July 22, 2020

Submitted via www.regulations.gov

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

Re: 2020-2021 Priority Guidance Plan Recommendation (Notice 2020-47)

Dear Sir or Madam,

We 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) priority guidance plan (Notice 2020-47), to recommend that Treasury and the IRS take action to provide employers with the certainty needed to enable them to use substantial assets – sometimes hundreds of millions of dollars, which currently sit untouched and unusable – to provide benefits to employees and their beneficiaries. More specifically, we are writing to recommend 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 that Treasury and the IRS begin again to issue private letter rulings (PLRs) on the same issue, 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.

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.

1501 M Street NW Suite 600 Washington, DC 20005 202-289-6700 Facsimile 202-289-4582 www.americanbenefitscouncil.org

BACKGROUND

Employers commonly invest assets in welfare benefit funds to fund 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 Council members, would like to repurpose such assets to fund other welfare benefits, 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 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 and IRS statements indicate that it should not.

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 (*See*, *e.g.*, PLR 9438017). 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 including PLR 201927001 (dated March 28, 2019; released July 5, 2019).[1] 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), they nevertheless 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. 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 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.

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

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.[2]

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 assets to provide important benefits to their employees unless they are willing to face a potential 100% excise tax on up to tens or hundreds of millions of dollars. As a result, the lack of IRS guidance substantially limits the use of a significant funding source that would directly benefit plan participants, particularly at a time when employers are exploring all potential options to fund employee benefits and help reduce employees' direct costs through lower premiums and out-of-pocket expenses.[3] While these concerns predate the COVID-19 pandemic and will remain significant concerns long after the pandemic ends, the IRS' position has a particularly adverse impact on employers and employees during the pandemic when many employers and employees are struggling financially or exploring ways to use assets most efficiently.

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. Indeed, less than five years after the enactment of Code Section 4976, the IRS opined in a General Counsel Memorandum 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.[4] 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."[5]
- "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."[6]

---

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

[3] We note that we may separately be in touch with the Treasury Department and the IRS in the future on other welfare benefit overfunding issues, such as with respect to overfunded Code Section 401(h) accounts.

[4] General Counsel Memorandum 39774 (1989)

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

Although this language is clear and instructive, the position taken in the General 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; or (2) moving forward with repurposing assets in an uncertain landscape of prior IRS approvals and the current no-rule position.

RECOMMENDATION

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 other welfare benefits. While we do not see any basis 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 only apply prospectively.

Such guidance meets the relevant criteria listed in Notice 2020-47, 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. More generally, we commend you for your efforts to address the pandemic and economic crisis, and we understand the immense amount of work that

---

[6] 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)

Treasury and the IRS have been undertaking in response. We greatly appreciate your attention to this request among the many other essential matters before you.

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