the Treasury

Department and the IRS would find it useful, we would be more than happy to meet to discuss these issues, including as part of a larger stakeholder meeting.

If you have any questions or would like to discuss these recommendations further, please contact us at (202) 289-6700.

Sincerely,



Katy Johnson
Senior Counsel, Health Policy