[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9467]

RIN 1545-BG72; RIN 1545-BH07

Measurement of Assets and Liabilities for Pension Funding Purposes; Benefit Restrictions for Underfunded Pension Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations providing guidance regarding the determination of the value of plan assets and benefit liabilities for purposes of the funding requirements that apply to single employer defined benefit plans, regarding the use of certain funding balances maintained for those plans, and regarding benefit restrictions for certain underfunded defined benefit pension plans. These regulations reflect provisions added by the Pension Protection Act of 2006, as amended by the Worker, Retiree, and Employer Recovery Act of 2008. These regulations affect sponsors, administrators, participants, and beneficiaries of single employer defined benefit pension plans.

DATES: Effective Date: These regulations are effective on October 15, 2009.

Applicability Date: These regulations apply to plan years beginning on or after January 1, 2010.

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SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-2095. The collections of information in this final regulation are in §§1.430(f)-1(f), 1.430(h)(2)-1(e), 1.436-1(f), and 1.436-1(h). The information required under §1.430(f)-1(f) is required in order for plan sponsors to make elections regarding a plan’s credit balances upon occasion. The information required under §1.430(h)(2)-1(e) is required in order for a plan sponsor to make an election to use an alternative interest rate for purposes of determining a plan’s funding obligations under §1.430(h)(2)-1. The information required under §§1.436-1(f) and 1.436-1(h) is required in order for a qualified defined benefit plan’s enrolled actuary to provide a timely certification of the plan’s adjusted funding target attainment percentage (AFTAP) for each plan year to avoid certain benefit restrictions.

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.

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 final Income Tax Regulations (26 CFR part 1) under sections 430(d), 430(f), 430(g), 430(h)(2), 430(i), and 436, as added to the Internal Revenue Code (Code) by the Pension Protection Act of 2006 (PPA ’06), Public Law 109-280 (120 Stat. 780), and amended by the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA ‘08), Public Law 110-458 (122 Stat. 5092).

Section 412 provides minimum funding requirements that generally apply for pension plans (including both defined benefit pension plans and money purchase pension plans). PPA ‘06 makes extensive changes to those minimum funding requirements for defined benefit plans that generally apply for plan years beginning on or after January 1, 2008. Section 430, which was added by PPA ‘06, specifies the minimum funding requirements that apply to single employer defined benefit pension plans (including multiple employer plans) pursuant to section 412. Section 436, which was also added by PPA ’06, sets forth certain limitations on benefits that may apply to a single employer defined benefit plan based on its funded status. Neither section 430 nor section 436 applies to multiemployer plans.

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, and section 303 of ERISA sets forth additional funding rules for single employer plans that are parallel to those in section 430 of the Code. In addition, section 206(g) of ERISA sets forth benefit limitations 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 3002(c) of ERISA, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these regulations for purposes of ERISA, as well as the Code. Thus, these final Treasury Department regulations issued under sections

430 and 436 of the Code apply for purposes of sections 206(g) and 303 of ERISA.

If the value of plan assets (less the sum of the plan's prefunding balance and funding standard carryover balance) is less than the funding target, section 430(a)(1) defines the minimum required contribution as the sum of the plan's target normal cost and the shortfall and waiver amortization charges for the plan year. If the value of plan assets (less the sum of the plan's prefunding balance and funding standard carryover balance) equals or exceeds the funding target, section 430(a)(2) defines the minimum required contribution as the plan's target normal cost for the plan year reduced (but not below zero) by the amount of the excess.

Under section 430(d), except as otherwise provided in section 430(i)(1) (regarding at-risk status), a plan's funding target for a plan year is the present value of all benefits accrued or earned under the plan as of the beginning of the plan year.

Prior to amendment by WRERA '08, section 430(b) defined a plan's target normal cost for a plan year as the present value of all benefits expected to accrue or be earned under the plan during the plan year (with any increase in any benefit attributable to services performed in a preceding plan year by reason of a compensation increase during the current plan year treated as having accrued during the current plan year). Section 101(b)(2) of WRERA '08 amended section 430(b) to modify the definition of a plan's target normal cost by adding the amount of plan-related expenses expected to be paid from plan assets during the plan year, and by subtracting the amount of mandatory employee contributions expected to be made during the plan year. This modification applies to plan years beginning after December 31, 2008; however, a plan sponsor is permitted to elect to apply this modification beginning with the first plan year beginning after December 31, 2007.

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 applicable minimum required contribution for a plan year in certain situations. 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. An employer that makes contributions for a plan year that exceed the minimum required contribution for the year is permitted in certain circumstances to use those excess contributions in order to satisfy the minimum funding requirement in a subsequent plan year. However, section 430(f)(6)(iii) provides that contributions required to avoid a benefit restriction under section 436 are disregarded for purposes of determining the extent to which contributions for a plan year exceed the minimum required contribution for the plan year. 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.

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 a new restriction on the ability of a poorly funded plan to use the prefunding balance and the funding standard carryover balance as a credit against the minimum required contribution for a plan year. Under section 430(f)(3)(C), the prefunding balance or funding standard carryover balance can only be used for a plan year if the value of plan assets for the preceding plan year (after subtracting the prefunding balance) was at least 80 percent of the funding target (determined without regard to the at-risk rules of section 430(i)) for that preceding 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 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 plan assets, section 430(f)(5) permits an employer to elect to reduce those balances.

Section 430(g)(1) provides that all determinations made with respect to minimum required contributions for a plan year (such as the value of plan assets and liabilities) are made as of the plan's valuation date. Section 430(g)(2) provides that, other than for plans with 100 or fewer participants (determined as provided in section 430(g)(2)(B) and (C)), the valuation date for a plan year must be the first day of the plan year. Under section 430(g)(2)(B), all defined benefit pension plans (other than multiemployer plans) maintained by the employer, a predecessor employer, or by any member of the employer's controlled group are treated as a single plan for this purpose, but only participants with respect to the employer or member of the controlled group are taken into account.

Section 430(g)(3) provides rules regarding the determination of the value of plan assets for purposes of section 430. Under section 430(g)(3)(A), except as otherwise provided in section 430(g)(3)(B), the fair market value of plan assets must be used for this purpose. As an alternative to the use of fair market value, section 430(g)(3)(B) permits the use of an actuarial value of assets based on the average of fair market values, but only if such method is permitted under regulations prescribed by the Secretary, does not provide for averaging of such values over more than the period beginning on the last day of the 25th month preceding the month in which the valuation date occurs and ending on the valuation date (or a similar period in the case of a valuation date that is not the 1st day of a month), and does not result in a determination of the actuarial value of plan assets that, at any time, is lower than 90 percent or greater than 110 percent of the fair market value of plan assets as of the valuation date.

Under section 430(g)(4), if a contribution made after the valuation date for the current plan year is a contribution for a preceding plan year, the contribution is taken into account in determining the value of plan assets for the current plan year. For 2009 and future plan years, only the present value (determined as of the valuation date for the current plan year, using the plan's effective interest rate for the preceding plan year) of the contributions made for the preceding plan year is taken into account. If any contributions for the current plan year are made before the valuation date (which could only occur for a small plan with a valuation date that is not the first day of the plan year), plan assets as of the valuation date must exclude those contributions and also must exclude interest on those contributions (determined at the plan's effective interest rate for the plan year) for the period between the date of the contribution and the valuation date. Under section 430(h)(2)(A), a plan's effective interest rate for a plan year is defined as the single interest rate that, if used to determine the present value of the benefits taken into account in determining the plan's funding target for the plan year in lieu of the interest rates under section 430(h)(2), would result in an amount equal to the plan's funding target determined for the plan year under section 430(d).

Under section 430(h)(1), the determination of any present value or other computation under section 430 is to be made on the basis of actuarial assumptions and methods each of which is reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

Section 430(h)(2) specifies the interest rates that must be used in determining a plan's target normal cost and funding target. Under section 430(h)(2)(B), present value is determined using three interest rates (segment rates) for the applicable month, each of which applies to benefit payments expected to be paid during a certain period. The first segment rate applies to benefits reasonably determined to be payable during the 5-year period beginning on the first day of the plan year. The second segment rate applies to benefits reasonably determined to be payable during the 15-year period following the initial 5-year period. The third segment rate applies to benefits reasonably determined to be payable after the end of that 15-year period.

Section 430(h)(2)(C) defines each segment rate as a single interest rate determined for a month by the Treasury Department on the basis of the corporate bond yield curve for the month. Under section 430(h)(2)(D), the corporate bond yield curve for a month is to be prescribed by the Treasury Department and is to reflect the average, for the 24-month period ending with the preceding month, of yields on investment grade corporate bonds with varying maturities that are in the top three quality levels available. Section 430(h)(2)(D)(ii) provides an alternative to the use of the three segment rates, under which the corporate bond yield curve (determined without regard to the 24 month average) is substituted for the segment rates.

Section 430(h)(2)(G) provides a transition rule for plan years beginning in 2008 and 2009 (other than for plans where the first plan year begins on or after January 1, 2008). Under this transition rule, the interest rates to be used in the valuation are based on a blend of the segment rates and the long-term corporate bond rates used for plan years prior to the effective date of PPA '06. Under section 430(h)(2)(G)(iv), a plan sponsor may elect to have this transition rule not apply.

Section 430(i) sets forth special rules that apply to a plan that is in at-risk status. If a plan is in at-risk status, then special assumptions must be used in determining the plan's funding target and target normal cost, a loading factor is applied to the plan's liabilities in certain cases, and, under section 409A(b)(3), restrictions apply to the employer's ability to set aside assets for purposes of paying deferred compensation to a covered employee under a nonqualified deferred compensation plan.

Under section 430(i)(4), a plan is in at-risk status for a year if, for the preceding year: (1) the plan's FTAP, determined without regard to the at-risk assumptions, was less than 80 percent (with a transition rule discussed in the next sentence); and (2) the plan's FTAP, determined using the at-risk assumptions (without regard to whether the plan was in at-risk status for the preceding year), was less than 70 percent. Under a transition rule, reduced percentages apply for plan years beginning before 2011 instead of 80 percent in the first part of the test for determining at-risk status. Under section 430(i)(4), in the case of plan years beginning in 2008, the plan's FTAP for the preceding plan year is to be determined under rules provided by the Treasury Department.

Under section 430(i)(6), the at-risk rules do not apply if a plan had 500 or fewer participants on each day during the preceding plan year. For this purpose, the number of participants is determined using the same rules as apply for determining whether a plan is a small plan for purposes of eligibility for the use of a valuation date other than the first day of the plan year. If a plan is in at-risk status, the plan's funding target and target normal cost are determined (under section 430(i)(1) and (2)) using special actuarial assumptions. Under these assumptions, all employees who are not otherwise assumed to retire as of the valuation date, but who will be eligible to elect to commence benefits in the current and 10 succeeding plan years, are assumed to retire at the earliest retirement date under the plan, but not before the end of the current plan year. In addition, all employees are assumed to elect the form of retirement benefit available under the plan for each assumed retirement age that results in the highest present value.

The funding target of a plan in at-risk status for a plan year is generally the sum of: (1) the present value of all benefits accrued or earned as of the beginning of the plan year determined using the special assumptions described in this preamble; and (2) in the case of a plan that has been in at-risk status for at least 2 of the 4 preceding plan years, a loading factor. That loading factor is equal to the sum of: (1) $700 multiplied by the number of participants in the plan; plus (2) 4 percent of the funding target determined as if the plan were not in at-risk status. The target normal cost of a plan in at-risk status for a plan year is generally the sum of: (1) the present value of benefits expected to accrue or be earned under the plan during the plan year; determined using the special assumptions described in this preamble; and (2) in the case of a plan that has been in at-risk status for at least 2 of the 4 preceding plans years, a loading factor of 4 percent of the present value of all benefits under the plan that accrue, are earned, or are otherwise allocated to service for the plan year (determined as if the plan were not in at-risk status). The target normal cost of a plan in at-risk status is adjusted for plan-related expenses expected to be paid from plan assets during the plan year and mandatory employee contributions expected to be made during the plan year under the same rules that apply to plans that are not in at-risk status.

Under section 430(i)(3), the funding target of a plan in at-risk status and the target normal cost of a plan in at-risk status are never less than the respective funding target and target normal cost determined without regard to the at-risk rules. In addition, if a plan has been in at-risk status for fewer than 5 consecutive plan years, a phase-in rule applies to the determination of the funding target and the target normal cost under section 430(i)(5).

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 that is not based on compensation, but only if the rate of increase does not exceed the contemporaneous rate of increase in average wages of 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, 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 benefit accruals under the plan must cease as of the valuation date for the plan year.[1] 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 relating to contributions required to avoid benefit restrictions. Under section 436(f)(1), an employer is permitted to provide security to the plan (in the form of a surety bond, cash, United States obligations that mature in 3 years or less, or other form 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.

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 AFTAP to avoid a benefit limitation under section 436 (because the result of the election is a higher asset value used to determine the AFTAP). In particular, if the

[1] Pursuant to section 203 of WRERA, for the first plan year beginning during the period beginning on October 1, 2008, and ending on September 30, 2009, section 436(e)(1) is applied by substituting the plan's adjusted funding target attainment percentage for the preceding plan year for such percentage for such plan year but only if the adjusted funding target attainment percentage for the preceding plan year is greater.

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 any of these cases (the election with respect to the limitations under section 436(d) or a deemed election in the case of a plan maintained pursuant to a collective bargaining agreement), the deeming rule applies only if the prefunding balance and funding standard carryover balances are large enough to avoid the application of the 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 (or until the first day of the 10th month, if earlier). Under section 436(h)(3), if any of these limitations did not apply to the plan for the preceding year, but would have applied if the plan's AFTAP for the preceding year was 10 percentage points lower, the plan's AFTAP is presumed to be 10 percentage points lower than the AFTAP for the prior plan year as of the first day of the 4th month of the current plan year (and that day is deemed to be the plan's valuation date for purposes of applying the benefit limitations), unless the plan's enrolled actuary has certified the plan's AFTAP for the current year by that day.

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, those 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 definition of AFTAP. In general, a 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), as added by WRERA '08, provides the Secretary with authority to issue special rules for the application of section 436 in the case of a plan that uses a valuation date other than the first day of the plan year.

Section 436(m) (designated section 436(k) prior to amendment by WRERA '08) 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.

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 certain specified dates. These dates include the date the plan has become subject to a restriction described in the ERISA provisions that are parallel to Code sections 436(b) and 436(d) and, in the case of a plan that is subject to the ERISA provisions that are parallel to Code section 436(e), 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 Code section 436(h)). Under section 101(j) of ERISA, the Secretary of the Treasury can specify other dates under which notice is to be provided. Any notice under section 101(j) of ERISA must 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.

Sections 430 and 436 generally apply to plan years beginning on or after January 1, 2008. The applicability of section 430 for purposes of determining the minimum required contribution and the application of section 436 is delayed for certain plans in accordance with sections 104 through 106 of PPA '06.

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). 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 anti-cutback requirements of section 411(d)(6) by reason of such amendment, except as otherwise provided by the Secretary of the Treasury.

Proposed regulations regarding the rules for funding balances under section 430(f) and the benefit restrictions for underfunded plans under section 436 were published on August 31, 2007 (REG-113891-07, 72 FR 50544). The regulations were proposed to apply to plan years beginning on or after January 1, 2008. Comments were received regarding the regulations, and a public hearing was held on January 28, 2008.

Proposed regulations regarding the measurement of assets and liabilities for pension funding purposes (generally covering the rules of sections 430(d), (g), (h)(2), and (i)) were published on December 31, 2007 (REG-139236-07, 72 FR 74215). The regulations were proposed to apply to plan years beginning on or after January 1, 2009. Comments were received regarding the regulations, and a public hearing was held on May 29, 2008.

Notice 2008-21 (2008-1 CB 431) provides that the regulations under section 430(f) and 436 will not apply to plan years beginning before January 1, 2009. See §601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin. Notice 2008-21 also provides that the IRS will not challenge a reasonable interpretation of an applicable provision under section 430 or 436 for a plan year beginning in 2008 and provides transitional guidance with respect to years before the regulations are effective.

On December 23, 2008, WRERA ‘08 was enacted. WRERA ’08 contains technical corrections and other changes to the rules of sections 430 and 436, including a modification to the asset valuation method set forth in section 430(g)(3)(B). Notice 2009-22 (2009-14 IRB 741) provides interim rules regarding the asset valuation method as modified by WRERA '08.

Explanation of Provisions

I. Overview.

These regulations finalize the rules proposed in REG-113891-07 (published August 31, 2007), regarding funding balances and benefit restrictions for underfunded plans, and the rules proposed in REG-139236-07 (published December 31, 2007), regarding measurement of assets and liabilities for pension funding purposes, with certain revisions. The Treasury Department and the IRS published proposed regulations relating to other portions of the rules under section 430 (including sections 430(a), (c), and (j)) on April 15, 2008 (REG-108508-08, 72 FR 20203). Those regulations will be finalized separately.

II. Section 1.430(d)-1 Determination of Funding Target and Target Normal Cost.

Section 1.430(d)-1 generally adopts the rules set forth in the proposed regulations for determining the funding target and the target normal cost under sections 430(b) and 430(d) for a plan that is not in at-risk status, including rules relating to the application of actuarial assumptions described in sections 430(h)(1) and 430(h)(4).

The final regulations generally adopt the definition of target normal cost for a plan that is not in at-risk status that was set forth in the proposed regulations. However, the final regulations contain modifications to this definition to reflect amendments made by WRERA '08. Under the proposed regulations, plan administrative expenses would not have been taken into account in determining a plan's target normal cost or funding target for the plan year. Under the final regulations, the target normal cost of a plan for the plan year is the present value (determined as of the valuation date) of all benefits under the plan that accrue during, are earned during, or are otherwise allocated to service for the plan year, subject to certain special adjustments as added by section 101(b)(2) of WRERA ’08. These special adjustments are optional for plan years beginning during 2008, but are required to be made for later plan years.

Under the special adjustments, the target normal cost of the plan for the plan year is adjusted (not below zero) by adding the amount of plan-related expenses expected to be paid from plan assets during the plan year, and by subtracting the amount of any mandatory employee contributions expected to be made during the plan year. For this purpose, the final regulations reserve the issue of the definition of plan-related expenses, which is expected to be addressed in forthcoming proposed regulations.

The regulations clarify that the benefits taken into account in determining target normal cost are the benefits that are accrued, earned, or otherwise allocated to service beginning with the first day of the plan year through the valuation date, plus benefits that are expected to accrue, be earned, or otherwise allocated to service during the remainder of the plan year. Thus, for a plan with a valuation date other than the first day of the plan year, the actual benefits earned during the part of the year before the valuation date must be included in the target normal cost. The final regulations generally adopt the definition of the funding target for a plan that is not in at-risk status as set forth in the proposed regulations, but with a few clarifications that take into account comments received on the proposed regulations. Under the regulations, the funding target of a plan for the plan year is the present value (determined as of the valuation date) of all benefits under the plan that have been accrued, earned, or are otherwise allocated to years of service prior to the first day of the plan year.

Under the proposed regulations, the definition of a plan's FTAP was set forth in proposed §1.430(i)-1. These final regulations include this definition in §1.430(d)-1, and the definition is cross-referenced in §§1.430(i)-1 and 1.436-1. Under the final regulations, except as otherwise provided in a transition rule, the FTAP of a plan for a plan year is a fraction (expressed as a percentage), the numerator of which is the value of plan assets for the plan year after subtraction of the plan's funding balances under section 430(f)(4)(B) and §1.430(f)-1, and the denominator of which is the funding target of the plan for the plan year (determined without regard to the at-risk rules under section 430(i) and §1.430(i)-1).

The regulations provide transition rules for determining a plan's FTAP for the 2007 plan year. These rules are generally the same as the rules set forth in the proposed regulations under section 430(i) for determining a plan's FTAP for the last plan year before section 430 applies to the plan. However, the final regulations differ from the proposed regulations in the transition rules that apply for the determination of a plan's FTAP for a plan year that begins on or after January 1, 2008, but for which section 430 does not apply for purposes of determining the plan's minimum required contribution. In such a case, the FTAP is determined for that plan year in the same manner as for a plan to which section 430 applies to determine the plan's minimum required contribution, except that the value of plan assets that forms the FTAP numerator is determined without subtraction of the funding standard carryover balance or the credit balance under the funding standard account. These rules are needed to enable a plan described in sections 104 through 106 of PPA ’06 to disclose its FTAP for purposes of the annual funding notice under section 101(f) of ERISA.[2]

The regulations adopt the special rule set forth in the proposed regulations for determining the FTAP for a new plan. Under the final regulations, if the funding target of the plan is equal to zero for the plan year, the FTAP is equal to 100 percent for the plan year. Unlike the proposed regulations, the final regulations do not limit the application of this rule to a plan that has no predecessor plan because of concerns that it is not always appropriate to carry over the FTAP from the predecessor plan.

The final regulations contain rules regarding the determination of present value in order to clarify the application of various rules that were set forth in the proposed regulations. Under the regulations, the present value of a benefit with respect to a participant that is taken into account under the regulations is determined as of the valuation date by multiplying the amount of that benefit by the probability that the benefit will be paid at a future date and then discounting the resulting product using the appropriate interest rate. The probability that the benefit will be paid with respect to the participant at that future date is determined using actuarial assumptions as to the probability of future service, advancement in age, and other events (such as death, disability, termination of employment, and selection of an optional form of benefit) that affect whether the participant or beneficiary will be eligible for the benefit and whether

[2] Section 430(i)(4) provides for special rules to apply in determining a plan’s FTAP only for plan years beginning during 2008. Accordingly, the regulations limit the use of the special rule under which the plan’s FTAP is determined based on the plan’s current liability to the determination of the plan’s FTAP for the 2007 plan year, even for a plan described in sections 104 through 106 of PPA ’06 for which section 430 does not apply for purposes of determining a plan’s minimum required contribution until a plan year after the 2008 plan year.

the benefit will be paid at that future date.

As under the proposed regulations, these regulations provide that the benefits taken into account in determining the funding target and the target normal cost are all benefits earned or accrued under the plan that have not yet been paid as of the valuation date, including retirement-type and ancillary benefits. The benefits taken into account are based on the participant's or beneficiary's status (such as active employee, vested or partially vested terminated employee, or disabled participant) as of the valuation date, and those benefits are allocated to funding target or target normal cost.

In order to determine a plan's funding target and target normal cost, the future benefits to be paid from the plan must be allocated among prior plan years (in which case they will be taken into account in determining the funding target for the current plan year), the current plan year (in which case they will be taken into account in determining the target normal cost for the current plan year), and future plan years (in which case they will not be taken into account in determining either the funding target or the target normal cost for the current plan year). The final regulations adopt the rules set forth in the proposed regulations for this allocation of benefits where benefits are a function of the accrued benefit and where benefits are a function of service, but the final regulations modify those rules for benefits in other circumstances.

To the extent that the amount of a benefit that is expected to be paid is a function of the accrued benefit, the amount of the benefit taken into account in determining the funding target for a plan year under the final regulations is determined by applying that function to the accrued benefit as of the first day of the plan year, and the portion of the benefit that is taken into account in the target normal cost for the plan year is determined by applying that function to the increase in the accrued benefit during the plan year. To the extent that the amount of a benefit that is expected to be paid is not a function of the accrued benefit but is a function of the participant's service, the portion of the benefit that is taken into account in determining the funding target for the plan year under the final regulations is determined by applying that function to the participant's service as of the first day of the plan year, and the portion of the benefit that is taken into account in determining the target normal cost for the plan year is determined by applying that function to the increase in the participant's years of service during the plan year. For a benefit that is determined as the excess of a function of the participant's service over a function of the participant's accrued benefit, the amount of the funding target and the target normal cost attributable to the portion of the benefit that is a function of the accrued benefit is determined pursuant to the rules that apply to such benefits and the amount of the funding target and the target normal cost attributable to the net benefit (the excess of the benefit that is a function of service over the benefit that is a function of accrued benefit) is determined pursuant to the rules that apply to a benefit that is a function of service.

The proposed regulations included rules for allocating benefits where the amount of a benefit that is expected to be paid is neither a function of the accrued benefit at the time the benefit is expected to be paid nor a function of the participant's service at that time. Under those rules, the benefit would have been allocated proportionately over the years until the participant met the age and service conditions for eligibility for the benefit. A number of commenters suggested that this allocation yielded inappropriate results in certain cases. In response to these comments, the final regulations provide that, to the extent the amount of a benefit that is expected to be paid is neither a function of the accrued benefit nor a function of the participant's service (and is not the excess of a function of the participant's service over a function of the accrued benefit), the portion of the participant's benefit that is taken into account in determining the funding target for a plan year is equal to the total benefit multiplied by the ratio of the participant's years of service as of the first day of the plan year to the years of service the participant will have at the time of the event that causes the benefit to be payable (whether the benefit is expected to be paid at the time of that decrement or at a future time), and the portion of the benefit that is taken into account in determining the target normal cost for the plan year is the increase in the proportionate benefit attributable to the increase in the participant's years of service during the plan year.

Under the proposed regulations, the determination of the funding target and the target normal cost would not have taken into account any benefit limitations or anticipated benefit limitations under section 436. The reason for this provision was to avoid the circularity in calculations that would result from calculating the funding target based on the imposition of benefit restrictions for purposes of determining whether the benefit restrictions need to be imposed. In response to comments, the final regulations contain modifications to the rules regarding recognition of the section 436 benefit restrictions. In particular, the final regulations provide that benefits that were not paid or accrued prior to the valuation date as a result of the benefit limitations are generally not included in the funding target and the target normal cost, but that the determination of the funding target and the target normal cost is not permitted to anticipate any future applications of the section 436 benefit restrictions.

The final regulations retain the treatment from the proposed regulations regarding the non-recognition of the benefit accrual limitations of section 436(e) in determining target normal cost. This has the effect of requiring an employer sponsoring a plan that provides for ongoing benefit accruals to include the present value of those accruals in the target normal cost, even if the plan is temporarily not permitted to provide for accruals, with the goal of improving the plan's funded status. However, if the plan sponsor actually adopts a plan freeze, the target normal cost will reflect that plan freeze. In connection with this provision, the final regulations provide that if the plan contains a provision under which missed benefit accruals are automatically restored once the plan's AFTAP is above 60 percent (taking into account the missed benefit accruals), then any missed benefit accruals for the prior plan year are taken into account in determining the funding target if, as of the valuation date, the period of the missed benefit accruals is 12 months or less. The final regulations also contain rules regarding restrictions that arise as a result of benefit limitations that are imposed under section 401(a)(32) as a result of a liquidity shortfall and benefit limitations that are imposed under §1.401(a)(4)-5(b) with respect to certain highly compensated employees.

As under the proposed regulations, these regulations provide that a plan generally is required to reflect in the plan's funding target and target normal cost the liability for benefits that are funded through insurance contracts held by the plan, and to include the corresponding insurance contracts in plan assets.[3] As an alternative

[3] The PBGC has informed the IRS and Treasury Department that this inclusion of insurance contracts in plan assets and the associated benefit liabilities in the funding target does not apply for purposes of Title IV of ERISA and its regulations, which generally require that, if an insurer makes an irrevocable commitment to provide all benefit liabilities with respect to an individual, those benefits cease to be

treatment of benefits that are funded through insurance contracts, the regulations provide that the plan is permitted to exclude benefits provided under such contracts from the plan's funding target and target normal cost and to exclude the corresponding insurance contracts from plan assets. This treatment is only available with respect to insurance purchased from an insurance company licensed under the laws of a State and only to the extent that a participant's or beneficiary's right to receive those benefits is an irrevocable contractual right under the insurance contract, based on premiums paid to the insurance company prior to the valuation date under the insurance contracts. Thus, the alternative treatment is not available if the plan trustee can surrender a contract to the insurer for its cash value because the participant's or beneficiary's rights to receive those benefits is not an irrevocable contractual right. A plan's treatment of benefits funded through insurance contracts pursuant to either of these methods is part of the plan's funding method. Accordingly, that treatment can be changed only with the consent of the Commissioner.

Except as otherwise provided, the determination under the regulations of a plan's funding target and target normal cost for a plan year are determined based on plan provisions that are adopted no later than the valuation date for the plan year and that take effect during that plan year. For example, a plan amendment adopted on or before the valuation date for the plan year that has an effective date occurring in the current plan year is taken into account in determining the funding target and the target normal cost for the current plan year if it is permitted to take effect under the rules of section 436(c) for the current plan year; however, an amendment is not taken into account if it

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benefit liabilities of the plan, the individual is no longer a plan participant, and the irrevocable commitment is excluded from plan assets.

does not take effect until a future plan year.

The regulations apply the rules under section 436(c) (as described in section VII.C of this preamble) to determine when an amendment that increases benefits takes effect. For an amendment that decreases benefits, the amendment takes effect under a plan on the first date on which the benefits of any individual who is or could be a participant or beneficiary under the plan would be decreased due to the amendment if the individual were on that date to satisfy the applicable conditions for the benefits.

The regulations provide that section 412(d)(2) applies for purposes of determining whether a plan amendment is treated as having been adopted on the first day of the plan year (including a plan amendment adopted no later than 2-1/2 months after the close of the plan year). This is consistent with the IRS's prior interpretations of the pre-PPA '06 counterpart to section 412(d)(2) (section 412(c)(8) as in effect prior to amendments made by PPA '06) as set forth in Rev. Rul. 79-325 (1979-2 CB 190), which provides that section 412(c)(8) applies to plan amendments made during the plan year (as well as to plan amendments made within 2-1/2 months after the end of the plan year). Thus, if an amendment is adopted after the valuation date for a plan year (and no later than 2-1/2 months after the close of the plan year) but takes effect during that plan year, the full increase in liability is taken into account as of the valuation date for that plan year if a section 412(d)(2) election is made, and none of the increase in liability is taken into account as of the valuation date for that plan year if no section 412(d)(2) election is made.

Accordingly, the rule in section 2.02 of Revenue Ruling 77-2 (1977-1 CB 120) under which the charges for a plan year are based on a blend of the charges determined with and without regard to the plan amendment, and the alternative to that rule in section 3 of Revenue Ruling 77-2, no longer apply. However, the rule in section 2.01 of Revenue Ruling 77-2 (under which a change in benefit structure that does not become effective until a future plan year is disregarded) continues to apply. This is because section 430 does not contain any provision that corresponds to section 412(c)(12) as in effect prior to amendments made by PPA '06 (under which the provisions of a collective bargaining agreement were taken into account for funding purposes before the corresponding plan amendments became effective).

The regulations clarify that if an amendment is taken into account for a plan year, then the allocation of benefits that is used for purposes of determining the funding target and the target normal cost for the plan year is based on the plan as amended. Thus, the present value of the increase in the participant's accrued benefit attributable to service before the beginning of the plan year is taken into account in the funding target for the year.[4]

To address a concern regarding avoidance of the benefit restrictions under section 436(c), the final regulations contain a new rule regarding amendments adopted after the valuation date that increase the target normal cost for the plan year. Under this rule, in any case in which an increase in the target normal cost as the result of a plan amendment made after the valuation date would have caused the benefit restrictions of section 436(c) to apply if the increase were included in the plan's funding target (after taking into account all unpredictable contingent event benefits permitted to be paid for unpredictable contingent events that occurred during the current plan year

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[4] The regulations do not address the effect on the determination of a plan's funding shortfall of an amendment that is permitted to take effect on account of a contribution under section 436(c)(2).

and plan amendments that went into effect in the current plan year), the amendment must be taken into account in determining the plan’s funding target and target normal cost for the plan year. This rule is necessary to prevent the avoidance of the benefit restrictions of section 436(c) by means of a mid-year plan amendment that purports not to increase benefits earned prior to the beginning of the plan year (so that the amendment does not increase the funding target for the plan year and the amount required to “buy up” the amendment under section 436(c)(2) by paying the increase to the funding target on account of the amendment would be zero).

Like the proposed regulations, the regulations require all currently employed plan participants, formerly employed plan participants (including retirees and terminated vested participants), and other individuals currently entitled to benefits under the plan to be included in the valuation. Unlike §1.412(c)(3)-1(c)(3)(ii), the regulations do not permit exclusion from the valuation of those plan participants who could have been excluded from participation in the plan under the rules of section 410(a). However, the final regulations adopt the rules of §1.412(c)(3)-1(c)(3)(iii) (relating to the exclusion of terminated employees who do not have a vested benefit under the plan and whose service might be taken into account in future years upon return to service, but only if the plan's experience as to separated employees returning to service has been such that the exclusion would not be unreasonable) and the rules of §1.412(c)(3)-1(d)(2) (under which the future participation in the plan of current employees who are not yet participants is permitted to be anticipated). Whether former employees who are terminated with partially vested benefits are assumed to return to service is determined under the same rules that apply to former employees without vested benefits.

The regulations provide that the determination of any present value or other computation under section 430 must be made on the basis of actuarial assumptions and a funding method. Except as specifically provided, the same actuarial assumptions and funding method must be used for all computations under sections 430 and 436.

The final regulations cross reference other regulations for the details of the statutorily specified interest rates, mortality tables, and actuarial assumptions that apply to plans in at-risk status. Under the final regulations, with respect to the actuarial assumptions used for the plan other than those that are specified by statute, each of those actuarial assumptions must be reasonable (taking into account the experience of the plan and reasonable expectations). In addition, the actuarial assumptions (other than the statutorily specified assumptions), in combination, must offer the plan's enrolled actuary's best estimate of anticipated experience under the plan. The final regulations provide that, in the case of a plan which has fewer than 100 participants and beneficiaries who are not in pay status, the actuarial assumptions are permitted to assume no pre-retirement mortality, but only if that assumption would be a reasonable assumption.

The regulations provide that actuarial assumptions established for a plan year cannot subsequently be changed for that plan year unless the Commissioner determines that the assumptions that were used are unreasonable. Similarly, the regulations provide that a funding method established for a plan year cannot subsequently be changed for that plan year unless the Commissioner determines that the use of that funding method for that plan year is impermissible. For this purpose, actuarial assumptions and funding methods are established by the timely completion (and filing, if required) of the actuarial report (Schedule SB, "Single-Employer Defined Benefit Plan Actuarial Information" of Form 5500, "Annual Return/Report of Employee Benefit Plan") for a plan year under section 6059. If the Schedule SB is not completed (and filed, if required) by the deadline, then the prior plan year actuarial assumptions and methods will continue to apply, unless the Commissioner permits or requires other actuarial assumptions or another funding method permitted under section 430 to be used for the current plan year.

The regulations provide that a plan's funding method includes not only the overall funding method used by the plan, but also each specific method of computation used in applying the overall method. However, the choice of which actuarial assumptions are appropriate to the overall method or to the specific method of computation is not a part of the funding method. The assumed earnings rate used for purposes of determining the actuarial value of assets under section 430(g)(3)(B) is treated as an actuarial assumption, rather than as part of the funding method.

In accordance with section 430(h)(4), the regulations provide rules relating to the probability that benefit payments will be paid as single sums or other optional forms under a plan and the impact of that probability on the determination of the present value of those benefit payments under section 430. In general, any determination of present value or any other computation under the regulations must take into account the probability that future benefit payments under the plan will be made in the form of optional forms of benefits provided under the plan (including single-sum distributions), determined on the basis of the plan's experience and other related assumptions, and any difference in the present value of future benefit payments that results from the use of actuarial assumptions in determining benefit payments in any such optional form of benefits that are different from those prescribed by section 430(h).

The proposed regulations would have provided that, in the case of a distribution that is subject to section 417(e)(3) and that is determined using the applicable interest rates and applicable mortality table under section 417(e)(3), the computation of the present value of that distribution is treated as having taken into account any difference in present value that results from the use of actuarial assumptions that are different from those prescribed by section 430(h) if the present value of the distribution is determined by valuing, using special actuarial assumptions, the annuity (either the deferred or immediate annuity) that is used under the plan to determine the amount of the distribution. The final regulations adopt that method and clarify that its use is mandatory for benefits determined using the section 417(e) actuarial assumptions.

Under this special computation, for the period beginning with the annuity starting date for the distribution, the applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date is substituted for the mortality table under section 430(h)(3) that would otherwise be used. In determining the present value of a distribution, the final regulations adopt the rules in the proposed regulations and provide that if a plan uses the generational mortality tables under §1.430(h)(3)-1(a)(4) or §1.430(h)(3)-2, the plan is permitted to use a 50-50 male-female blend of the annuitant mortality rates under the §1.430(h)(3)-1(a)(4) generational mortality tables in lieu of the applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date.

In addition, under this special computation, the valuation interest rates under section 430(h)(2) are used for purposes of discounting the projected annuity payments from their expected payment dates to the valuation date (rather than the interest rates under section 417(e)(3) which the plan uses to determine the amount of the benefit).

However, a plan is permitted to make adjustments to the interest rates in order to reflect differences between the phase-in of the section 430(h)(2) segment rates under section 430(h)(2)(G) and the adjustments to the segment rates under section 417(e)(3)(D)(iii).

The proposed regulations would have provided that, in the case of a distribution that is subject to section 417(e)(3) but is determined as the greater of the benefit determined using the assumptions required under section 417(e)(3) and some other actuarial basis, the computation of present value must take into account the extent to which the present value of the distribution is greater than the present value determined using this annuity substitution method. Commenters requested a similar rule where the value of the distribution is lower because of the use of different actuarial assumptions that are not more favorable, citing the situation where section 415 may require the use of less favorable actuarial assumptions. In response to these concerns, the final regulations provide that, if a distribution that is subject to section 417(e)(3) is determined on a basis other than using the applicable interest rates and the applicable mortality table under section 417(e)(3), then the computation of present value must take into account the extent to which the present value of the distribution is different from the present value determined using this annuity substitution method.

As under the proposed regulations, the final regulations provide that, in the case of an applicable defined benefit plan described in section 411(a)(13)(C), the amount of a future distribution is based on the amount determined by projecting the future interest credits or equivalent amounts under the plan's interest crediting rules using actuarial assumptions that satisfy the requirements of the regulations. Thus, the present value of a future distribution is not necessarily the current amount of a participant's hypothetical account balance. Commenters requested that various safe harbors be provided for making this determination. The IRS and the Treasury Department believe that this determination should be made using the actuary's best estimate of the projected future interest credits, and that the use of broadly applicable safe harbors for this purpose is not appropriate.

In the case of a single-sum distribution determined under the rules of section 411(a)(13)(A), the amount of the future distribution is equal to the projected account balance at the expected date of payment calculated in accordance with the regulations. In the case of a distribution determined as an annuity, the regulations provide that the amount of the future distribution must be determined by converting the projected account balance to an annuity using the plan's annuity conversion provisions and actuarial assumptions that satisfy the requirements of the regulations.

The regulations provide that, if the plan bases the conversion of the projected account balance to an annuity using the applicable interest rates and applicable mortality table under section 417(e)(3), the future annuity is determined by dividing the projected account balance (or accumulated percentage of final average compensation) by an annuity factor corresponding to the assumed form of payment using, for the period beginning with the annuity starting date, the current applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date (in lieu of the mortality table under section 430(h)(3) that would otherwise be used) and the valuation interest rates under section 430(h)(2) (as opposed to the interest rates under section 417(e)(3) which the plan uses to determine the amount of the benefit). In determining the amount of a future annuity for this purpose, if a plan uses the generational mortality tables under §1.430(h)(3)-1(a)(4) or §1.430(h)(3)-2, the plan is permitted to use a 50-50 male-female blend of the annuitant mortality rates under the §1.430(h)(3)-1(a)(4) generational mortality tables in lieu of the applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date. In the case of a plan that determines an annuity under the regulations using a variable interest rate or rates other than the applicable interest rates under section 417(e)(3), the amount of the annuity must be based on actuarial assumptions that satisfy the requirements of the regulations.

Some commenters maintained that unpredictable contingent event benefits should not be taken into account for minimum funding purposes before the occurrence of the unpredictable contingent event. The final regulations provide that any determination of present value or any other computation under this section must take into account, based on information as of the valuation date, the probability that future benefits (or increased benefits) under the plan will become payable due to the occurrence of an unpredictable contingent event (as described in §1.436-1(j)(9)). However, if, as of the valuation date, the likelihood of the occurrence of the event is de minimis, the regulations permit the use of a zero probability of the occurrence of the event.

The regulations provide that any reasonable technique can be used to determine the present value of the benefits expected to be paid during a plan year, based on the interest rates and mortality assumptions applicable for the plan year. For example, the present value of a monthly retirement annuity payable at the beginning of each month can be determined using estimating techniques such as the standard actuarial approximation that reflects 13/24ths of the discounted expected payments for the year as of the beginning of the year and 11/24ths of the discounted expected payments for the year as of the end of the year; or by assuming that the payment is made in the middle of the year. In the case of a participant for whom there is a less than 100 percent probability that the participant will terminate employment during the plan year, for purposes of determining the benefits expected to accrue, be earned, or otherwise allocated to service during the plan year (which are used to determine the target normal cost), it is permissible to assume the participant will not terminate during the plan year, unless using this method of calculation would be unreasonable.

Like the proposed regulations, the final regulations reflect the provisions of section 430(h)(5), requiring approval of the Commissioner for changes in actuarial assumptions for certain large plans. Under the regulations, except as otherwise provided, any change in actuarial assumptions used to determine a plan’s funding target for a plan year cannot be changed from the actuarial assumptions that were used for the preceding year without the approval of the Commissioner if the plan is sponsored by a member of a controlled group which maintains plans with over $50 million in unfunded vested benefits and the change in assumptions results in a decrease in the plan’s funding shortfall (within the meaning of section 430(c)(4)) for the current plan year (disregarding the effect on the plan's funding shortfall resulting from changes in interest and mortality assumptions) that exceeds $50,000,000, or that exceeds $5,000,000 and is 5 percent or more of the funding target of the plan before such change.

The proposed regulations did not contain an exception to this rule for a plan exiting at-risk status. Commenters maintained that a plan exiting at-risk status should be able to resume use of its previously used actuarial assumptions without obtaining the Commissioner's approval. To address these concerns, the final regulations provide that a plan that is not in at-risk status for the current plan year and that was in at-risk status for the prior plan year (but not for a period of 5 or more consecutive plan years) is granted automatic approval to use the actuarial assumptions that were applied before the plan entered at-risk status and that were used in combination with the required at-risk assumptions during the period the plan was in at-risk status.

These regulations provide automatic approval for changes in funding method for the first plan year section 430 applies to determine the minimum required contribution for the plan (the first plan year beginning in 2008, or a later year for plans described in sections 104 through 106 of PPA '06). The regulations also provide automatic approval for changes in funding method for the first plan year that a plan applies all the provisions of the regulations under section 430(d), section 430(f), section 430(g), section 430(i), and section 436 (which could be the first plan year beginning on or after January 1, 2010 or an earlier plan year). Thus, a plan can receive automatic approval for a change in funding method for the first plan year beginning on or after January 1, 2009, if it applies all of these regulation provisions, without regard to whether it applies the provisions of §1.430(h)(2)-1 for that plan year. In addition, the regulations provide automatic approval for a change of funding method that is necessary to reflect the new allocation rules for benefits under §1.430(d)-1(c)(1)(ii).

III. Section 1.430(f)-1 Effect of Prefunding Balance and Funding Standard Carryover Balance.

Section 1.430(f)-1 of these regulations provides rules relating to the application of prefunding and funding standard carryover balances under section 430(f). The regulations generally adopt the rules that were set forth in the corresponding proposed regulations.

Subject to the limitations otherwise provided, the regulations provide that in the case of any plan year with respect to 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 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. The regulations also provide rules that apply where the plan sponsor elects to use all or a portion of the prefunding balance or the funding standard carryover balance to satisfy the requirement to make quarterly contributions under section 430(j)(3) that are due after the valuation date. Rules with respect to use of the prefunding balance or funding standard carryover balance to satisfy quarterly contribution requirements with respect to installments due before the valuation date are expected to be addressed in future proposed regulations.

Under the regulations, a plan sponsor is permitted to elect 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, and decreased (but not below zero) by the sum of, as of the first day of a plan year, any amount of the prefunding balance that was used to offset the minimum required contribution of the plan for the preceding plan year and any reduction in the prefunding balance for the plan year. The plan sponsor’s initial election to add to the prefunding balance constitutes an election to maintain a prefunding balance (so that no special election is necessary to establish a prefunding balance). The prefunding balance is adjusted further for actual investment return for the plan year.

The regulations provide that if the plan sponsor elects to add to the plan's prefunding balance, as of the first day of a plan year, the prefunding balance is increased by the amount so elected by the plan sponsor. The amount added to the prefunding balance cannot exceed the present value of the excess contribution for the preceding plan year increased for interest.

The present value of the excess contribution for the preceding plan is the excess, if any, of the present value of the employer contributions (other than contributions to avoid or terminate section 436 benefit limitations) to the plan for such preceding plan year over the minimum required contribution for such preceding plan year. In addition, a contribution for a plan year to correct an unpaid minimum required contribution for a prior plan year is not treated as part of the present value of excess contributions. This present value is increased with interest from the valuation date for the preceding plan year to the first day of the current plan year. The regulations provide that the plan's effective interest rate under section 430(h)(2)(A) for the preceding plan year is generally used to calculate the present value of the contributions for the preceding plan year and for adjusting the excess amount.

The proposed regulations would have prohibited an employer from adding to the prefunding balance any amount of contributions that are excess contributions for a plan year solely by reason of a reduction in the minimum required contribution for the year through the use of the prefunding balance or funding standard carryover balance. This rule was intended to preclude 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 adjustment with respect to minimum required contributions for the plan year). Commenters argued that this rule was unwarranted and would prevent plan sponsors from adding excess contributions to the prefunding balance in situations where balance amounts were used to offset minimum contributions earlier for reasons other than interest arbitrage. The final regulations permit an excess contribution to be added to the prefunding balance for a plan year notwithstanding that the amount is an excess contribution solely because an election is made for that plan year to use the funding standard carryover balance or prefunding balance to offset minimum required contributions (or required installments), but provide that the interest adjustment with respect to such a contribution is made using the plan’s actual investment experience for the plan year, rather than the effective interest rate under section 430(h)(2)(A). Thus, the funding standard carryover balance and prefunding balance are adjusted with the plan’s actual investment return when the balances are not actually used to satisfy the minimum contribution requirement for a plan year, regardless of whether the plan sponsor makes an election to use the balance to offset the minimum contribution requirement and subsequently replenishes the prefunding balance.

The proposed regulations would have provided that the plan sponsor is permitted to maintain a funding standard carryover balance for a plan that had a positive balance in the funding standard account under section 412(b) (as in effect prior to PPA ’06) as of the end of the plan’s pre-effective plan year (the plan year immediately preceding the first plan year that section 430 applies for purposes of determining the minimum required contribution for the plan). Some commenters suggested that no formal election should be required in order to maintain a funding standard carryover balance. In response, the regulations provide that a funding standard carryover balance is automatically established for a plan that had a positive balance in the funding standard account under section 412(b) (as in effect prior to PPA ’06) as of the end of the pre-effective plan year for the plan. A plan sponsor that does not wish to have the funding standard carryover balance established can elect to reduce it to zero.

The final regulations provide that the plan’s funding standard carryover balance as of the beginning of the first effective plan year (the first plan year beginning on or after the date section 430 applies for purposes of determining the minimum required contribution for the plan) is the positive balance in the funding standard account under section 412(b) (as in effect prior to PPA ’06) as of the end of the pre-effective plan year for the plan. For subsequent plan years, the funding standard carryover balance is decreased (but not below zero) by the sum of, as of the first day of each plan year, any amount of the funding standard carryover balance that was used to offset the minimum required contribution of the plan for the preceding plan year and any reduction in the funding standard carryover balance for the plan year. The regulations also provide that the funding standard carryover balance is adjusted further to reflect the actual rate of return on plan assets for the preceding plan year.

For both the funding standard carryover balance and the prefunding balance, the regulations provide that the adjustment for investment return is applied to the balance as of the beginning of the preceding plan year after subtracting amounts used to offset the minimum required contribution for the preceding plan year and after any reduction of balances for that preceding plan year. 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.

If a plan's valuation date is not the first day of the plan year, then, for purposes determining a plan's prefunding balance and funding standard carryover balance as of the valuation date, the plan's prefunding balance and funding standard carryover balance (if any) are increased to the valuation date using the plan's effective interest rate under section 430(h)(2)(A) for the plan year. Any elections to reduce the prefunding balance and funding standard carryover balance, to use the prefunding balance and funding standard carryover balance to offset the minimum required contribution for the year, or to add to the prefunding balance occur as of the valuation date for the plan year. After the elections are applied as of the valuation date, the resulting amount of the prefunding balance and funding standard carryover balance is adjusted to the first day of the plan year (discounted using the effective interest rate under section 430(h)(2)(A) for that year) before applying the adjustments for investment experience for the plan year.

The regulations provide that, 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 otherwise provided in the regulations. 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 amount of the prefunding balance is subtracted from the value of plan assets only if an election to use all or any portion of the prefunding balance to offset the minimum required contribution is made for the plan year. In addition, for this purpose, 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.

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, the regulations provide that the specified amount is not subtracted from the value of plan assets for purposes of determining the funding shortfall under section 430(c)(4). 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.

To address questions raised by commenters, the final regulations provide ordering rules regarding the application of use and reduction elections with respect to prefunding and funding standard carryover balances. The regulations provide that the amount of prefunding balance or funding standard carryover balance that may be used to offset the minimum required contribution for the plan year must take into account any decrease in those balances which result from a prior election either to use the prefunding balance or funding standard carryover balance under section 430(f) or to reduce those balances under section 430(f) (including deemed elections under section 436(f)(3) and §1.436-1(a)(5)).

The regulations describe the application of the ordering rules of section 430(f)(5)(A). Under these rules, an election to reduce the funding standard carryover balance or prefunding balance is deemed to occur on the valuation date for the plan before any election to use the balance to offset the minimum required contribution for the current year. Thus, if an election to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution for the plan year (including an election to satisfy the quarterly contribution requirement) has been made prior to the election to reduce the prefunding balance or funding standard carryover balance, then the amount available for use to offset the otherwise applicable minimum required contribution for the plan year will be retroactively reduced and may result in a missed quarterly contribution.

If an election is made to reduce the prefunding balance or funding standard carryover balance or to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution with respect to a plan year, a special rule applies to determine the amount of remaining prefunding balance or funding standard carryover balance that may be used to offset the minimum required contribution for the prior plan year. Under this special rule, an election to reduce the prefunding balance or the funding standard carryover balance that is made with respect to the later plan year is taken into account by decreasing the funding standard carryover balance or prefunding balance as of the valuation date for the prior plan year by the prior plan year equivalent of the current year election. The prior plan year equivalent of the current year election is determined by dividing the amount of the current year election by a number equal to 1 plus the rate of investment return for the prior plan year. The funding standard carryover balance and prefunding balance are nonetheless adjusted in accordance with the rules described above, after adjusting for all elections for that prior year. Thus, the amount used to offset the minimum required contribution for the earlier plan year is subtracted from the prefunding balance or funding standard carryover balance as of the valuation date for that year prior to the adjustment for investment return for that plan year, and the amount by which the prefunding balance or funding standard carryover balance is decreased for the second year is based on the elections made for the second year.

Accordingly, under the final regulations, a prefunding balance or a funding standard carryover balance is maintained in a manner that tracks the way the balances are reported on Schedule SB, "Single-Employer Defined Benefit Plan Actuarial Information" of Form 5500,"Annual Return/Report of Employee Benefit Plan". Thus, the balances at the beginning of the year are increased (by investment experience or by addition to the prefunding balance) or decreased (by elections to use or reduce the balances or by investment experience) at the first day of the next plan year. These increases and decreases are made before any elections (whether made or deemed) are applied for the next plan year.

To the extent that a plan has a funding standard carryover balance greater than zero, the regulations provide that 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 used to offset the minimum required contribution.

The regulations provide that an election to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution is not available for a plan year if the plan's prior plan year funding ratio is less than 80 percent. The plan's prior plan year funding ratio generally is equal to the 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)).

If the prior plan year was the first year of a new plan and the funding target for the prior plan year was zero, the regulations provide that the prior plan year's funding ratio is deemed to be 80 percent for purposes of this limitation on the use of the prefunding or funding standard carryover balances. Thus, the sponsor of a new plan that has no funding target in its first year can use a prefunding balance that resulted from first year contributions in excess of the target normal cost in order to offset the otherwise minimum required contribution in the second year of the plan. Commentators requested rules with respect to plan mergers and spin-offs. The IRS and the Treasury Department expect to address these issues in future proposed regulations.

The regulations provide that 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. If such an election is made, the amount of those balances that must be subtracted from the value of plan assets will be smaller and, accordingly, the value of plan assets taken into account for purposes of sections 430 and 436 will be larger. 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 plan year funding ratio for the following plan year. Section 436(f)(3) and §1.436-1(a)(5) provide a rule under which the plan sponsor is deemed to make this election. To the extent that a plan has a funding standard carryover balance greater than zero, no election 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 to reduce its prefunding balance.

Like the proposed regulations, these regulations provide that 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 dollar amounts involved in the election. Thus, a conditional or formula-based election generally does not satisfy the requirements.

The final regulations provide rules regarding the timing of elections to use or reduce the prefunding balance or funding standard carryover balance that are generally the same as under the proposed regulations. Under the final regulations, any election to add to the prefunding balance or to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution for a plan year must be made no later than the last date for making the minimum required contribution for the plan year as described in section 430(j)(1). Any election 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. These timing rules establish the latest date that an election can be made. An employer is permitted to make an earlier election, and, in certain circumstances, may need to make such an earlier election in order to timely satisfy a quarterly contribution requirement under section 430(j).

In response to comments received on the desirability of standing elections, the final regulations permit a plan sponsor to provide a standing election in writing to the plan's enrolled actuary to use the funding standard carryover balance and the prefunding balance to the extent needed to avoid an unpaid minimum required contribution under section 4971(c)(4) taking into account any contributions that are or are not made. In addition, the regulations allow a plan sponsor to provide a standing election in writing to the plan's enrolled actuary to add the maximum amount possible each year to the prefunding balance.[5] Any election made pursuant to a standing election is deemed to occur on the last day available to make the election for the plan year. The regulations provide that any standing election remains in effect for the plan with respect to the enrolled actuary named in the election, unless the standing election is revoked by notice to the plan's enrolled actuary and the plan administrator on or before the date the corresponding election is deemed to occur, or the plan's enrolled

[5] The regulations do not provide for a standing election to be made with respect to quarterly contributions. The issue of standing elections with respect to quarterly contributions will be considered in conjunction with future regulations regarding quarterly contributions.

actuary who signs the Schedule SB is not the enrolled actuary named in the standing election. If there is a change in enrolled actuary for the plan year which would result in a revocation of the standing election, then the plan sponsor may reinstate the revoked standing election by providing a replacement to the new enrolled actuary by the due date of the Schedule SB of Form 5500.

In general, a plan sponsor's election with respect to the plan's prefunding balance or funding standard carryover balance is irrevocable (and must be unconditional). However, an election to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution for a plan year (including an election to satisfy the quarterly contribution requirements for a plan year) is permitted to be revoked to the extent the amount the plan sponsor elected to use to offset the minimum contribution requirements exceeds the minimum required contribution for a plan year (determined without regard to the offset), if and only if the election is revoked by providing written notification of the revocation to the plan's enrolled actuary and the plan administrator by the end of the plan year (or, for plans with a valuation date other than the first day of the plan year, the deadline for contributions for the plan year as described in section 430(j)(1)). The final regulations defer the deadline for making this revocation for the first plan year beginning in 2008 until the due date (including extensions) of the Schedule SB, "Single-Employer Defined Benefit Plan Actuarial Information" of Form 5500, "Annual Return/Report of Employee Benefit Plan." Thus, a plan sponsor that made an election to use the funding standard carryover balance for the first plan year beginning in 2008 to offset the minimum required contribution for that plan year determined prior to the enactment of WRERA '08 has an opportunity to revoke that election to the extent it exceeds the minimum required contribution for that plan year taking into account WRERA ’08. However, plan sponsors should note that any such revocation made after the enrolled actuary has certified the AFTAP for the plan year, could result in a change in the AFTAP for that plan year, which could be a material change. If such an excess election is not timely revoked, it has the same effect as an election to reduce the applicable balance to the extent of the excess.

The proposed regulations provided a transition rule for determining a plan’s funding ratio for the pre-effective plan year (that is, the plan’s prior year funding ratio with respect to the plan’s first effective plan year). These regulations adopt this transition rule, but limit its application to the 2007 plan year (rather than apply it to a later plan year for a plan described in sections 104 through 106 of PPA ’06). Under the regulations, a plan’s funding ratio for the plan year preceding the first plan year beginning on or after January 1, 2008 (the “2007 plan year”) is generally the same as the computation of FTAP for the 2007 plan year. However, the assets are determined without subtracting the funding standard account balance from the plan assets.

IV. Section 1.430(g)-1 Valuation Date and Valuation of Plan Assets.

Section 1.430(g)-1 provides rules relating to a plan’s valuation date and the valuation of a plan’s assets for a plan year under section 430(g). The rules under the regulations relating to valuation dates do not reflect significant changes from those under the proposed regulations. The regulations provide that the determination of the funding target, target normal cost, and value of plan assets for a plan year is made as of the valuation date of the plan for that plan year.

Except in the case of a small plan, the valuation date of a plan for any plan year is the first day of the plan year. For this purpose, a small plan is defined as a plan that, on each day during the preceding plan year, had 100 or fewer participants (including active and inactive participants and all other individuals entitled to future benefits). For purposes of making this determination, all defined benefit plans (other than multiemployer plans as defined in section 414(f)) maintained by an employer or members of the controlled group are treated as one plan, but only participants with respect to that employer are taken into account. The regulations provide that, in the case of the first plan year of any plan, this exception for small plans is applied by taking into account the number of participants that the plan is reasonably expected to have on each day during the first plan year.

The regulations provide that the selection of a plan's valuation date is part of the plan's funding method and, accordingly, may only be changed with the consent of the Commissioner. However, a change of a plan's valuation date that is required by section 430 is treated as having been approved by the Commissioner and does not require the Commissioner's prior specific approval.

Under the regulations, the value of plan assets for purposes of section 430 is determined in one of two ways: as the fair market value of plan assets on the valuation date, or as the average of the fair market values of assets on the valuation date and the adjusted fair market value of assets determined for one or more earlier determination dates, subject to a 90 to 110 percent corridor. The method of determining the value of assets is part of the plan's funding method and, accordingly, may only be changed with the consent of the Commissioner.

The regulations provide that the fair market value of an asset is determined as the price at which the asset would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. Except as otherwise provided by the Commissioner, any guidance on the valuation of insurance contracts under Subchapter D of Chapter 1 of the Internal Revenue Code applies for purposes of the regulations. Such guidance has been issued in Revenue Procedure 2005-25 (2005-1 CB 962) and Revenue Procedure 2006-13 (2006-1 CB 315). See §601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin.

The regulations provide rules for the treatment of contributions that are made after the valuation date for a plan year that are attributable to a prior plan year. These rules are generally the same as under the proposed regulations. Under these rules, only the present value of the contributions (discounted using the effective interest rate for the prior plan year) is included in the value of plan assets. The final regulations clarify that a contribution for a prior plan year is taken into account only if the contribution is made by the deadline for contributions for the immediately preceding plan year under section 430(j). However, for the first plan year that begins on or after January 1, 2008, any such prior plan year contribution is taken into account at the full value without a present value discount, provided it is made by the deadline for contributions under section 412(c)(10), as in effect before amendment by PPA ‘06.

The regulations also provide rules for the treatment of a contribution that is made before the valuation date of the plan year to which it is attributable. Such a contribution (and any interest on the contribution for the period between the contribution date and the valuation date, determined using the effective interest rate under section 430(h)(2)(A) for the plan year) must be subtracted from plan assets in determining the value of plan assets as of the valuation date. If the result of this subtraction is a number less than zero, the value of plan assets as of the valuation date is equal to zero.

Subject to the plan asset corridor rules, a plan is permitted to determine the value of plan assets on the valuation date as the average of the fair market value of assets on the valuation date and the adjusted fair market value of assets determined for one or more earlier determination dates. The regulations require that the period of time between each determination date (treating the valuation date as a determination date) must be equal and that the period of time cannot exceed 12 months. In addition, the earliest determination date with respect to a plan year cannot be earlier than the last day of the 25th month before the valuation date of the plan year (or a similar period in the case of a valuation date that is not the first day of a month). In a typical situation, the earlier determination dates will be the two immediately preceding valuation dates. However, these rules also permit the use of more frequent determination dates (for example, monthly or quarterly determination dates).

The regulations provide that the adjusted fair market value of plan assets for a prior determination date is the fair market value of plan assets on that date, increased for contributions included in the plan's asset balance on the valuation date that were not included in the plan's asset balance on the earlier determination date, reduced for benefits and all other amounts paid from plan assets during the period beginning with the prior determination date and ending immediately before the valuation date, and adjusted for expected earnings. The fair market value of assets as of a determination date includes any contribution for a plan year that ends with or prior to the determination date that is receivable as of the determination date (but only if the contribution is actually made within 8½ months after the end of the applicable plan year). For this purpose, the present value of a contribution receivable for the applicable plan year is determined using the effective interest rate under section 430(h)(2)(A) for the applicable plan year. For purposes of determining the value of plan assets for the first plan year that begins in 2008, if the plan sponsor makes a contribution to the plan after the valuation date for that plan year but by the deadline for contributions under section 412(c)(10) as in effect before the effective date of PPA '06 and the contribution is for the preceding plan year, then the contribution is taken into account as a plan asset without applying any present value discount.

The final regulations provide that, for purposes of determining the adjusted fair market value of plan assets, assets spun off from a plan as a result of a spin-off described in §1.414(l)-1(b)(4) are treated as an amount paid from plan assets. In addition, except as otherwise provided by the Commissioner, for purposes of this determination, assets that are added to a plan as a result of a plan-to-plan transfer are treated in the same manner as contributions. It is expected that future proposed regulations will provide additional rules, including rules relating to plan mergers.

The regulations provide that if the value of plan assets determined under the averaging method would otherwise be less than 90 percent of the fair market value of plan assets, then the value of plan assets is equal to 90 percent of the fair market value of plan assets. If the value of plan assets determined under the averaging method would otherwise be greater than 110 percent of the fair market value of plan assets, then the value of plan assets is equal to 110 percent of the fair market value of plan assets. The rules for accounting for contribution receipts are applied prior to the application of this 90 to 110 percent corridor.

To reflect changes to the rules regarding determination of average plan assets made by WRERA ‘08, portions of the regulations have been reserved to provide rules regarding adjustments for expected earnings that are applied in determining average plan assets. These issues are expected to be addressed in future proposed regulations. In the interim, Notice 2009-22 (2009-14 IRB 741) provides guidance regarding these issues. See §601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin. As provided under that guidance, the final regulations permit the use of an assumed earnings rate of zero for purposes of determining the actuarial value of assets for a plan year beginning during 2008 using the averaging rules (even if zero is not the actuary’s best estimate of the anticipated annual rate of return on plan assets).

The regulations provide that any change in a plan’s valuation date or asset valuation method that is made for the first plan year beginning in 2008, the first plan year beginning in 2009, or the first plan year beginning in 2010 is automatically approved and does not require the Commissioner’s specific prior approval. In addition, the regulations provide that a change in a plan’s valuation date or asset valuation method for the first plan year to which section 430 applies to determine the plan’s minimum required contribution (even if that plan year begins after December 31, 2010) that satisfies the requirements of the regulations is automatically approved and does not require the Commissioner’s specific prior approval.

V. Section 1.430(h)(2)-1 Interest Rates Used to Determine Present Value.

Section 1.430(h)(2)-1 provides rules relating to the interest rates used in determining the present value of the benefits that are included in the target normal cost and the funding target for the plan for a plan year. These rules follow the rules set forth in the proposed regulations except for a few changes that are noted in this preamble.

The interest rates used under the regulations are generally based on the 24-month moving averages of 3 separate segment rates for the month that includes the valuation date (which are determined based on the monthly corporate bond yield curves for the preceding 24 months). The first segment rate, which is based on the portion of the corporate bond yield curve over the period from 0 to 5 years, applies for purposes of discounting benefits that are expected to be paid during the 5-year period beginning on the valuation date for the plan year in the case of a plan with a beginning of year valuation date. The second segment rate, which is based on the portion of the corporate bond yield curve over the period between 5 and 20 years, applies for purposes of discounting benefits that are expected to be paid within 15 years after that initial 5 year-period. The third segment rate, which is based on the portion of the corporate bond yield curve over the period between 20 years and 60 years, applies to benefit payments that are expected to be paid after the 20-year period. For example, if a series of monthly payments is assumed to be made beginning on the valuation date, the second segment rate will apply beginning with the 61st such payment and the third segment rate will apply beginning with the 241st such payment. Except in the case of a new plan, a transition rule applies for plan years beginning in 2008 and 2009 under which these segment rates are blended with the long-term corporate bond rate that applies under pre-PPA ‘06 law.

The monthly corporate bond yield curve is, with respect to any month, a yield curve that is prescribed by the Commissioner for that month based on yields for that month on investment grade corporate bonds with varying maturities that are in the top three quality levels available. Notice 2007-81 (2007-2 CB 899) provides guidance on the monthly corporate bond yield curve and the related first, second, and third segment rates, including a description of the methodology for determining the monthly corporate bond yield curve. See §601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin.

The proposed regulations would have used the rules for applying the first segment rate as stated in this preamble to all plans, regardless of the valuation date for the plan. Some commenters noted that section 430(h)(2)(B)(i) applies the first segment rates to benefits expected to be paid in the 5 years from the beginning of the plan year rather than the valuation date. These commenters argued that the regulations should likewise base the period to which the first segment rate applies on the beginning of the plan year rather than the valuation date. The IRS and the Treasury Department continue to believe that the position set forth in the proposed regulations remains the best method of valuing assets and liabilities as of the valuation date. Accordingly, the final regulations reserve the issue of guidance on the interest rates to be used by plans with valuation dates other than the first day of the plan year. A technical correction to the statute may address this in the future.

The regulations reflect the special interest rate for determining a plan’s funding target in the case of airlines that make the 10-year amortization election described in section 402(a)(2) of PPA ’06, in accordance with section 6615 of the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Public Law 110-28 (121 Stat. 112). This special interest rate does not apply for other purposes such as the determination of the plan’s target normal cost.

The regulations provide for elections that a plan sponsor can make to use alternative interest rates rather than the segment rates for the month that includes the valuation date. These elections are made by providing written notification of the election to the plan’s enrolled actuary. These elections may be adopted for a plan year without obtaining the consent of the Commissioner but, once adopted, they will apply for that plan year and all future plan years and may be changed only with the consent of the Commissioner. Under one such election, a plan sponsor that is using segment rates may elect the use of an alternative month as the applicable month, provided that the alternative month is one of the 4 months preceding that month that as the applicable month. In such a case, the segment rates for an applicable month are based upon data through the end of the immediately preceding month. Under another election, for purposes of determining the funding target, target normal cost, shortfall amortization installments, waiver amortization installments, and the present value of those installments, the plan sponsor may elect to use interest rates under the monthly corporate bond yield curve -- which is a set of spot rates for the month preceding the valuation date rather than a 24-month moving average for that month -- in lieu of the segment rates. The target normal cost and funding target determined using the monthly corporate bond yield curve will also be used for purposes of sections 404 and 436.

Some commenters have maintained that the rules under which an applicable month earlier than the month before the valuation date can be used should be permitted to be applied when the plan sponsor elects to use the monthly corporate bond yield curve. The IRS and the Treasury Department believe that, while this is a reasonable interpretation of the statute, the better view is that this option should not be available when the plan elects to use the monthly corporate bond yield curve. Accordingly, this interpretation can be used for plan years beginning during 2008 and 2009 (so, for example, for a plan year beginning on January 1, 2009, the plan sponsor could elect to use the monthly corporate bond yield curve for September, October, November 2008, or December 2008, or January 2009, based on data for that month), but such an election is not permitted for plan years beginning on or after the regulations become effective.

The proposed regulations would have required plan sponsors to obtain approval for an election to use alternative interest rates as described above that is made for a plan year after the first plan year for which section 430 applies to the plan. Some commenters argued that the statute permits these elections to be made without approval, with approval required only for a later change or revocation of election. In response to the comments, the final regulations do not require approval for the initial adoption of these elections for any year. For example, a plan sponsor that was using segment rates for the plan year beginning in 2010 can elect to switch to use the monthly corporate bond yield curve for the plan year beginning in 2011 and subsequent years without approval of the Commissioner (and, in such a case, if the plan had been using a different month for the segment rates, then the change to use the yield curve makes the applicable month election irrelevant). However, once an election has been made, any change requires the approval of the Commissioner.

The final regulations provide that, in the case of a plan sponsor using the monthly corporate bond yield curve, if with respect to a decrement the benefit is only expected to be paid for one-half of a year (because the decrement was assumed to occur in the middle of the year), the interest rate for that year can be determined as if the benefit were being paid for the entire year.

The final regulations provide that the interest rate elections are made by the plan sponsor, which is generally the employer or employers responsible for making contributions to or under the plan. In the case of plans that are multiple employer plans to which section 413(c)(4)(A) does not apply, the regulations provide that any reference to the plan sponsor means the plan administrator within the meaning of section 414(g).

The regulations provide that, except as otherwise provided, the effective interest rate determined under section 430(h)(2)(A) for the plan year is the single interest rate that, if used to determine the present value of the benefits that are taken into account in determining the plan's funding target for the plan year, would result in an amount equal to the plan's funding target determined for the plan year under section 430(d) (without regard to calculations for plans in at-risk status under section 430(i)).

Some commenters asked how to determine the effective interest rate for a plan year for which a plan's funding target is equal to zero. The final regulations provide that if, for the plan year, the plan's funding target is equal to zero, then the effective interest rate determined under section 430(h)(2)(A) for the plan year is the single interest rate that, if used to determine the present value of the benefits that are taken into account in determining the plan's target normal cost for the plan year, would result in an amount equal to the plan's target normal cost determined for the plan year under section 430(b) (without regard to calculations for plans in at-risk status under section 430(i)).

The final regulations provide that the interest rates used to determine the amount of shortfall amortization installments and waiver amortization installments and the present value of those installments are determined based on the dates those installments are assumed to be paid, using the same timing rules that apply in determining target normal cost. Thus, for a plan that uses the segment rates, the first segment rate applies to installments assumed to be paid during the first five plan years, and the second segment rate applies to any installments assumed to be paid during the subsequent 15-year period. For this purpose, the shortfall amortization installments for a plan year are assumed to be paid on the valuation date for that plan year.

Under the regulations, notwithstanding the general rules for determination of segment rates, for plan years beginning in 2008 or 2009, the first, second, or third segment rate for a plan with respect to any month is equal to the sum of the product of that rate for that month, multiplied by the applicable percentage and the product of the weighted average interest rate determined under the rules of section 412(b)(5)(B)(ii)(II) (as that provision was in effect for plan years beginning in 2007), multiplied by a percentage equal to 100 percent minus the applicable percentage. This transition rule does not apply to a plan if the first plan year of the plan begins on or after January 1, 2008. A plan sponsor may elect not to apply the transition rule, but once an election has been made any change to that election requires the approval of the Commissioner.

The proposed regulations would have required that the pre-PPA '06 weighted average be determined as of the same month as the segment rates. In response to comments, the final regulations provide that this weighted average interest rate can be determined for the same month that is used to determine the segment rates, or for the month that contains the first day of the plan year (that is, the month that was used under section 412(b)(5)(B)(ii)(II) as in effect before amendment by PPA ‘06).

The final regulations provide that any change to any interest rate election that is made for the first plan year beginning in 2009 or 2010 is automatically approved by the Commissioner and does not require the Commissioner’s specific prior approval.

VI. Section 1.430(i)-1 Special Rules for Plans in At-risk Status.

Section 1.430(i)-1 of the final regulations provides special rules related to determining the funding target and making other computations for certain defined benefit plans that are in at-risk status for the plan year due to their significantly underfunded status. The at-risk rules do not apply to small plans. For this purpose, a small plan is defined as a plan sponsored by an employer that had 500 or fewer participants (including both active and inactive participants) in defined benefit plans (other than multiemployer plans) sponsored by the employer or any member of the employer’s controlled group on each day during the preceding plan year.

The regulations generally adopt the rules set forth in the proposed regulations, with a few modifications that are noted in this preamble. In general, the regulations provide that a plan is in at-risk status for a plan year if the FTAP for the preceding plan year is less than 80 percent (65, 70, and 75 percent, respectively, for plan years beginning in 2008, 2009, and 2010), and the at-risk FTAP for the preceding plan year is less than 70 percent. For this purpose, the FTAP is defined in the same manner as under §1.430(d)-1. The at-risk FTAP of a plan for a plan year is a fraction (expressed as a percentage) the numerator of which is the value of plan assets for the plan year after subtraction of the prefunding balance and the funding standard carryover balance under section 430(f)(4)(B), and the denominator of which is the at-risk funding target of the plan for the plan year (determined using the special actuarial assumptions that apply to plans in at-risk status, but without regard to the loading factor that is imposed with respect to certain plans in at-risk status).

In the case of a new plan that was neither the result of a merger nor involved in a spin-off, the FTAP and the at-risk FTAP are equal to 100 percent for years before the plan exists. As a result, such a plan will not be in at-risk status in its first year. In addition, if the funding target of the plan is equal to zero for a plan year, the FTAP and the at-risk FTAP are equal to 100 percent for that plan year. Accordingly, a plan that is established without benefits accruing for periods prior to establishment will not be in at-risk status in its second year. The final regulations reserve a place for rules regarding a plan that is involved in a merger or a spin-off and a newly established plan with a predecessor plan that was in at-risk status.

In accordance with section 430(i)(1), the final regulations provide that the at-risk funding target and the at-risk target normal cost of the plan for the plan year are generally determined in the same manner as for plans not in at-risk status, but using special actuarial assumptions. In addition, the at-risk funding target and the at-risk target normal cost are increased to take into account a loading factor if the plan has been in at-risk status for at least 2 out of the preceding 4 plan years. In any case, the at-risk funding target and the at-risk target normal cost of a plan for a plan year cannot be less than the plan's funding target and target normal cost determined without regard to the at-risk rules. This minimum value is determined on a plan-wide (rather than a participant-by-participant) basis.

The actuarial assumptions used to determine a plan's at-risk funding target for a plan year are the actuarial assumptions that are applied under section 430, with certain modifications as set forth in the final regulations. Under the proposed regulations, if by the end of the plan year that begins 10 years after the end of the current plan year (that is, the end of the 11th plan year beginning with the current plan year) an employee would be eligible to commence an immediate distribution upon termination of employment, then the employee would be assumed to terminate and commence an immediate distribution at the earliest retirement date under the plan, or, if later, at the end of the current plan year. For this purpose, the proposed regulations defined the earliest retirement age under the plan as the earliest age at which a participant could terminate employment and receive an immediate distribution. The proposed regulations provided that, under the special at-risk actuarial assumptions, all employees who are subject to the special early retirement assumption are also assumed to elect the optional form of benefit available under the plan at the assumed retirement age that would result in the highest present value of benefits.

In response to comments, the final regulations clarify that the special early retirement assumption applies to all participants (employees, terminated vested participants, and beneficiaries) who have not commenced payment and is not limited to employees. In addition, the final regulations provide that the earliest retirement age is not earlier than the age at which the participant's benefit is fully vested. The regulations also provide that, under the special at-risk actuarial assumptions, all participants and beneficiaries (not just the participants who are subject to the special early retirement assumption) who are assumed to retire on a particular date are assumed to elect the optional form of benefit available under the plan that would result in the highest present value of benefits commencing at that date.

If a plan that is in at-risk status for the plan year has not been in at-risk status for one or more of the preceding 4 plan years, the plan's funding target for the plan year is determined as a blend of the funding target determined as if the plan were not in at-risk status and the funding target determined as if the plan had been in at-risk status for each of the preceding 4 plan years. For this purpose, the funding target determined as if the plan had been in at-risk status for each of the preceding 4 plan years is determined without applying the loading factor if the plan has not been in at-risk status for two of the preceding four plan years. The increase in the funding target to reflect the at-risk rules is phased in over 5 years at 20 percent per year. The final regulations provide similar rules for determining the at-risk target normal cost of a plan that has been in at-risk status for fewer than 5 consecutive plan years.

For purposes of applying the rules under section 430(i), the regulations set forth rules for making certain calculations with respect to the first plan year to which section 430 applies to the plan. These rules are generally the same as the rules that apply for that plan year for purposes of section 436.

There is no special rule for determining the at-risk funding target for the plan year preceding the plan year section 430 first applies to the plan. This is because, for a plan to which section 430 applies beginning in 2008, if the plan's FTAP for the preceding plan year was less than the 65 percent needed to be in at-risk status (pursuant to the transition rule described in section 430(i)(4)(B)), then the at-risk FTAP would necessarily be below the 70 percent needed for the plan to be in at-risk status (because the at-risk funding target cannot be less than the funding target for a plan that is not in at-risk status). However, plans for which the effective date of section 430 is delayed for purposes of determining the minimum required contribution will have to determine the at-risk funding target for the plan year that precedes the plan year for which section 430 is first effective with respect to the plan.

VII. Section 1.436-1 Limits on Benefits and Benefit Accruals Under Single Employer Defined Benefit Plans.

A. Overview and general rules.

1. In general.

The final regulations set forth the rule that a defined benefit pension plan that is subject to section 412 and that is not a multiemployer plan is a qualified plan only if it satisfies 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. The final regulations generally adopt the rules set forth in the proposed regulations, but with a number of modifications that are discussed in this preamble.

2. New plans.

In accordance with section 436(g), the final regulations 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. Thus, the only benefit limitation under section 436 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). Except as otherwise provided by the Commissioner in guidance of general applicability, plan years of the plan include the following (in addition to plan years during which the plan was maintained by the employer or plan sponsor): (1) plan years when the plan was maintained by a predecessor employer within the meaning of §1.415(f)-1(c)(1); (2) plan years of another defined benefit plan maintained by a predecessor employer within the meaning of §1.415(f)-1(c)(2) within the preceding five years if any participants in the plan participated in that other defined benefit plan (even if the plan maintained by the employer is not the plan that was maintained by the predecessor employer); and (3) plan years of another defined benefit plan maintained by the employer within the preceding five years if any participants in the plan participated in that other defined benefit plan.

3. Terminated plans.

The proposed regulations did not contain any special rules regarding terminated plans. Commenters asked whether, upon plan termination, the benefit restrictions under section 436(d) operate to prevent the purchase of annuities to satisfy plan benefits or the distribution of single sums. In response, these regulations contain special rules for plan terminations. Under the final regulations, in general, any section 436 limitations in effect immediately before the termination of a plan continue to apply. However, the limitations under section 436(d) do not apply to prohibited payments that are made to carry out the termination of a plan in accordance with applicable law. For example, a plan sponsor's purchase of an irrevocable commitment from an insurer to pay benefit liabilities with respect to participants in connection with the standard termination of a plan, in accordance with 4041(b)(3) of ERISA and 29 CFR § 4041.28, does not violate section 436(d).

4. Multiple employer plans.

The 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 regulations apply separately with respect to each employer under the plan, as if each employer maintained a separate plan. Thus, the benefit limitations under section 436 can 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 regulations apply as if all participants in the plan were employed by a single employer. Some commenters objected to the separate application of the rules of section 436 for a multiple employer plan to which section 413(c)(4)(A) applies. These commenters argued that, because it is impossible for an employer to make a contribution that inures only to the benefit of its employees in the event of plan termination, it is inappropriate to apply the requirements of section 436 separately for each employer. No change has been made to reflect this comment because the IRS and the Treasury Department believe that this rule is consistent with the applicable statutory requirement under section 413(c)(4)(A) that applies that the funding rules apply separately to each employer.

5. Treatment of plan as of close of prohibited or cessation period.

The final regulations use the term section 436 measurement date to identify the dates on which a section 436 limitation may apply or cease to apply (as discussed in section VII.A.8 of this preamble). The regulations provide that, if a limitation on prohibited 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 final regulations provide that, if a limitation on benefit accruals under section 436(e) applies to a plan, then, 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. If the accruals resume effective in the middle of a plan year, the plan must comply with the rules relating to partial years of participation and the prohibition on double proration under Department of Labor regulation 29 CFR §2530.204-2(c) and (d).

With respect to a participant who was barred from receiving an optional form of benefit that would have been payable but for the application of a restriction on prohibited payments pursuant to section 436(d), once the restriction ceases to apply, the participant’s benefits will continue to be paid in the form previously elected unless the plan offers the participant a new election that modifies the prior election. The final regulations 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 clarify that any such new election will result in 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) are credited under the plan once the limitation no longer applies, subject to applicable qualification requirements (including the limitations of section 436(c)). If a plan provides for the restoration of benefit accruals for the period of the limitation under preexisting plan terms, the plan is generally treated as having adopted an amendment that has the effect of increasing liabilities under the plan. The proposed regulations would have provided an exception to this rule if the period of limitation is 12 months or less. The final regulations retain that exception, but clarify that the exception is available only if the plan's AFTAP would be at least 60 percent taking into account the restored accruals.[6]

In response to questions raised by commenters, the final regulations clarify the treatment of unpredictable contingent event benefits that are limited under the rules of section 436(b). The regulations provide that, in general, if any unpredictable contingent event benefits are limited under section 436(b) with respect to an unpredictable contingent event, then that limitation applies to all such benefits that otherwise would have been paid to any plan participant with respect to that unpredictable contingent event. However, if the limitations of section 436(b) with respect to an unpredictable contingent event cease to apply for a plan year as a result of a contribution that satisfies the requirements of section 436(b)(2) or a certification of the AFTAP for the plan year, then any unpredictable contingent event benefits that were limited under the rules of section 436(b) for the plan year must automatically become payable, retroactive to the period those benefits would have been payable under the terms of the plan (other than

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[6] 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, unless it is covered by the 12-month exception.

plan terms implementing the requirements of section 436(b)). If the benefits do not become payable during the plan year in accordance with the preceding sentence, then the plan is treated as if it does not provide for those benefits. However, all or any portion of those benefits can be restored pursuant to a plan amendment that meets the requirements of section 436(c) and other applicable qualification requirements.

6. Treatment of plan amendments that do not go into effect.

The proposed regulations did not contain rules regarding the treatment of plan amendments that do not go into effect because of the restrictions under section 436(c). To clarify the application of these rules, the final regulations provide that, if a plan amendment does not go into effect as of the effective date of the amendment because of the limitations of section 436(c), but is permitted to go into effect later in the plan year as a result of additional contributions that satisfy the requirements of section 436(c)(2) or a certification of the AFTAP for the plan year, then the plan amendment must automatically take effect as of the first day of the plan year (or, if later, the original effective date of the amendment). However, if the plan amendment cannot take effect during the plan year, then it must be treated as if it were never adopted, unless the plan amendment provides otherwise. For example, a plan amendment that provides a benefit increase pursuant to a collective bargaining agreement could provide that if the plan amendment does not take effect pursuant to the rules of section 436(c), it will take effect at the earliest time it is permitted to take effect pursuant to the rules of section 436(c).

7. Deemed election to reduce prefunding and funding standard carryover balances.

Pursuant to section 436(f)(3), the final regulations provide that, if a limitation on prohibited payments under section 436(d)(1) or (d)(3) would otherwise 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 AFTAP to be at or above the applicable threshold (60 or 80 percent, as the case may be)[7] 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 prohibited payments 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 prohibited payments that are subject to the benefit limitation or if the plan is not subject to section 436(d) because the plan was frozen before September 1, 2005). 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. The final regulations provide that, if a plan is presumed to have an AFTAP of less than 60 percent because the plan did not receive a certification of the AFTAP before the first day of the 10th month of the plan year under

[7] Pursuant to section 436(j)(3), for any plan year, if the FTAP is 100 percent or more (or at a lower transition threshold for 2008 through 2010) determined without subtracting the prefunding balance and funding standard carryover balance from the value of plan assets, then the AFTAP is determined without regard to that subtraction. The deemed election under section 436(f)(3) is irrelevant in the case of the 100% funding threshold that applies under section 436(d)(2) when an employer is in bankruptcy because, either the plan is 100 percent or more funded without the subtraction (and therefore no subtraction need be made under section 436(j)(3)), or the plan is less than 100 percent funded without the subtraction so that the value of plan assets must necessarily be insufficient for a deemed election to increase the plan's AFTAP to 100%.

the section 436(h)(2) 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.

In addition, the regulations 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 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. 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. As in the case of the deemed reduction in funding balances to avoid the application of 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.

The proposed regulations would have provided that, 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 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. A number of commentators asked which participants are taken into account in this calculation. The final regulations adopt the definition in the proposed regulations, but also provide that such a plan is considered a collectively bargained plan if at least 50 percent of the employees benefiting under the plan (within the meaning of §1.410(b)-3(a)) are members of collective bargaining units for which the benefit levels under the plan are specified under a collective bargaining agreement.

8. Section 436 measurement date.

The section 436 measurement date is a defined term under the final 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 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 is made during the plan year. The regulations further provide that a section 436 measurement date also occurs where there is a change in the plan's presumed AFTAP under the presumption rules of section 436(h). In addition, the regulations 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 in section VII.G of this preamble.

9. Notice requirement under section 101(j) of ERISA.

Section 101(j) of ERISA requires the plan administrator of a single employer plan to provide a written notice to participants and beneficiaries within 30 days after certain specified dates, including the date the plan has become subject to a restriction described in the ERISA provisions that are parallel to Code sections 436(b) and 436(d); and, in the case of a plan that is subject to the ERISA provisions that are parallel to

Code section 436(e), 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). These regulations do not include any guidance on section 101(j) of ERISA. The benefit restrictions under section 436 (and the parallel provisions under section 206(g) of ERISA) apply without regard to whether the requirements of section 101(j) of ERISA are satisfied.

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

In accordance with section 436(b), the final regulations provide that a plan that provides for any unpredictable contingent event benefit[8] 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 AFTAP were redetermined applying an actuarial assumption that the likelihood of the occurrence of the unpredictable contingent event during the plan year is 100 percent). 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 plan sponsor makes the contribution specified in section 436(b)(2), as described in section VII.F of this preamble.

The regulations provide that an unpredictable contingent event benefit is 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 that an unpredictable contingent event is 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

[8] See also Notice 2007-14, 2007-1 CB 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.

derivation of any compensation, or the occurrence of death or disability. 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 (including the absence) 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, that benefit is 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 the plan's funded status is such that benefits contingent upon that plant shutdown are not subject to the limitation described in section 436(b) for that calendar plan year, section 436(b) does not apply to restrict payment of those benefits even if another plant shutdown occurs in 2012 that results in the restriction of benefits that are contingent upon that later plant shutdown under section 436(b) (where the plan's adjusted funding target attainment percentage for 2012 would be less than 60 percent taking into account the liability attributable to those shutdown benefits). 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 60 percent (subject to the rules permitting plan amendments to reinstate previously restricted benefits, including unpredictable contingent event benefits, as described in section VII.A.5 of this preamble).

To clarify the operation of the rules regarding unpredictable contingent event benefits, the final regulations contain rules of application that were not provided in the proposed regulations. The regulations clarify that the limitations of section 436(b) apply on a participant-by-participant basis. Thus, whether payment or commencement of an unpredictable contingent event benefit under a plan is restricted with respect to a participant is determined based on whether the participant satisfies the plan's eligibility requirements (other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability) for such a benefit in a plan year in which the limitations of section 436(b) apply. In addition, in the case of a plan that provides for a benefit that depends upon the occurrence of more than one unpredictable contingent event with respect to a participant, the unpredictable contingent event for purposes of section 436(b) occurs upon the last of those unpredictable contingent events. Cessation of a benefit under a plan upon the occurrence of a specified event does not trigger the application of a limitation under section 436(b). Thus, section 436(b) does not prohibit provisions of a plan that provide for cessation, suspension, or reduction of any benefits upon occurrence of any event.

C. Limitations on plan amendments increasing plan liabilities.

In accordance with section 436(c), the regulations 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 AFTAP were redetermined taking into account the benefits attributable to the amendment). 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 section VII.F of this preamble. Thus, an amendment that provides for an increase in benefits under a formula that is based solely on service performed by participants after the amendment is adopted is always permitted to take effect in a plan year because the amount of contribution described in section 436(c)(2) is $0. However, see §1.430(d)-1(d)(2) for a rule that requires such an amendment to be taken into account in determining the funding target and the target normal cost in certain situations.

The final regulations clarify the application of section 436(c) to certain pre-existing plan provisions. Under the regulations, if a plan contains a provision that provides for the automatic restoration of benefit accruals that were not permitted to accrue because of the application of section 436(e), the restoration of those accruals is generally treated as a plan amendment that is subject to section 436(c). However, the automatic restoration of benefit accruals that were not permitted to accrue because of the application of section 436(e) is not treated as a plan amendment that is subject to section 436(c) if the continuous period of the limitation is 12 months or less and the AFTAP for the plan would not be less than 60 percent taking into account the restored benefit accruals for the prior plan year. The application of section 436(c) to other pre-existing plan provisions that result in benefit increases is expected be addressed in future proposed regulations.

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 by the amendment. Like the proposed regulations, the final regulations provide that 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.

If the participants covered by an amendment include both currently employed participants and terminated participants, all covered participants are included in determining the increase in average wages of the participants covered by the amendment. For this purpose, terminated participants who are not employees at any time during the period from the effective date of the most recent benefit increase applicable to all the participants who are covered by the current amendment and ending on the effective date of the current amendment are treated as having no increase or decrease in wages for the period after severance from employment. Alternatively, the employer can adopt two amendments -- one that increases benefits for currently employed participants that is eligible for this exception based solely on the wages of those current employees, and another that increases benefits for terminated participants. However, 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 this exception.

As under the proposed regulations, the final regulations exempt a plan amendment (or any pre-existing plan provision) that provides for a mandatory increase in the vesting of benefits under the Code or ERISA (such as vesting rate increases pursuant to statute, plan termination amendments or partial terminations under section 411(d)(3), and vesting increases required by the rules for top-heavy plans under section 416) from the requirements of section 436(c) to the extent the increase in vesting is necessary to enable the plan to continue to satisfy the requirements for qualified plans. In addition, the final regulations provide that the Commissioner may, in guidance of general applicability, issue additional rules under which other amendments to a plan are not treated as amendments to which section 436(c) applies.

The final regulations contain a rule to clarify when an amendment is considered to take effect for purposes of section 436(c). Under these regulations, in the case of an amendment that increases benefits, the amendment takes effect under a plan on the first date on which any individual who is or could be a participant or beneficiary under the plan would obtain a legal right to the increased benefit if the individual were on that date to satisfy the applicable requirements for entitlement to the benefit (such as the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death, disability, or severance from employment). Thus, if a plan's operations change to provide increased benefits so that participants obtain a legal right to the benefit at the time of the change (with the corresponding plan amendment adopted in that year or in a subsequent year that is within the remedial amendment period under section 401(b)), the amendment takes effect at the time of the change and must satisfy the requirements of section 436(c) for that earlier year. By contrast, if an amendment is adopted to provide increased benefits retroactively with respect to a prior year, but no participant's benefits are increased until the amendment is adopted, the amendment takes effect at the time of adoption and must satisfy the requirements of section 436(c) for the plan year the amendment is adopted.

D. Limitations on prohibited payments.

1. Funding percentage less than 60 percent.

In accordance with section 436(d)(1), under the final regulations, a plan must provide that, if the plan's AFTAP for a plan year is less than 60 percent, a participant or beneficiary is not permitted to elect an optional form of benefit that includes a prohibited payment, and the plan will not pay any prohibited payment, with an annuity starting date that is on or after the applicable section 436 measurement date. The proposed regulations would have provided that, if a participant requests such a prohibited payment, the plan must permit the participant to elect another form of benefit available under the plan and this rule is retained in these regulations. Thus, if a participant elects a single-sum payment which is not available because of the section 436 limitations, the participant has to retain the right to elect the annuity forms offered under the plan which do not contain prohibited payments. 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).

The proposed regulations would also have provided that, if a participant requests such a prohibited payment, the plan must permit the participant to elect to defer payment to a later date to the extent permitted under applicable qualification requirements. Questions have arisen regarding whether this deferral right must be provided to a participant who has separated from service and has attained normal retirement age if the plan does not otherwise provide such a participant with the right to defer commencement of benefits. The final regulations clarify that, if a participant requests a prohibited payment at a time when that form of payment cannot be made, the participant retains the right to delay commencement of benefits only if the right to delay commencement is in accordance with the terms of the plan and applicable qualification requirements (such as sections 411(a)(11) and 401(a)(9)). Thus, where payment of an optional form of benefit is restricted pursuant to section 436(d), the plan is not required to provide participants with deferral rights that would not be otherwise available.

Some commenters requested that the regulations permit a plan under which prohibited payments are restricted to handle an election for a prohibited payment by paying the maximum amount permitted under section 436(d) each year, with payments resuming under the originally elected schedule as soon as permitted under section 436(d) (with appropriate catch-up payments). The final regulations do not permit this approach because the IRS and the Treasury Department believe that a plan should pay benefits in accordance with a participant's actual election (with the associated spousal consent, if applicable). However, the final regulations clarify that a plan can offer special optional forms of benefit during the period in which section 436(d)(1) applies to the plan. For example, a plan may permit participants or beneficiaries who commence benefits during this period to elect, within a specified period after the date on which the limitation ceases to apply to the plan, to receive the remaining benefit in the form of a single-sum payment equal to the present value of the remaining benefit to the extent then permitted under section 436(d)(3). Any such optional forms must satisfy section 436(d) and applicable qualification requirements, including satisfaction of section 417(e) and section 415 (at each annuity starting date).

2. Bankruptcy.

In accordance with section 436(d)(2), under the final regulations, a plan must provide that a participant or beneficiary is not permitted to elect an optional form of benefit that includes a prohibited payment, and the plan will not pay any prohibited payment, with an annuity starting date that occurs 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, until the date on which the enrolled actuary of the plan certifies that the plan's AFTAP for the plan year is not less than 100 percent. Participants and beneficiaries can still elect those forms of distribution offered under the plan which do not contain a prohibited payment, as well as the right to defer distribution, as described in section VII.D.1 of this preamble.

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

In accordance with section 436(d)(3), under the final 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 or beneficiary is not permitted to elect the payment of an optional form of benefit that includes a prohibited payment, and the plan will not pay any prohibited payment, with an annuity starting date that is on or after the applicable section 436 measurement date, unless the present value, determined in accordance with section 417(e)(3), of the portion of the benefit that is being paid in a prohibited payment does not exceed the lesser of: (A) 50 percent of the present value (determined in accordance with section 417(e)(3)) of the benefit payable in the optional form of benefit that includes the prohibited payment; or (B) 100 percent of the PBGC maximum benefit guarantee amount.

Commenters asked a number of questions about this limitation, including how to determine the portion of the benefit that is being paid in a prohibited payment. Under the final regulations, this determination is made based on the applicable optional form of benefit. If the benefit is being paid in an optional form for which any of the payments is greater than the amount payable under a straight life annuity to the participant or beneficiary (plus any social security supplements described in the last sentence of section 411(a)(9) payable to the participant or beneficiary) with the same annuity starting date, then the portion of the benefit that is being paid in a prohibited payment is the excess of each payment over the smallest payment during the participant's lifetime under the optional form of benefit (treating a period during the participant's lifetime in which no payments are made as a payment of zero). Thus, for an optional form of benefit in the form of a single sum or in the form of installments over a fixed period of years, the entire optional form of benefit would be a prohibited payment, whereas in the case of a social security leveling optional form of benefit (under which higher payments are made before an assumed social security commencement date, with lower payments thereafter for life), only the amount payable before the assumed social security commencement date that exceeds the ultimate life annuity amount would be a prohibited payment (so that a social security leveling form could go into effect under section 436(d)(3) if the present value of the payments before the assumed social security commencement date that exceed the ultimate life annuity amount does not exceed the present value of 50 percent of the total benefit or, if less, the PBGC maximum benefit guarantee amount). In addition, the PBGC maximum benefit guarantee amount is 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 with respect to a participant (based on the participant's age or the beneficiary's age at the annuity starting date) under section 4022 of ERISA for the year in which the annuity starting date occurs.

Like the proposed regulations, the final regulations require that, 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 the requirements of section 436(d)(3), the plan must permit a participant or beneficiary to elect to bifurcate the benefit into unrestricted and restricted portions. The plan must also offer the participant or beneficiary any other optional form of benefit otherwise available under the plan at that annuity starting date that would satisfy the 50 percent/PBGC maximum benefit guarantee amount limitation, as well as any general right to defer commencement of benefits under the plan (in the same manner described in section VII.D.1 of this preamble).

Commenters had raised a number of questions concerning calculation of the unrestricted portion of the benefit for purposes of the rule requiring the participant's benefit to be bifurcated into unrestricted and restricted portions. The final regulations clarify that the benefit for the unrestricted portion of the benefit is calculated at the annuity starting date with respect to each optional form of benefit that does not satisfy the 50 percent/PBGC maximum benefit guarantee amount limitation. In general, the unrestricted portion of the benefit with respect to an optional form of benefit is 50 percent of the amount payable under that optional form of benefit. Thus, if a participant elects a single-sum payment of a participant's entire benefit which is not permitted under section 436(d)(3), the bifurcation rule requires the plan to offer the participant half that amount as a single-sum payment (with the remainder being payable as a life annuity or any other optional form available under the plan at that annuity starting date that does not include a prohibited payment).

However, for an optional form of benefit that is a prohibited payment on account of a social security leveling feature or a refund of employee after-tax contributions feature, the unrestricted portion of the benefit is that optional form of benefit applied to only 50 percent of the total benefit. Thus, for a social security leveling option, the unrestricted portion is not equal to half the amount payable before the assumed social security commencement date, plus half the amount payable thereafter, but instead would be a result of applying the plan's social security leveling option provision to half of the participant's total benefit. This may often result in the unrestricted portion being a series of payments ending at the assumed social security commencement date (which, in combination with a life annuity for the restricted portion commencing at the same annuity starting date plus the participant's anticipated social security benefit, would provide level income to the participant to the extent permitted under section 436(d)(3)).

In any event, the unrestricted portion of the benefit must be reduced to the extent necessary so that the present value (determined in accordance with section 417(e)) of the unrestricted portion of that optional form of benefit does not exceed the PBGC maximum benefit guarantee amount.

If the participant or beneficiary elects to bifurcate the benefit, the plan must provide, with respect to the unrestricted portion, the optional form of benefit elected by the participant, treating the unrestricted portion of the benefit as if it were the participant's or beneficiary's entire benefit under the plan. The participant can elect to receive the remainder of his or her benefit in any optional form of benefit available under the plan at that annuity starting date that does not include a prohibited payment. If a plan provides for an optional form of benefit that applies to only a portion of the participant's benefit, that optional form of benefit must be available on a proportionate basis with respect to the unrestricted portion of the benefit. The rules of §1.417(e)-1 are applied separately to the separate optional forms for the unrestricted and restricted portions of the benefits.

Under the regulations, a plan is permitted to provide for separate elections with respect to the unrestricted and restricted portions of the benefit, without regard to whether the participant or beneficiary elects an optional form of benefit that includes a prohibited payment that is not permitted to be paid under the rules of section 436(d)(3).

Like the proposed regulations, the final regulations permit a plan to offer optional forms of benefit that are solely available during a period during which benefits are restricted pursuant to section 436(d)(3). For example, during that period, a plan may offer an optional form of benefit (such as a single sum) that provides for the current payment of the unrestricted portion of the benefit, with a delayed commencement for the restricted portion of the benefit or for an immediate commencement of the restricted portion of the benefit in an annuity form with a right to commute to a single sum offered upon the enrolled actuary's certification that the plan's AFTAP is at least 80 percent. As another example, a plan that offers a subsidized early retirement benefit or a single-sum payment based on the normal retirement benefit may offer an optional form of benefit that combines an unsubsidized single-sum payment for over 50 percent of the accrued benefit with a subsidized early retirement life annuity for the remainder of the accrued benefit, provided that the optional form satisfies the section 436(d)(3) 50 percent/PBGC maximum benefit guarantee limitation. Any such optional forms must also satisfy the applicable qualification requirements, including satisfaction of section 417(e) and, in the case of optional forms of benefit with different annuity starting dates, section 415 at the later annuity starting date for the restricted portion of the benefit.

The IRS and the Treasury Department anticipate that plan sponsors will use one of several alternative approaches to providing benefit election packages to participants in order to comply with the benefit restrictions of section 436(d). As part of any of these alternatives, as described in the preceding paragraph, the plan may provide special optional forms that are available only when the restrictions of section 436(d) apply.

One approach would be to provide a benefit election package that does not take into account the restrictions under section 436(d), regardless of whether a benefit restriction under section 436(d) applies at the time the package is furnished. In periods during which a restriction applies, the plan must permit the participant either to (1) choose another optional form of benefit that does not have a restriction, (2) defer commencement of the payments to a later annuity starting date, or (3) if the AFTAP is at least 60 percent but less than 80 percent, elect to bifurcate the benefit -- that is, to receive the unrestricted portion in the optional form chosen and to make a separate election with respect to the remaining portion of the benefit (the restricted portion). Thus, if a participant elects a form of benefit that is not permitted pursuant to a restriction, then the participant must be informed which benefit options are currently available in order to enable the participant to make a new election among the available forms if the participant so chooses. This approach entails a two-step process.

As an alternative to this approach, the plan may provide for a one-step process which eliminates the need to go back to the participant if the participant elects a form of benefit that is restricted. Under this one-step process, a participant who elects an optional form of benefit that could be subject to restrictions would also elect a backup distribution form which would apply if restrictions are applicable as of the annuity starting date for the distribution. As part of the backup election, this one-step process would also provide the participant with the opportunity to defer commencement and, if the AFTAP is at least 60 percent but less than 80 percent, to bifurcate the benefit.

A third alternative approach, which also eliminates the need to go back to the participant, anticipates the application of the section 436(d) restriction on prohibited payments. Under this approach, with respect to an optional form of benefit that includes a prohibited payment that is not permitted to be paid and for which no additional information is needed to make that determination (such as information regarding a social security leveling optional form of benefit), rather than wait for the participant or beneficiary to elect such optional form, the plan is permitted to provide for separate elections with respect to the restricted and unrestricted portions of that optional form of benefit. However, the alternative described in the preceding sentence is permitted to be applied only if the plan applies the rule to all the optional forms for which no additional information from the participant or beneficiary is needed to make that determination and the plan identifies the option that the bifurcation election replaces. Thus, if section 436(d)(3) applies to a plan during a period and the plan's prohibited payments include a single-sum payment, installments for 10 years, and various life annuities with social security leveling features that depend on information from the participant regarding assumed social security commencement date and social security amount, then during this period the plan can offer 50% of the single-sum payment and 50% of the 10-year installments, without having to offer half of each of the potential life annuities with social security leveling features. Thus, the package presented to a participant would generally present optional forms of benefit that satisfy the requirements of section 436(d) at the annuity starting date (but if the participant were to elect a life annuity with a social security leveling feature that is not permitted to be paid, then the plan would have to follow the two-step approach). If this third approach is used and the plan's benefit restriction status with respect to the participant's annuity starting date changes after the package is furnished, then updated information would be provided to the participant that takes into account the plan's new status. As part of the overall methodology, a plan may provide special optional forms that are available only when the restrictions of section 436(d) apply. Thus, the package presented to a participant would only present optional forms of benefit that satisfy the requirements of section 436(d) at the annuity starting date.

A participant for whom a prohibited payment (or a series of prohibited payments under a single optional form of benefit) is made in accordance with the 50 percent/PBGC maximum benefit guarantee amount limitation cannot receive any additional payment that would be a prohibited payment during any period of consecutive plan years to which any of the limitations under section 436(d) apply. Benefits provided to a participant and any beneficiary of that participant are aggregated for purposes of determining whether the distribution complies with the limitations under section 436(d)(3). The final regulations also reflect the rules of section 436(d)(3)(B)(ii), which describe how this limited distribution is allocated among the beneficiaries of a participant. The final regulations include two special rules for beneficiaries. First, while generally the annuity starting date for the payments to the participant is also the annuity starting date for payments to the beneficiary, a new annuity starting date occurs if the amount payable to the beneficiary can exceed the monthly amount that would have been paid to the participant had he or she not died (such as where a plan offers to pay the death benefit in a single sum). Second, if a beneficiary is not an individual, the prohibited payment amount is determined based on the monthly amount payable in installments over 20 years (instead of the monthly amount paid under a straight life annuity).

4. Exception for certain frozen plans.

In accordance with section 436(d)(4), the limitations under section 436(d) do 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, provide for no benefit accruals with respect to any participants. However, if such a plan provides for any benefit accruals thereafter, this exception ceases to apply for the plan as of the date those accruals start.

5. Prohibited payment.

In accordance with section 436(d)(5), the final regulations provide that the term prohibited payment means 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 occurs during any period that a limitation on prohibited payments is in effect, as well as any payment for the purchase of an irrevocable commitment from an insurer to pay benefits. The final regulations also include in this definition any transfer of assets and liabilities to another plan maintained by the same employer (or by any member of the employer's controlled group) that is made in order to avoid or terminate the application of section 436 benefit limitations. In addition, the Commissioner may provide for other amounts to be identified as prohibited payments in revenue rulings and procedures, notices, and other guidance published in the Internal Revenue Bulletin.

Commenters raised several concerns regarding the definition of the term annuity starting date as applied to various types of benefits restricted under section 436(d). The final regulations generally adopt the definition of annuity starting date set forth in §1.401(a)-20, Q&A-10(b), modified to cover retroactive annuity starting dates, as well as transactions that are restricted under section 436(d) even though they do not constitute distributions to any participant. Thus, the final regulations provide that, for purposes of applying the limitations on prohibited payments under section 436(d), the term annuity starting date is defined as 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) if the benefit is being paid in the form of an annuity. In the case of a benefit not payable in the form of an annuity, the annuity starting date is the annuity starting date for the qualified joint and survivor annuity that is payable under the plan at the same time as the benefit that is not payable as an annuity, and, in the case of an amount payable under a retroactive annuity starting date, the annuity starting date is the benefit commencement date. The effect of the change in the definition of annuity starting date will be to provide plan administrators with some additional time to adjust their administrative practices to take into account a newly issued certification of the plan's AFTAP. The definition of annuity starting date also includes the date of the purchase of an irrevocable commitment from an issuer to pay benefits under the plan and the date of any transfer of assets and liabilities to another plan maintained by the same employer (or by any member of the employer's controlled group) that is made in order to avoid or terminate the application of section 436 benefit limitations.

The final regulations include rules to clarify how the limitations apply with respect to any prohibited payment that is in the form of a purchase of an irrevocable commitment from an insurer or a transfer of assets and liabilities. In the case of a purchase of insurance, the annuity starting date is the date of the purchase of the irrevocable commitment from the insurer and the present value (for purposes of the section 436(d)(3) limitation regarding the lesser of 50 percent of the present value of the benefit and the PBGC maximum benefit guarantee amount) is based on the cost to the plan (which is generally the insurance premium). Where a prohibited payment is in the form of a plan-to-plan transfer of assets and liabilities, the annuity starting date is the date of the transfer to the other qualified plan and the present value is based on the present value of the liabilities transferred (determined in accordance with section 414(l)). However, any such transfer would have to independently satisfy section 414(l), which generally would not be possible where only a portion of a participant's or beneficiary's accrued benefit is being transferred.

The regulations do not address the change made by section 101(c)(2)(C) of WRERA '08, under which the limitations of section 436 do not apply to distributions permitted without consent of the participant under section 411(a)(11) (that is, distributions where the total present value of the benefit is not in excess of $5,000). That change is expected to be addressed in future proposed regulations. Those proposed regulations are also expected to address issues regarding plan loans.

E. Limitation on benefit accruals.

In accordance with section 436(e), the final regulations require a plan to 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 no longer applies for a plan year if the plan sponsor makes the contribution specified in section 436(e)(2), as described in section VII.F of this preamble.

The regulations do not reflect the provisions of section 203 of WRERA '08 under which, for the first plan year beginning during the period beginning on October 1, 2008 and ending on September 30, 2009, the plan's AFTAP for purposes of the benefit limitation under section 436(e) is equal to the larger of the AFTAP for the plan year and the AFTAP for the prior plan year. That change is expected to be addressed in future proposed regulations.

F. Rules relating to techniques to avoid benefit limitations.

The final regulations provide rules regarding techniques that the plan sponsor may utilize to avoid or terminate benefit limitations under section 436 that are largely unchanged from the rules in the proposed regulations. For example, under the final regulations, an employer sponsoring a plan that would otherwise be subject to the limitations of section 436 can avoid the application of those limits by reducing the funding standard carryover balance and prefunding balance by an amount sufficient to avoid the limitations or, if the deadline for making contributions for the prior plan year has not passed, by making additional contributions for a prior plan year that are not added to the prefunding balance. Either of these techniques will have the effect of increasing the adjusted plan assets that form the numerator of the AFTAP calculation, which will increase the AFTAP. In addition, a plan sponsor could make the specific contributions described in section 436(b)(2), 436(c)(2), or 436(e)(2) or provide security to the plan as described in section 436(f)(1). These latter two techniques for avoiding or terminating the application of the benefit limitations of section 436 are described in §1.436-1(f).

The regulations provide that the plan sponsor is permitted to make additional contributions that are specifically designated at the time of the contribution as a contribution used to avoid the application of a limitation under section 436(b), 436(c), or 436(e). To address questions raised with respect to the proposed regulations, the final regulations provide general rules that apply to all contributions pursuant to section 436(f) (referred to as section 436 contributions) and also separately state the rules with respect to the amount of contributions needed to avoid each type of benefit limitation.

Section 436 contributions must be separate from any minimum required contributions under section 430 and are disregarded in determining the maximum addition to the prefunding balance under section 430(f)(6) and §1.430(f)-1(b)(1)(i)(B). The designation of a contribution as a section 436 contribution must be made at the time the contribution is used to avoid or terminate the applicable benefit limitations and, except as specifically provided, cannot subsequently be recharacterized with respect to any plan year as a contribution to satisfy a minimum required contribution obligation, or otherwise. Thus, if a plan sponsor makes a section 436 contribution 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. The designation must be made in accordance with the rules and procedures that otherwise apply to elections under the regulations (at §1.430(f)-1(f)) with respect to funding balances. The deductibility of a section 436 contribution is determined pursuant to the rules of section 404 (including the rules of section 404(a) and (o)). For this purpose, the section 436 contribution is considered to be made for the plan year during which it is made.

Any section 436 contribution made 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 rate 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 an employer contribution taken into account under section 430 for the current plan year.

Any section 436 contribution must be paid before the unpredictable contingent event benefits are permitted to be paid, the plan amendment is permitted to go into effect, or the benefit accruals are permitted to resume. In addition, any section 436 contribution with respect to a plan year must be paid during the plan year. Furthermore, no prefunding balance or funding standard carryover balance under section 430(f) may be used as a section 436 contribution to avoid benefit limitations.

In the case of a contribution to avoid or terminate the application of the limitation on benefits attributable to an unpredictable contingent event under section 436(b), in the event that the AFTAP for the plan year determined without taking into account the liability attributable to the unpredictable contingent event benefits is less than 60 percent, 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. In the event that the AFTAP for the plan year determined without taking into account the liability attributable to the unpredictable contingent event benefits is 60 percent or more, but would be less than 60 percent taking the unpredictable contingent event benefits into account, the amount of the contribution under section 436(b)(2) is the amount that would be sufficient to result in an AFTAP for the plan year of 60 percent if the benefits attributable to the unpredictable contingent event were included in the determination of the funding target and the contribution were included as part of the assets of the plan. In this latter case, the determination of the amount that would be sufficient to result in an AFTAP of 60 percent must take into account all liabilities for benefits attributable to prior unpredictable contingent event benefits that were permitted to be paid, prior plan amendments that were permitted to take effect, and restored accruals (and any associated section 436 contributions).

In the case of a contribution to avoid or terminate the application of the limitation on benefits attributable to a plan amendment under section 436(c), in the event that the AFTAP for the plan year determined without taking into account the liability attributable to the plan amendment is less than 80 percent, 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. In the event that the AFTAP for the plan year determined without taking into account the liability attributable to the plan amendment is 80 percent or more, but would be less than 80 percent taking the amendment into account, the amount of the contribution under section 436(c)(2) is the amount that would be sufficient to result in an AFTAP for the plan year of 80 percent if the liabilities attributable to the plan amendment were included in the determination of the funding target and the contribution were included as part of the assets of the plan. In this latter case, the determination of the amount that would be sufficient to result in an AFTAP of 80 percent must take into account all liabilities for benefits attributable to prior unpredictable contingent event benefits that were permitted to be paid, prior plan amendments that were permitted to take effect, and restored benefit accruals (and any associated section 436 contributions).

In the case of a contribution to avoid or terminate 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 AFTAP for the plan year of 60 percent if the contribution were included as part of the assets of the plan. For this purpose, the determination of the amount that would be sufficient to result in an AFTAP of 60 percent must take into account all liabilities for benefits attributable to prior unpredictable contingent event benefits that were permitted to be paid, prior plan amendments that were permitted to take effect, and restored benefit accruals (and any associated section 436 contributions).

A plan sponsor is treated as making a section 436 contribution to bring the funding level to the applicable threshold only after the plan's enrolled actuary certifies an AFTAP for the plan year that takes into account the increased liability for the unpredictable contingent event benefits, the plan amendments, or accruals, and any associated section 436 contributions.

Another 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 as a plan asset 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, held in escrow by a bank or insurance company. The regulations reflect section 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 final regulations 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). In response to commenter concerns, the final regulations permit security to be replaced, provided that the new security is in at least the same amount and satisfies certain other requirements.

G. Presumed underfunding for purposes of benefit limitations.

1. General rules relating to operation of presumptions.

Section 436(h) sets forth rules under which the limitations of section 436 are applied during the portion of a plan year before the enrolled actuary has certified the plan's AFTAP for the plan year. The regulations set forth rules for the application of the section 436 benefit limitations during the period the presumptions of section 436(h) apply to a plan, and describe the interaction of the application of those presumptions on plan operations with plan operations after the plan's enrolled actuary has issued a certification of the plan's AFTAP for the plan year. The rules in the final regulations have been revised from those in the proposed regulations to reflect comments.

Under the final regulations, a plan must provide that, for any period during which a presumption under section 436(h) applies to the plan, the limitations applicable under section 436 are applied to the plan as if the AFTAP for the year were the presumed AFTAP determined under the applicable rule under section 436(h), in accordance with the rules of operation set forth in the regulations. For example, a plan's prefunding balance and funding standard carryover balance must be reduced under section 436(f)(3) if the reduction would be sufficient to avoid the applicable limitation based on the presumed AFTAP. The final regulations provide rules for determining the amount of the reduction in balances that are similar to those under the proposed regulations.

The final regulations use the presumed AFTAP and the interim value of adjusted plan assets as of a date to calculate a presumed adjusted funding target as of that date. The presumed adjusted funding target is then compared to the interim value of adjusted plan assets in order to determine the amount of any deemed reduction in the funding standard carryover balance and prefunding balance under section 436(f)(3) that is made as of the first day of the plan year (and, in certain circumstances, that may be made later in the plan year).

The interim value of adjusted plan assets is equal to the value of adjusted plan assets as of the first day of the plan year, determined without regard to future contributions and future elections with respect to the plan's prefunding and funding standard carryover balances under section 430(f) (for example, elections to add to the prefunding balance for the prior plan year, elections to use the prefunding and funding standard carryover balances to offset the minimum required contribution for a year, and elections (including deemed elections under section 436(f)(3)) to reduce the prefunding and funding standard carryover balances for the current plan year). The presumed adjusted funding target is equal to the interim value of adjusted plan assets for the plan year divided by the presumed AFTAP.

The final regulations provide that, if the presumed AFTAP for the plan year changes during the year, the rules regarding the deemed election to reduce funding balances must be reapplied based on the new presumed AFTAP. This will typically occur on the first day of the 4th month of a plan year, but could also happen at a different date if the enrolled actuary certifies the AFTAP for the prior plan year during the current plan year. In order to determine the amount of any reduction in prefunding balance and funding standard carryover balance that would apply in such a situation, a new presumed adjusted funding target must be established, which is then compared to the updated interim value of adjusted plan assets. For this purpose, the updated interim value of adjusted plan assets for the plan year is determined as the interim value of adjusted plan assets as of the first day of the plan year updated to take into account contributions for the prior plan year and section 430(f) elections with respect to the plan's prefunding and funding standard carryover balances made before the date of the change in the presumed AFTAP, and the new presumed adjusted funding target is equal to the updated interim value of adjusted plan assets divided by the new presumed AFTAP. The reapplication of the rules regarding the deemed election under section

436(f)(3) 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 (e) is greater than the amount that was initially reduced. Prior reductions of funding balances continue to apply.

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, no prohibited payment may be paid if the plan's enrolled actuary has not yet certified the plan's AFTAP for the plan year to be at least 100 percent. The presumption rules of section 436(h) do not apply for purposes of section 436(d)(2).

The regulations also provide special rules that apply when the presumed AFTAP is deemed to be under 60 percent as a result of the application of section 436(h)(2). In such a case, the regulations provide that neither a reduction of the funding standard carryover balance or prefunding balance nor a section 436 contribution can be used to increase the presumed AFTAP to 60 percent. Accordingly, no prohibited payment can be made, no benefit accruals are permitted, and no plan amendment increasing benefits can take effect during the period the plan is deemed to have an AFTAP of less than 60 percent. However, an unpredictable contingent event benefit is permitted to be paid if the plan sponsor makes the contribution described in section 436(b)(2)(B) (that is, a contribution equal to the increase in the funding target attributable to the unpredictable contingent event benefits).

2. <u>Rules relating to unpredictable contingent event benefits and plan amendments</u>.

Under the regulations, for purposes of applying the limitations applicable to unpredictable contingent event benefits and plan amendments during the presumption period, the presumed adjusted funding target must be adjusted to take into account the increase in the funding target attributable to the unpredictable contingent event benefits or the plan amendment, as well as the increase in the funding target attributable to any unpredictable contingent event benefits that are permitted to be paid as a result of any unpredictable contingent event that occurred, or plan amendment that has taken effect, in the prior plan year to the extent not taken into account in the prior plan year adjusted funding target attainment percentage, and any other unpredictable contingent event benefits that are permitted to be paid as a result of any unpredictable contingent event that occurred, or plan amendment that has taken effect, in the current plan year to the extent not previously taken into account in the presumed adjusted funding target for the plan year. The final regulations use the term <u>inclusive presumed adjusted funding target</u> for this value. The inclusive presumed adjusted funding target is used to calculate an inclusive presumed AFTAP by comparing it to the interim value of adjusted plan assets, updated to take into account contributions for the prior plan year, prior section 436 contributions for the current plan year, and section 430(f) elections with respect to the plan's prefunding and funding standard carryover balances made before the date of the unpredictable contingent event or the date the plan amendment would take effect.

During the presumption period, the rules relating to the deemed election of a collectively bargained plan to reduce the funding standard carryover balance and the prefunding balance must be applied based on the inclusive presumed adjusted funding target and the updated interim value of adjusted plan assets. Thus, if, based on the comparison of the updated interim value of adjusted plan assets and the inclusive presumed adjusted funding target, a plan amendment with respect to a collectively bargained plan can only take effect if the funding standard carryover balance and prefunding balance are reduced, then those balances must be reduced. A plan sponsor of a plan that is not a collectively bargained plan (and, thus, is not required to reduce the funding standard carryover balance and the prefunding balance) is permitted to reduce those balances in order to increase the updated interim value of adjusted plan assets that is compared to the inclusive presumed adjusted funding target.

Under the final regulations, if the ratio of the updated interim value of adjusted plan assets to the inclusive presumed adjusted funding target is less than the applicable threshold under section 436(b) or 436(c), then the plan is not permitted to provide any benefits attributable to the unpredictable contingent event, nor is the plan amendment permitted to take effect, 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 take effect under section 436(b)(2) or 436(c)(2). However, if, after application of any reduction in the funding standard carryover balance or prefunding balance (whether mandatory or optional), the ratio of the interim value of adjusted plan assets to the inclusive presumed adjusted funding target is greater than or equal to the applicable threshold under section 436(b) or 436(c), then the plan is not permitted to limit the payment of unpredictable contingent event benefits, nor is the plan permitted to restrict a plan amendment increasing benefit liabilities from becoming effective based on an expectation that the limitations under section 436(b) or 436(c) will apply following the enrolled actuary’s certification of the AFTAP for the plan year.

3. Updated determination of presumed AFTAP.

If, in accordance with the rules of operation under the final regulations, unpredictable contingent event benefits are permitted to be paid, or a plan amendment takes effect, because the plan sponsor makes a contribution described in section 436(b)(2) or (c)(2), then the presumed adjusted funding target must be adjusted to reflect the increase in the funding target attributable to the unpredictable contingent event benefits or the plan amendment and the present value of the section 436 contribution is included in the updated interim value of adjusted plan assets. For example, if a plan amendment would have caused the ratio of the updated interim value of adjusted plan assets to the inclusive presumed AFTAP to be less than 80 percent, then, after the contribution described in section 436(c)(2)(B) is made, the presumed AFTAP would be 80 percent. The adjustment to the presumed adjusted funding target is made on the date the contribution is made, and that date is a section 436 measurement date.

Similar rules apply to a contribution described in section 436(e)(2). Thus, if benefit accruals are permitted to resume in a plan year because the plan sponsor makes the contribution described in section 436(e)(2), then the presumed AFTAP will be increased to 60 percent. In this case, the adjustment to the presumed adjusted funding target is made on the date the contribution is made, and that date is a section 436 measurement date.

The regulations also provide that if a plan's funding standard carryover balance or prefunding balance is reduced as a result of applying the presumption rules, then the presumed AFTAP for the plan year is increased to reflect the higher interim value of adjusted plan assets resulting from the reduction in the funding standard carryover balance or prefunding balance. For example, if a reduction in the prefunding balance is made in an amount necessary to increase the presumed AFTAP to 60 percent, then the presumed AFTAP is changed to 60 percent. The date of the event that causes the reduction is a section 436 measurement date.

4. Periods for which no presumptions apply to the plan.

Under the regulations, 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 AFTAP for the plan year, the plan is not permitted to limit the payment of prohibited payments under section 436(d) or the accrual of benefits under section 436(e) based on an expectation that those sections will apply to the plan once an actuarial certification is issued. However, the limitations on unpredictable contingent event benefits under section 436(b) and plan amendments increasing benefit liabilities under section 436(c) must be applied during that period by treating the preceding year's certified AFTAP as if it were a presumed AFTAP and applying the rules for the presumption period as described in this preamble. Thus, an inclusive presumed adjusted funding target must be determined that takes into account prior events (including the unpredictable contingent event or plan amendment, any other unpredictable contingent event benefits that were permitted to be paid as a result of any unpredictable contingent event that occurred, and any other plan amendment that took effect, earlier during the plan year to the extent not taken into account in the certified AFTAP for the plan year, and any earlier section 436 contributions made for the plan year to the extent those contributions were not taken into account in the certified

AFTAP).

If after application of those rules the plan would be treated as having an AFTAP below the applicable threshold (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 take effect, unless the plan sponsor makes a contribution that would allow payment of the unpredictable contingent event benefits or would permit the plan amendment to go into effect. In the case where the plan sponsor makes section 436 contributions to avoid the application of the applicable benefit limitations, to the extent those contributions would not be needed to permit the payment of the unpredictable contingent event benefits or for a plan amendment increasing benefits to go into effect based on a subsequent certification of the AFTAP for the current plan year that takes into account the increase in the funding target attributable to those unpredictable contingent event benefits or the increase in liability attributable to that plan amendment, the excess section 436 contributions are recharacterized as employer contributions and taken into account under section 430 for the current plan year.

5. Periods following certification of AFTAP.

Under the final regulations, the rules of operation that apply during a period for which a section 436(h) presumption is in effect no longer apply for a plan year on and after the date the enrolled actuary for the plan issues a certification of the AFTAP 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. For example, the plan must provide that section

436(d) applies for distributions with annuity starting dates on and after the date of that certification using the certified AFTAP of the plan for the plan year. Similarly, the plan must provide that any prohibition on accruals under section 436(e) as a result of the enrolled actuary's certification that the AFTAP 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 AFTAP 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 AFTAP for a plan year by the plan's enrolled actuary, the plan sponsor must comply with the requirements of sections 436(b) and (c) for an unpredictable contingent event that occurs or a plan amendment that would take effect on or after the date of the enrolled actuary's certification. 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, any other unpredictable contingent event benefits that were permitted to be paid as a result of any unpredictable contingent event that occurred (and any other plan amendment that went into effect) earlier during the plan year to the extent not taken into account in the certified AFTAP for the plan year, and any earlier section 436 contributions made for the plan year to the extent those contributions were not taken into account in the certified AFTAP.

After the AFTAP for a plan year is certified by the plan's enrolled actuary, the deemed election to reduce funding balances 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 rules 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 section 436(d) or (e) is greater than the amount that was reduced. 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, 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 remaining amount of the funding balances, then the prior reduction continues to apply and no further reduction is made.

The enrolled actuary’s certification of the AFTAP for the plan for the plan year does not affect unpredictable contingent event benefits that were permitted to be paid for events that occurred during the prior periods for which a presumption under section 436(h) applied. In addition, the enrolled actuary’s certification of the AFTAP for the plan for the plan year does not affect a plan amendment that increases the liability for benefits where the amendment was permitted to first take effect during the prior periods for which a presumption under section 436(h) applies. Similarly, the enrolled actuary’s certification of the AFTAP for the plan for the plan year does not affect prohibited payment distributions with annuity starting dates before the certification and does not require a cessation of accruals prior to the date of that certification.

However, under the final regulations, if a plan does not pay benefits attributable to an unpredictable contingent event or plan amendment because of the application of a presumption under section 436(h) for a plan year, 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 AFTAP for that plan year, 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.

The final regulations clarify that, for any plan year in which a plan is providing benefits with respect to multiple unpredictable contingent events occurring within the plan year or plan amendments taking effect within the plan year, the section 436(b) restriction on unpredictable contingent event benefits and the section 436(c) restriction on plan amendments are applied with respect to each unpredictable contingent event or amendment by treating the increase in the funding target attributable to that event or amendment as if it included the increase in the funding target attributable to any earlier event or amendment (and including any earlier section 436 contributions for the plan year as plan assets). As applied with respect to the limitation on plan amendments, this rule ensures that the limitation applies in a similar fashion regardless of whether a benefit increase is effectuated through a series of amendments or through a single amendment. In the absence of such a rule, the limitation on plan amendments could be avoided through a series of amendments each of which provides only a small portion of the aggregate increase.

H. Determination of AFTAP and presumed AFTAP.

1. Determination of presumed AFTAP based on prior plan year's certified AFTAP.

The final regulations provide rules for the determination of the presumed AFTAP under section 436(h)(1) that are similar to the rules under the proposed regulations.

Thus, if a limitation under section 436 applied in the prior plan year based on a certified AFTAP during that plan year, the presumed AFTAP as of the first day of the current plan year is equal to the AFTAP for the prior plan year.

The final regulations modify the rule in the proposed regulations that would have permitted a certified AFTAP that is made on or after the first day of the 10th month of the prior plan year to be used as the basis for the presumed AFTAP in the current plan year (in lieu of using the deemed “under 60 percent” AFTAP that applied for the prior plan year in such a case). Under the final regulations, such a late prior plan year certification is permitted to be so used only if the certification took into account any unpredictable contingent event benefits that are permitted to be paid based on unpredictable contingent events that occurred and plan amendments that went into effect prior to that late certification (along with any associated section 436 contributions).

In addition, the regulations provide rules for the application of the presumptions if the plan actuary did not certify the AFTAP in the prior plan year, but that prior plan year ended before the first day of the 10th month of the plan year (so that section 436(h)(2) did not apply in that prior plan year). In such a case, the presumed AFTAP that applied as of the end of the prior plan year is treated as a certified AFTAP for that plan year which is used for purposes of the presumptions in the current year.

2. Change in presumed AFTAP on first day of the 4th month.

The final regulations provide rules for the application of section 436(h)(3) that are similar to the proposed regulations. Some comments suggested that section 436(h)(3) applies on a limitation by limitation basis (with the result that a plan could have different presumed AFTAPs among the various limitations). However, the IRS and the Treasury Department believe that applying a single presumed AFTAP for all purposes reflects the statutory language of section 436(h)(3) and provides a consistent set of rules for applying the limitations during the period following the first day of the 4th month of the plan year. This interpretation is also essential for purposes of the rule under which benefits with respect to unpredictable contingent events that previously occurred during the plan year and plan amendments that previously took effect during the plan year are taken into account on a combined basis for purposes of applying the limitations with respect to subsequent events or amendments, such as a subsequent unpredictable contingent event.

Under the final regulations, if the AFTAP for the prior plan year was at least 60 percent but less than 70 percent or was at least 80 percent but less than 90 percent, and the actuary has not certified the AFTAP for the current plan year before the first day of the 4th month of the current plan year, then the presumed AFTAP for the current plan year is 10 percentage points lower than the AFTAP for the prior plan year. As under the proposed regulations, this 10 percentage point reduction will also apply as of the date the actuary certifies the AFTAP for the prior plan year, even if that certification is on or after the first day of the 4th month of the current plan year. In either case, the date of the 10 percentage point reduction is a section 436 measurement date.

The final regulations also provide that the 10 percentage point reduction applies in the first year that section 436 applies to the plan if the AFTAP for the prior plan year was at least 70 percent but less than 80 percent. This rule reflects an interpretation of section 436(h)(3)(A) (providing for a 10 percentage point reduction in the AFTAP if a limitation under section 436 would have applied in the prior plan year) under which the determination of whether a limitation under section 436 would have applied in the prior plan year is made by assuming that section 436 was effective in that prior plan year.

3. <u>Change in presumed AFTAP on first day of 10th month for plans with no current year certification</u>.

The final regulations reflect the rules of section 436(h)(2), under which a plan for which the actuary has not issued a certification before the first day of the 10th month of the plan year is conclusively presumed to have an AFTAP of less than 60 percent beginning on that date. These rules are unchanged from the proposed regulations.

4. <u>Rules regarding certifications and range certifications</u>.

The proposed regulations would have provided that 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. The final regulations specify that the certification must also set forth the value of plan assets, the prefunding balance, the funding standard carryover balance, the value of the funding target used in the determination, the aggregate amount of annuity purchases included in the adjusted value of plan assets and the adjusted funding target, the unpredictable contingent event benefits permitted to be paid for unpredictable contingent events that occurred during the current plan year that were taken into account for the current plan year (including with any associated section 436 contribution), the plan amendments that went into effect in the current plan year that were taken into account for the current plan year (including with any associated section 436 contribution), and any other relevant factors. The actuarial assumptions and funding methods used in the calculation for the certification must be the actuarial assumptions and funding methods used for the plan for purposes of determining the minimum required contributions under section 430 for the plan year. Thus, if the actuary who determines the minimum required contributions for the plan year is not the same actuary who certified the AFTAP for the plan year, then the second actuary must either apply the actuarial assumptions and methods used by the first actuary or must issue a revised certification for the plan year. See section VII.H.5 of this preamble for a description of the consequences of a revised certification.

Some commenters requested that an enrolled actuary be permitted to certify the AFTAP for a plan year based on a “roll forward” of prior year actuarial results with appropriate adjustments for subsequent changes. The final regulations do not provide for such an alternative to estimate the AFTAP because the AFTAP must be based on the funding target for the current plan year and section 436 does not provide any rules to address discrepancies between an estimated AFTAP and an actual AFTAP for a plan year.

As an alternative to certifying a specific number for the plan’s AFTAP, the proposed regulations would have provided that the enrolled actuary is permitted to certify during the first 9 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 final regulations adopt this alternative and provide that such a “range” certification ends the application of the presumptions, but only if the enrolled actuary follows up with a certification of the specific AFTAP and that the certified specific AFTAP is within the range of the earlier certification. In addition, the final regulations permit a range certification of under 60 percent.

The proposed regulations would have provided that the specific AFTAP must be certified before the first day of the 10th month of that year. In response to concerns raised by commenters, the final regulations provide that, if the plan's enrolled actuary has issued a timely range certification for a plan year, then the specific AFTAP is permitted to be certified at any time prior to the end of the plan year. However, if the plan's enrolled actuary has issued a range certification for the plan year but does not issue a certification of the specific AFTAP for the plan by the last day of that plan year, the AFTAP for the plan is retroactively deemed to be less than 60 percent as of the first day of the 10th month of the plan year.

If this range certification alternative is followed, then the plan is treated as having a certified AFTAP at the smallest value within the applicable range. 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 date of the specific AFTAP certification. In such a case, if there is an unpredictable contingent event or a plan amendment is adopted 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). If the plan sponsor makes a contribution under section 436(b)(2) or section 436(c)(2), the final regulations 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 final regulations specify that the enrolled actuary is not permitted to certify the AFTAP based on a value of assets that includes contributions receivable for the prior plan year that have not actually been made as of the date of the certification. However, this rule does 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.

5. Change in certified AFTAP.

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 generally must be applied for the period beginning with the date of the first certification. The subsequent determination could be the correction of a prior incorrect certification (including a certification for a plan year beginning in 2008 which assumed an employer contribution that was not made) or it could be an update of a prior correct certification to take into account subsequent events, such as plan amendments, additional contributions, or elections under section 430(f). The implications of such a change depend on whether the change is a material change or an immaterial change.

For this purpose, the regulations define a change of AFTAP as 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. A change in a plan's AFTAP for a plan year can be a material change even if the only impact of the change occurs in the following plan year under the rules for determining the presumed AFTAP in that following year.

The regulations specify that a change in an AFTAP that is not a material change as described in the preceding paragraph is an immaterial change. In addition, the regulations provide that if the difference between the AFTAP for a plan year and the later revised determination of that percentage is the result of certain specified actions, then the change in the AFTAP is deemed to be an immaterial change. The proposed regulations would have provided that the specified actions are additional contributions for the preceding year or a plan sponsor's election to reduce the prefunding or funding standard carryover balance after the date of the certification. The final regulations add to this list, including adding a plan sponsor's election to apply the prefunding balance or funding standard carryover balance to offset the prior plan year's minimum required contribution, a change in funding method or actuarial assumptions (where such change required actual approval of the Commissioner, rather than deemed approval), and an unpredictable contingent event or plan amendment for which a section 436 contribution was made.

The final regulations provide rules requiring a recertification of the AFTAP in certain situations. For example, if the plan would have a material change in the AFTAP as a result of one of the changes described in the prior paragraph, the change is deemed immaterial only if the actuary recertifies the AFTAP for the plan year as soon as practicable thereafter, taking into account the relevant event. Similarly, if the plan sponsor is making a section 436 contribution in the amount needed to bring the AFTAP up to a relevant threshold (60 or 80 percent), then the actuary must recertify the AFTAP as 60 or 80 percent. The regulations also provide that the plan administrator is permitted to request an updated certification of AFTAP in other situations, such as where the employer makes a section 436 contribution in the amount of the increase in the funding target attributable to the unpredictable contingent event benefits or the plan amendment.

The regulations provide that a material change will result in the plan not satisfying the qualification rules. If 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, then the plan will not have been operated in accordance with its terms. Furthermore, the regulations provide that 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.

The final regulations provide that, in the case of an immaterial change, the revised percentage applies prospectively. For this purpose, in the case of a change that would be a material change but for the rule deeming it to be an immaterial change, the revised percentage must be applied beginning with the date of the event that gave rise to the need for the updated certification. As under the proposed regulations, an immaterial change does not change the inapplicability of the presumptions under section 436(h) for the plan year prior to the date of the subsequent certification.

I. Determination of adjusted 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, and the FTAP is determined under the same rules that apply under section 430(d).

The 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 value of plan assets, decreased by the plan's funding standard carryover balance and prefunding balance and increased by the aggregate amount of purchases of annuities for participants and beneficiaries (other than participants who, at the time of the purchase, were highly compensated employees (as defined in section 414(q), which definition includes highly compensated former employees described in §1.414(q)-1T, Q&A-4)) which were made by the plan during the preceding 2 plan years, to the extent not included in plan assets under section 430. The final regulations 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 same annuity purchases that were added to the assets in determining adjusted plan assets.

If the FTAP for a plan year, determined without regard to the subtraction of the funding standard carryover balance and the prefunding balance from the value of plan assets in accordance with section 436(f), would be 100 percent or more, then, for purposes of section 436, the value of net plan assets used in the determination of the FTAP (and hence the AFTAP) is determined without regard to any subtraction of funding balances under section 430(f)(4). The final regulations reflect the transition rule of section 436(j)(3)(B) under which a lower percentage is substituted for 100 percent for purposes of the rule described in the preceding sentence. However, this transition is only available if the plan's FTAP for each prior year is above the transition percentage. This latter requirement was unchanged by WRERA.

The final regulations also provide rules for determining the AFTAP for the prior plan year in the case of the first plan year beginning in 2008. These rules are the same as under the proposed regulations, except that the proposed regulations would have allowed the special rules to apply to the first effective plan year (which could be later than 2008 in the case of a plan described in sections 104 through 106 of PPA '06).

Under the rules for determining the AFTAP for the plan year preceding the first plan year beginning in 2008, the FTAP for the preceding plan year is determined by substituting the current liability for the funding target. The transition rules for determining the value of plan assets are the same under section 436 as apply under section 430(d). Thus, 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 in this preamble 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) (as in effect prior to PPA ’06) on the valuation date for 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 section 430(f)(5), then the present value (determined as of the valuation date for the prior plan 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.

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.

The final regulations differ from the proposed regulations in the transition rules that apply for the determination of a plan’s AFTAP for the pre-effective plan year in the case of a plan described in sections 104 through 106 of PPA ‘06. In such a case, the AFTAP is determined for that plan year in the same manner as for a plan to which section 430 applies to determine the plan’s minimum required contribution, except that the value of plan assets that forms the FTAP numerator is determined without subtraction of the funding standard carryover balance or the credit balance under the funding standard account.[9]

The regulations do not include any special rules authorized under section 436(k) (relating to the determination of the AFTAP for a plan that uses a valuation date other than the first day of the plan year). Those rules, based on the rules described in Notice 2008-21, will be included in future proposed regulations. See §601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin.

J. Timeliness of certification of a plan's AFTAP.

A number of comments were received raising issues concerning potential delays in the completion and delivery of a certification of the plan's AFTAP by the plan's enrolled actuary. In particular, commenters asked whether there was any legal obligation to provide a certification, whether an actuary could intentionally delay providing the certification, and whether the plan administrator could direct the certification to be delayed (or delay requesting a certification where the plan's actuary would not provide a certification until so requested by the plan administrator). These final regulations do not include any special rules relating to these comments, but these comments may be considered in connection with future proposed regulations. In addition, the Treasury Department and the IRS will be coordinating with the Department

[9] Section 436(m) provides for special rules to apply in determining a plan's AFTAP for the preceding plan year only for plan years beginning during 2008. Accordingly, the regulations limit the use of the special rule under which the plan's FTAP is determined based on the plan's current liability to the determination of the plan's FTAP for the 2007 plan year, even for a plan described in sections 104 through 106 of PPA '06 for which section 430 does not apply for purposes of determining a plan's minimum required contribution until a plan year after the 2008 plan year.

of Labor to consider the circumstances in which the power to delay issuance of a certification may result in fiduciary responsibilities in the administration of the plan, rather than being merely ministerial.

Section 1.411(d)-4, Q&A-4(a) provides generally that a plan that permits the employer, either directly or indirectly, through the exercise of discretion, to deny a participant a section 411(d)(6) protected benefit provided under the plan for which the participant is otherwise eligible violates the requirements of section 411(d)(6). In addition, pursuant to that regulation, a plan that permits employer discretion to deny the availability of a section 411(d)(6) protected benefit violates the definitely determinable requirement of section 401(a). Section 1.411(d)-4, Q&A-4(b) provides an exception to this general rule for limited discretion with respect to the ministerial or mechanical administration of the plan. Section 1.411(d)-4, Q&A-6(b) provides that a plan may not limit the availability of section 411(d)(6) protected benefits permitted under the plan based on objective conditions that are within the employer's discretion. As an example of such a provision, the regulation states that the availability of section 411(d)(6) protected benefits in a plan may not be conditioned on a determination with respect to the level of the plan's funded status because the amount of the plan's funding is within the employer's discretion.

Future proposed regulations are expected to address the interaction of the rules of section 436 and the rules of §1.411(d)-4 that relate to employer discretion. These future proposed regulations are expected to conform the rules of §1.411(d)-4, Q&A-6(b), regarding employer discretion in plan funding to the requirements of section 436. These future proposed regulations are also expected to address the extent to which §1.411(d)-

4, Q&A-4(b) (under which a plan may permit limited discretion with respect to ministerial acts) applies with respect to the certification of the plan's AFTAP.

Effective/Applicability Date

The final regulations under section 430 apply to plan years beginning on or after January 1, 2010, regardless of whether section 430 applies to determine the minimum required contribution for the plan year. For plan years beginning before January 1, 2010, plans are permitted to rely on these final regulations for purposes of satisfying the requirements of section 430. This reliance applies section by section under the final regulations. Alternatively, for plan years beginning before January 1, 2010, plans are permitted to rely on the proposed regulations under section 430(d), (f), (g), (h)(2), and (i) (REG-139236-07, 72 FR 74215; REG-113891-07, 72 FR 50544) for purposes of applying the rules of section 430.

Section 436 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 436 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of PPA '06. 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, section 436 does not apply to plan years beginning before the earlier of January 1, 2010, or the later of the date on which the last such collective bargaining agreement relating to the plan terminates[10] (determined without regard to any extension thereof agreed to after August 17, 2006), or the first day of the first plan year to which section 436 would otherwise

[10] As provided in section 113(b)(2) of PPA '06, 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.

apply. 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 if it is considered a collectively bargained plan under the rules that apply for purposes of section 436(f)(3)(C) described in section VII.A.7 of this preamble.

The final regulations under section 436 apply to plan years beginning on or after January 1, 2010. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in these final regulations for purposes of satisfying the requirements of section 436. Alternatively, for plan years beginning before January 1, 2010, plans are permitted to rely on the proposed regulations under section 436 (REG-113891-07, 72 FR 50544) for purposes of satisfying the requirements of section 436.

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 the enactment of section 436 (or pursuant to these regulations) until the last day of the first plan year beginning on or after January 1, 2009. 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 otherwise provided by the Secretary of the Treasury.[11] For example, section 411(d)(6) relief would be available for plan amendments that would prohibit single sum or other optional forms of benefit that include prohibited payments if the plan’s AFTAP was less than 60 percent, in accordance with section 436(d) and

[11] Except to the extent permitted under section 411(d)(6) and §1.411(d)-3 or 1.411(d)-4, 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 that the amendment is adopted and effective before the benefits accrue.

§1.436-1(d) of these regulations. 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.

Special Analyses

It has been determined that this Treasury Decision 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 regulations will not have a significant economic impact on a substantial number of small entities. The estimated burden imposed by the collection of information contained in these regulations is 1.5 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 regulations provide for several written elections to be made by the plan sponsor upon occasion; these written elections will require minimal time to prepare. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Michael P. Brewer, 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.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are 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(d)-1 is added to read as follows:

§1.430(d)-1 Determination of target normal cost and funding target.

(a) In general--(1) Overview. This section sets forth rules for determining a plan's target normal cost and funding target under sections 430(b) and 430(d), including guidance relating to the rules regarding actuarial assumptions under sections 430(h)(1), 430(h)(4), and 430(h)(5). Section 430 and this section apply to single employer defined benefit plans (including multiple employer plans as defined in section 413(c)) that are subject to section 412, but do not apply to multiemployer plans (as defined in section 414(f)). For further guidance on actuarial assumptions, see §1.430(h)(2)-1 (relating to interest rates) and §§1.430(h)(3)-1 and 1.430(h)(3)-2 (relating to mortality tables). See also §1.430(i)-1 for the determination of the funding target and the target normal cost for a plan that is in at-risk status.

(2) Organization of regulation. Paragraph (b) of this section sets forth certain definitions that apply for purposes of section 430. Paragraph (c) of this section provides rules regarding which benefits are taken into account in determining a plan's target normal cost and funding target. Paragraph (d) of this section sets forth the rules regarding the plan provisions that are taken into account in making these determinations, and paragraph (e) of this section provides rules on the plan population that is taken into account for this purpose. Paragraph (f) of this section provides rules relating to the actuarial assumptions and the plan's funding method that are used to determine present values. Paragraph (g) of this section contains effective/applicability dates and transition rules.

(3) 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 section 430 and this section are applied separately for each employer under the plan, as if each employer maintained a separate plan. Thus, the plan's funding target and target normal cost are computed separately for each employer 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 rules of section 430 and this section are applied as if all participants in the plan were employed by a single employer.

(b) Definitions--(1) Target normal cost--(i) In general. For a plan that is not in at-risk status under section 430(i) for a plan year, subject to the adjustments described in paragraph (b)(1)(iii) of this section, the target normal cost of the plan for the plan year is the present value (determined as of the valuation date) of all benefits under the plan that accrue during, are earned during, or are otherwise allocated to service for the plan year under the applicable rules of this section, including paragraph (c)(1)(ii)(B), (C), or (D) of this section. See §1.430(i)-1(d) and (e)(2) for the determination of the target normal cost for a plan that is in at-risk status.

(ii) Benefits allocated to a plan year. The benefits that accrue, are earned, or are otherwise allocated to service for the plan year are based on the actual benefits accrued, earned, or otherwise allocated to service for the plan year through the valuation date and benefits expected to accrue, be earned, or be otherwise allocated to service for the plan year for the period from the valuation date through the end of the plan year. The benefits that are allocated to the plan year under the rules of paragraph (c) of this section include any increase in benefits during the plan year that is attributable to increases in compensation for the current plan year even if that increase in benefits is with respect to benefits attributable to service performed in a preceding plan year. In addition, the benefits that are allocated to the plan year under the rules of paragraph (c) of this section include any increase in benefits during the plan year that arises on account of mandatory employee contributions (within the meaning of §1.411(c)-1(c)(4)) that are made during the plan year.

(iii) Special adjustments--(A) In general. The target normal cost of the plan for the plan year (determined under paragraph (b)(1)(i) of this section) is adjusted (not below zero) by adding the amount of plan-related expenses expected to be paid from plan assets during the plan year and subtracting the amount of mandatory employee contributions (within the meaning of §1.411(c)-1(c)(4)) that are expected to be made during the plan year.

(B) Plan-related expenses. [Reserved]

(2) Funding target. For a plan that is not in at-risk status under section 430(i) for a plan year, the funding target of the plan for the plan year is the present value (determined as of the valuation date) of all benefits under the plan that have been accrued, earned, or otherwise allocated to years of service prior to the first day of the plan year under the applicable rules of this section, including paragraph (c)(1)(ii)(B), (C), or (D) of this section. See §1.430(i)-1(c) and (e)(1) for the determination of the funding target for a plan that is in at-risk status.

(3) Funding target attainment percentage--(i) In general. Except as otherwise provided in this paragraph (b)(3), the funding target attainment percentage of a plan for a plan year is a fraction (expressed as a percentage)--

(A) The numerator of which is the value of plan assets for the plan year (determined under the rules of §1.430(g)-1) after subtraction of the prefunding balance and the funding standard carryover balance under section 430(f)(4)(B) and §1.430(f)-1(c); and

(B) The denominator of which is the funding target of the plan for the plan year (determined without regard to the at-risk rules of section 430(i) and §1.430(i)-1).

(ii) Determination of funding target attainment percentage for plans with delayed effective dates. If section 430 does not apply for purposes of determining the plan's minimum required contribution for a plan year that begins on or after January 1, 2008 (as is the case for a plan described in section 104, 105, or 106 of the Pension

Protection Act of 2006 (PPA ’06), Public Law 109-280 (120 Stat. 780)), then the funding target attainment percentage is determined for that plan year in accordance with the rules of paragraph (b)(3)(i) of this section in the same manner as for a plan to which section 430 applies to determine the plan’s minimum required contribution, except that the value of plan assets that forms the numerator under paragraph (b)(3)(i)(A) of this section is determined without subtraction of the funding standard carryover balance or the credit balance under the funding standard account.

(iii) Special rule for plans with zero funding target. If the funding target of the plan is equal to zero for a plan year, then the funding target attainment percentage under this paragraph (b)(3) is equal to 100 percent for the plan year.

(4) Present value. The present value of a benefit (including a portion of a benefit) with respect to a participant that is taken into account under the rules of paragraph (c) of this section is determined as of the valuation date by multiplying the amount of that benefit by the probability that the benefit will be paid at a future date and then discounting the resulting product using the appropriate interest rate under §1.430(h)(2)-1. The probability that the benefit will be paid with respect to the participant at such future date is determined using the actuarial assumptions that satisfy the standards of paragraph (f) of this section as to the probability of future service, advancement in age, and other events (such as death, disability, termination of employment, and selection of optional form of benefit) that affect whether the participant or beneficiary will be eligible for the benefit and whether the benefit will be paid at that future date.

(c) Benefits taken into account--(1) In general--(i) Benefits earned or accrued. The benefits taken into account in determining the target normal cost and the funding target under paragraph (b) of this section are all benefits earned or accrued under the plan that have not yet been paid as of the valuation date, including retirement-type and ancillary benefits (within the meaning of §1.411(d)-3(g)). The benefits taken into account are based on the participant's or beneficiary's status (such as active employee, vested or partially vested terminated employee, or disabled participant) as of the valuation date, and those benefits are allocated to the funding target or the target normal cost under paragraph (c)(1)(ii) of this section.

(ii) Allocation of benefits--(A) In general. To the extent that the amount of a participant's benefit that is expected to be paid is a function of the accrued benefit, the allocation of the benefit for purposes of determining the funding target and the target normal cost is made using the rules of paragraph (c)(1)(ii)(B) of this section. To the extent that the amount of a participant's benefit that is expected to be paid is not a function of the accrued benefit, but is a function of the participant's years of service (or is the excess of a function of the participant's years of service over a function of the participant's accrued benefit), the allocation of the benefit for purposes of determining the funding target and the target normal cost is made using the rules of paragraph (c)(1)(ii)(C) of this section. To the extent that the amount of a participant's benefit that is expected to be paid is not allocated under the rules of paragraph (c)(1)(ii)(B) or (C) of this section, the allocation of the benefit for purposes of determining the funding target and the target normal cost is made using the rules of paragraph (c)(1)(ii)(D) of this section.

(B) Benefits that are based on accrued benefits. If the allocation of the benefit for purposes of determining the funding target and the target normal cost is made under this paragraph (c)(1)(ii)(B), then the portion of a participant's benefit that is taken into account in the funding target for a plan year is determined by applying the function to the accrued benefit as of the first day of the plan year, and the portion of the benefit that is taken into account in determining the target normal cost for the plan year is determined by applying that function to the increase in the accrued benefit during the plan year. For example, a benefit that is assumed to be payable at a particular early retirement age in the amount of 90 percent of the accrued benefit is taken into account in the funding target in the amount of 90 percent of the accrued benefit as of the beginning of the plan year, and that benefit is taken into account in the target normal cost in the amount of 90 percent of the increase in the accrued benefit during the plan year.

(C) Benefits that are based on service. If the allocation of the benefit for purposes of determining the funding target and the target normal cost is made under this paragraph (c)(1)(ii)(C), then the portion of a participant's benefit that is taken into account in determining the funding target for a plan year is determined by applying the function to the participant's years of service as of the first day of the plan year, and the portion of the benefit that is taken into account in determining the target normal cost for the plan year is determined by applying that function to the increase in the participant's years of service during the plan year. For example, if a plan provides a post-retirement death benefit of $500 per year of service, then the funding target is determined based on a death benefit of $500 multiplied by a participant's years of service at the beginning of the year, and if the participant earns or is expected to earn a full year of service during the plan year, the target normal cost is based on the additional $500 in death benefits attributable to that additional year of service.

(D) Other benefits. If the allocation of the benefit for purposes of determining the funding target and the target normal cost is made under this paragraph (c)(1)(ii)(D), then the portion of a participant's benefit that is taken into account in determining the funding target for a plan year is equal to the total benefit multiplied by the ratio of the participant's years of service as of the first day of the plan year to the years of service the participant will have at the time of the event that causes the benefit to be payable (whether the benefit is expected to be paid at the time of that decrement or at a future time), and the portion of the benefit that is taken into account in determining the target normal cost for the plan year is the increase in the proportionate benefit attributable to the increase in the participant's years of service during the plan year. For example, if a plan provides a Social Security supplement for a participant who retires after 30 years of service that is equal to a participant's Social Security benefit, the funding target with respect to the benefit payable beginning at a particular age (which reflects the probability of retirement at that age) is determined based on the projected Social Security benefit payable at the particular age multiplied by a fraction, the numerator of which is the participant's years of service as of the first day of the plan year and the denominator of which is the participant's projected years of service at the particular age. In such a case, if the participant earns or is expected to earn a full year of service during the plan year, the target normal cost is determined based on the projected Social Security benefit payable at the particular age multiplied by a fraction, the numerator of which is one and the denominator of which is the participant's projected years of service at the particular age.

(iii) Application of section 436 limitations to funding target and target normal cost determination--(A) Effect of limitation on unpredictable contingent event benefits. The determination of the funding target and the target normal cost of a plan for a plan year must take into account any limitation on unpredictable contingent event benefits under section 436(b) with respect to unpredictable contingent events which occurred before the valuation date, but must not take into account anticipated funding-based limitations on unpredictable contingent event benefits under section 436(b) with respect to unpredictable contingent events which are expected to occur on or after the valuation date.

(B) Effect of limitation on applicability of plan amendments. See paragraph (d) of this section for rules regarding the treatment of plan amendments that take effect during the plan year taking into account the restrictions under section 436(c).

(C) Effect of limitation on prohibited payments. The determination of the funding target and the target normal cost of a plan for a plan year must take into account any limitation on prohibited payments under section 436(d) with respect to any annuity starting date that was before the valuation date, but must not take into account any limitation on prohibited payments under section 436(d) for any annuity starting date on or after the valuation date (however, the determination must take into account benefit distributions under plan provisions that allow new annuity starting dates with respect to distributions that were limited under section 436(d)).

(D) Effect of limitation on benefit accruals. Except as otherwise provided in this paragraph (c)(1)(iii)(D), the determination of the funding target of a plan for a plan year must take into account any limitation on benefit accruals under section 436(e) applicable before the valuation date. However, if the plan terms provide for the automatic restoration of benefit accruals as permitted under §1.436-1(a)(4)(ii)(B), and the restoration of benefits as of the valuation date will not be treated as resulting from a plan amendment under the rules of §1.436-1(c)(3) (because the period of limitation as of the valuation date does not exceed 12 months and the adjusted funding target attainment percentage for the plan would not be less than 60 percent taking into account the restored benefit accruals), then the determination of the funding target of a plan for a plan year must not take into account the limitation on benefit accruals under section 436(e) for that period. The determination of the target normal cost of a plan for a plan year must not take into account any limitation on benefit accruals under section 436(e). Thus, if an employer wishes to take a plan freeze into account in determining the target normal cost, the plan must be specifically amended to cease accruals.

(iv) Effect of other limitations of benefits--(A) Liquidity shortfalls. The determination of the funding target and the target normal cost of a plan for a plan year must take into account any restrictions on payments under section 401(a)(32) on account of a liquidity shortfall (as defined in section 430(j)(4)) for periods preceding the valuation date. The determination of the funding target and the target normal cost must not take into account any restrictions on payments under section 401(a)(32) on account of a liquidity shortfall or possible liquidity shortfall for any period on or after the valuation date.

(B) High 25 limitation. The determination of the funding target and the target normal cost of a plan for a plan year must take into account any restrictions on payments under §1.401(a)(4)-5(b) to highly compensated employees to the extent that benefits were not paid or will not be paid because of a limitation that applied prior to the valuation date. If a benefit that was otherwise restricted was paid prior to the valuation date but with suitable security (such as an escrow account) provided to the plan in the event of a plan termination, the benefit is treated as distributed for purposes of section 430 and this section. Accordingly, the funding target does not include any liability for the benefit and the plan assets do not include the security. The determination of the funding target and the target normal cost of a plan for a plan year must not take into account any restrictions on payments under §1.401(a)(4)-5(b) to highly compensated employees that are anticipated with respect to annuity starting dates on or after the valuation date on account of the funded status of the plan.

(2) Benefits provided by insurance--(i) General rule. A plan generally is required to reflect in the plan's funding target and target normal cost the liability for benefits that are funded through insurance contracts held by the plan, and to include the corresponding insurance contracts in plan assets. Paragraph (c)(2)(ii) of this section sets forth an alternative to this general approach. A plan's treatment of benefits funded through insurance contracts pursuant to this paragraph (c)(2) is part of the plan's funding method. Accordingly, that treatment can be changed only with the consent of the Commissioner.

(ii) Separate funding of insured benefits. As an alternative to the treatment described in paragraph (c)(2)(i) of this section, in the case of benefits that are funded through insurance contracts, the liability for benefits provided under such contracts is permitted to be excluded from the plan's funding target and target normal cost, provided that the corresponding insurance contracts are excluded from plan assets. This treatment is only available with respect to insurance purchased from an insurance company licensed under the laws of a State and only to the extent that a participant's or beneficiary's right to receive those benefits is an irrevocable contractual right under the insurance contracts, based on premiums paid to the insurance company prior to the valuation date. For example, in the case of a retired participant receiving benefits from an annuity contract in pay status under which no premiums are required on or after the valuation date, the liability for benefits provided by the contract is permitted to be excluded from the plan's funding target provided that the value of the contract is also excluded from the value of plan assets. Similarly, in the case of an active or deferred vested participant whose benefits are funded by a life insurance or annuity contract under which further premiums are required on or after the valuation date, the liability for benefits, if any, that would be paid from the contract if no further premiums were to be paid (for example, if the contract were to go on reduced paid-up status) is permitted to be excluded from the plan's funding target and target normal cost, provided that the value of the contract is excluded from the value of plan assets. By contrast, if the plan trustee can surrender a contract to the insurer for its cash value, then the participant's or beneficiary's right to receive those benefits is not an irrevocable contractual right and, therefore, the liability for benefits provided under the contract must be taken into account in determining the plan's funding target and target normal cost and the contracts cannot be excluded from plan assets.

(d) Plan provisions taken into account--(1) General rule--(i) Plan provisions adopted by valuation date. Except as otherwise provided in this paragraph (d), a plan's funding target and target normal cost for a plan year are determined based on plan provisions that are adopted no later than the valuation date for the plan year and that take effect on or before the last day of the plan year. For example, in the case of a plan amendment adopted on or before the valuation date for the plan year that has an effective date occurring in the current plan year, the plan amendment is taken into account in determining the funding target and the target normal cost for the current plan year if it is permitted to take effect under the rules of section 436(c) for the current plan year, but the amendment is not taken into account for the current plan year if it does not take effect until a future plan year.

(ii) Plan provisions adopted after valuation date. If a plan administrator makes the election described in section 412(d)(2) with respect to a plan amendment, then the plan amendment is treated as having been adopted on the first day of the plan year for purposes of this paragraph (d). Section 412(d)(2) applies to any plan amendment adopted no later than 2-1/2 months after the close of the plan year, including an amendment adopted during the plan year. Thus, if an amendment is adopted after the valuation date for a plan year (and no later than 2-1/2 months after the close of the plan year), but takes effect by the last day of the plan year, the amendment is taken into account in determining the plan’s funding target and target normal cost for the plan year if the plan administrator makes the election described in section 412(d)(2) with respect to such amendment.

(iii) Determination of when an amendment takes effect. For purposes of this paragraph (d)(1), the determination of whether an amendment that increases benefits takes effect and when it takes effect is determined in accordance with the rules of section 436(c) and §1.436-1(c)(5). For purposes of this paragraph (d)(1), in the case of an amendment that decreases benefits, the amendment takes effect under a plan on the first date on which the benefits of any individual who is or could be a participant or beneficiary under the plan would be less than those benefits would be under the pre-amendment plan provisions if the individual were on that date to satisfy the applicable conditions for the benefits. In either case, the determination of when an amendment takes effect is unaffected by an election under section 412(d)(2).

(2) Special rule for certain amendments increasing liabilities. In the case of a plan amendment that is not required to be taken into account under the rules of paragraph (d)(1) of this section because it is adopted after the valuation date for the plan year, the plan amendment must be taken into account in determining a plan's funding target and target normal cost for the plan year if the plan amendment--

(i) Takes effect by the last day of the plan year;

(ii) Increases the 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; and

(iii) Would not be permitted to take effect under the rules of section 436(c) if those rules were applied--

(A) By treating the increase in the target normal cost for the plan year attributable to the amendment (and all other amendments that must be taken into account solely because of the application of the rules in this paragraph (d)(2)) as if the increase were an increase in the funding target for the plan year; and

(B) By taking into account all unpredictable contingent event benefits permitted to be paid for unpredictable contingent events that occurred during the current plan year and all plan amendments that took effect in the current plan year (including all amendments to which this paragraph (d)(2) applies for the plan year).

(3) Allocation of benefits attributable to plan amendments. If a plan amendment is taken into account for a plan year under the rules of this paragraph (d), then the allocation of benefits that is used to determine the funding target and the target normal cost for that plan year is based on the plan as amended. Thus, if an amendment that is taken into account for a plan year increases a participant's accrued benefit for service prior to the beginning of the plan year, then the present value of that increase is included in the funding target for the plan year.

(e) Plan population taken into account--(1) In general. In making any determination of the funding target or target normal cost under paragraph (b) of this section, the plan population is determined as of the valuation date. The plan population must include three classes of individuals--

(i) Participants currently employed in the service of the employer;

(ii) Participants who are retired under the plan or who are otherwise no longer employed in the service of the employer; and

(iii) All other individuals currently entitled to benefits under the plan.

(2) Assumption regarding rehiring of former employees--(i) Special exclusion for "rule of parity" cases. Certain individuals may be excluded from the class of individuals described in paragraph (e)(1)(ii) of this section. The excludable individuals are those former employees who, prior to the valuation date for the plan year, have terminated service with the employer without vested benefits and whose service might be taken into account in future years because the "rule of parity" of section 411(a)(6)(D) does not

permit that service to be disregarded. However, if the plan's experience as to separated employees returning to service has been such that the exclusion described in this paragraph (e)(2) would be unreasonable, then no such exclusion is permitted.

(ii) Application to partially vested participants. Whether former employees who are terminated with partially vested benefits are assumed to return to service is determined under the same rules that apply to former employees without vested benefits under paragraph (e)(2)(i) of this section.

(3) Anticipated future participants. In making any determination of the funding target or target normal cost under paragraph (b) of this section, the actuarial assumptions and funding method used for the plan must not anticipate the affiliation with the plan of future participants not employed in the service of the employer on the plan’s valuation date. However, any such determination may anticipate the affiliation with the plan of current employees who have not yet satisfied the participation (age and service) requirements of the plan as of the valuation date.

(f) Actuarial assumptions and funding method used in determination of present value--(1) Selection of actuarial assumptions and funding method--(i) General rules. The determination of any present value or other computation under section 430 and this section must be made on the basis of actuarial assumptions and a funding method. Except as otherwise specifically provided (for example, in §1.430(h)(2)-1(b)(6) or section 4006(a)(3)(E)(iv) of the Employee Retirement Income Security Act of 1974, as amended (ERISA)), the same actuarial assumptions and funding method must be used for all computations under sections 430 and 436. For example, the actuarial assumptions and the funding method used in making a certification of the adjusted funding target attainment percentage for a plan year must be the same as those disclosed on the actuarial report under section 6059 (Schedule SB, “Single-Employer Defined Benefit Plan Actuarial Information” of Form 5500, “Annual Return/Report of Employee Benefit Plan”).

(ii) Changes in actuarial assumptions and funding method. Actuarial assumptions established for a plan year cannot subsequently be changed for that plan year unless the Commissioner determines that the assumptions that were used are unreasonable. Similarly, a funding method established for a plan year cannot subsequently be changed for that plan year unless the Commissioner determines that the use of that funding method for that plan year is impermissible.

(iii) Procedures for establishing actuarial assumptions and funding method. For purposes of this paragraph (f)(1), in the case of a plan for which an actuarial report under section 6059 (Schedule SB of Form 5500) is required to be filed for a plan year, actuarial assumptions and the funding method are established by the filing of the actuarial report if it is filed no later than the due date (with extensions) for the report. In the case of a plan for which an actuarial report for a plan year is not required to be filed, actuarial assumptions and the funding method are established by the delivery of the completed report to the employer if it is delivered no later than what would be the due date (with extensions) for filing the actuarial report were such a filing required. If the actuarial report is not filed or delivered by the applicable date described in the two preceding sentences, then the same actuarial assumptions (such as the same interest rate and mortality table elections) and funding method as were used for the preceding plan year apply for all computations under sections 430 and 436 for the current plan year, unless the Commissioner permits or requires other actuarial assumptions or another funding method permitted under section 430 to be used for the current plan year.

(iv) Scope of funding method. A plan's funding method includes not only the overall funding method used by the plan but also each specific method of computation used in applying the overall method. However, the choice of which actuarial assumptions are appropriate to the overall method or to the specific method of computation is not a part of the funding method. The assumed earnings rate used for purposes of determining the actuarial value of assets under section 430(g)(3)(B) is treated as an actuarial assumption, rather than as part of the funding method.

(2) Interest and mortality rates. Section 430(h)(2) and §1.430(h)(2)-1 set forth the interest rates, and section 430(h)(3) and §§1.430(h)(3)-1 and 1.430(h)(3)-2 set forth the mortality tables, that must be used for purposes of determining any present value under this section. However, notwithstanding the requirement to use the mortality tables, in the case of a plan which has fewer than 100 participants and beneficiaries who are not in pay status, the actuarial assumptions may assume no pre-retirement mortality, but only if that assumption would be a reasonable assumption.

(3) Other assumptions. In the case of actuarial assumptions other than those specified in sections 430(h)(2), 430(h)(3), and 430(i), each of those actuarial assumptions must be reasonable (taking into account the experience of the plan and reasonable expectations). In addition, the actuarial assumptions (other than those specified in sections 430(h)(2), 430(h)(3), and 430(i)) must, in combination, offer the plan's enrolled actuary's best estimate of anticipated experience under the plan based

on information determined as of the valuation date. See paragraph (f)(4)(iii) of this section for special rules for determining the present value of a single-sum and similar distributions.

(4) Probability of benefit payments in single sum or other optional forms--(i) In general. This paragraph (f)(4) provides rules relating to the probability that benefit payments will be paid as single sums or other optional forms under a plan and the impact of that probability on the determination of the present value of those benefit payments under section 430.

(ii) General rules of application. Any determination of present value or any other computation under this section must take into account--

(A) The probability that future benefit payments under the plan will be made in the form of any optional form of benefit provided under the plan (including single-sum distributions), determined on the basis of the plan’s experience and other related assumptions, in accordance with paragraph (f)(3) of this section; and

(B) Any difference in the present value of future benefit payments that results from the use of actuarial assumptions in determining the amount of benefit payments in any such optional form of benefit that are different from those prescribed by section 430(h).

(iii) Single-sum and similar distributions--(A) Distributions using section 417(e) assumptions. In the case of a distribution that is subject to section 417(e)(3) and that is determined using the applicable interest rates and applicable mortality table under section 417(e)(3), for purposes of applying paragraph (f)(4)(ii) of this section, the computation of the present value of that distribution is treated as having taken into account any difference in present value that results from the use of actuarial assumptions that are different from those prescribed by section 430(h) (as required under paragraph (f)(4)(ii)(B) of this section) if and only if the present value of the distribution is determined in accordance with this paragraph (f)(4)(iii).

(B) Substitution of annuity form. Except as otherwise provided in this paragraph (f)(4)(iii), the present value of a distribution is determined in accordance with this paragraph (f)(4)(iii) if that present value is determined as the present value, using special actuarial assumptions, of the annuity (either the deferred or immediate annuity) which is used under the plan to determine the amount of the distribution. Under these special assumptions, for the period beginning with the expected annuity starting date for the distribution, the current applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date is substituted for the mortality table under section 430(h)(3) that would otherwise be used. In addition, under these special assumptions, the valuation interest rates under section 430(h)(2) are used for purposes of discounting the projected annuity payments from their expected payment dates to the valuation date (as opposed to the interest rates under section 417(e)(3) which the plan uses to determine the amount of the benefit).

(C) Optional application of generational mortality and phase-in of interest rates. In determining the present value of a distribution under this paragraph (f)(4)(iii), if a plan uses the generational mortality tables under §1.430(h)(3)-1(a)(4) or §1.430(h)(3)-2, the plan is permitted to use a 50-50 male-female blend of the annuitant mortality rates under the §1.430(h)(3)-1(a)(4) generational mortality tables in lieu of the applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date. Similarly, a plan is permitted to make adjustments to the interest rates in order to reflect differences between the phase-in of the section 430(h)(2) segment rates under section 430(h)(2)(G) and the adjustments to the segment rates under section 417(e)(3)(D)(iii).

(D) Distributions subject to section 417(e)(3) using other assumptions. In the case of a distribution that is subject to section 417(e)(3) but that is determined on a basis other than using the applicable interest rates and the applicable mortality table under section 417(e)(3), for purposes of applying paragraph (f)(4)(ii)(B) of this section, the computation of present value must take into account the extent to which the present value of the distribution is different from the present value determined using the rules of paragraph (f)(4)(iii)(B) of this section, based on actuarial assumptions that satisfy the requirements of paragraph (f)(3) of this section. If the plan provides that the amount of the benefit is based on a comparison of the section 417(e)(3) benefit (that is, the benefit determined using the applicable interest rates and the applicable mortality table under section 417(e)(3)) with another benefit determined using some other basis, then paragraph (f)(4)(ii)(B) of this section is applied as of the valuation date by comparing the present value of the section 417(e)(3) benefit determined under the rules of paragraph (f)(4)(iii)(B) of this section with the present value of the other benefit. The rule of this paragraph (f)(4)(iii)(D) applies, for example, where a distribution that is subject to section 417(e)(3) is determined as the greater of the benefit determined using the applicable interest rates and the applicable mortality table under section 417(e)(3) and the benefit determined using some other basis, or where the amount of a distribution that is subject to section 417(e)(3) is determined using an interest rate other than the applicable interest rates as required under section 415(b)(2)(E)(ii) (see §1.417(e)-1(d)(1)).

(5) Distributions from applicable defined benefit plans under section 411(a)(13)(C)--(i) In general. In the case of an applicable defined benefit plan described in section 411(a)(13)(C), if the amount of a future distribution is based on an interest adjustment applied to the current accumulated benefit, then the amount of that distribution is determined by projecting the future interest credits or equivalent amount under the plan's interest crediting rules using actuarial assumptions that satisfy the requirements of paragraph (f)(3) of this section. Thus, if a plan provides for a single-sum distribution equal to the balance of a participant's hypothetical account under a cash balance plan, then the amount of that future distribution is equal to the projected account balance at the expected date of payment determined using actuarial assumptions that satisfy the requirements of paragraph (f)(3) of this section.

(ii) Annuity distributions--(A) General rule. In the case of an applicable defined benefit plan described in section 411(a)(13)(C), if the amount of an annuity distribution is based on either the balance of a hypothetical account maintained for a participant or the accumulated percentage of a participant's final average compensation, then the amount of that annuity distribution is calculated by converting the projected account balance (or accumulated percentage of final average compensation), in accordance with paragraph (f)(5)(i) of this section, to an annuity by applying the plan's annuity conversion provisions using the rules of this paragraph (f)(5)(ii).

(B) Use of current annuity factors. Except as otherwise provided in paragraph (f)(5)(ii)(C) of this section, if the plan bases the conversion of the projected account balance (or accumulated percentage of final average compensation) to an annuity using the applicable interest rates and applicable mortality table under section 417(e)(3), then the amount of the annuity distribution is determined by dividing the projected account balance (or accumulated percentage of final average compensation) by an annuity factor corresponding to the assumed form of payment using, for the period beginning with the annuity starting date, the current applicable mortality table under section 417(e)(3) that would apply to a distribution with an annuity starting date occurring on the valuation date (in lieu of the mortality table under section 430(h)(3) that would otherwise be used) and the valuation interest rates under section 430(h)(2) (as opposed to the interest rates under section 417(e)(3) which the plan uses to determine the amount of the annuity).

(C) Optional application of generational mortality and phase-in of segment rates. In determining the amount of an annuity distribution under paragraph (f)(5)(ii)(B) of this section, a plan is permitted to apply the options described in paragraph (f)(4)(iii)(C) of this section.

(D) Distributions using assumptions other than assumptions under section 417(e)(3). In applying this paragraph (f)(5)(ii), in the case of a plan that determines an annuity using a basis other than the applicable interest rates and applicable mortality table under section 417(e)(3), the amount of the annuity distribution must be based on actuarial assumptions that satisfy the requirements of paragraph (f)(3) of this section.

(6) Unpredictable contingent event benefits. Any determination of present value or any other computation under this section must take into account, based on information as of the valuation date, the probability that future benefits (or increased

benefits) will become payable under the plan due to the occurrence of an unpredictable contingent event (as described in §1.436-1(j)(9)). For this purpose, this probability with respect to an unpredictable contingent event may be assumed to be zero if there is not more than a de minimis likelihood that the unpredictable contingent event will occur.

(7) Reasonable techniques permitted--(i) Determination of benefits to be paid during the plan year. Any reasonable technique can be used to determine the present value of the benefits expected to be paid during a plan year, based on the interest rates and mortality assumptions applicable for the plan year. For example, the present value of a monthly retirement annuity payable at the beginning of each month can be determined--

(A) Using the standard actuarial approximation that reflects 13/24ths of the discounted expected payments for the year as of the beginning of the year and 11/24ths of the discounted expected payments for the year as of the end of the year;

(B) By assuming a uniform distribution of death during the year; or

(C) By assuming that the payment is made in the middle of the year.

(ii) Determination of target normal cost. In the case of a participant for whom there is a less than 100 percent probability that the participant will terminate employment during the plan year, for purposes of determining the benefits expected to accrue, be earned, or otherwise allocated to service during the plan year which are used to determine the target normal cost, it is permissible to assume the participant will not terminate during the plan year, unless using this method of calculation would be unreasonable.

(8) Approval of significant changes in actuarial assumptions for large plans--(i) In

general. Except as otherwise provided in paragraph (f)(8)(iii) of this section, any actuarial assumptions used to determine the funding target of a plan for a plan year during which the plan is described in paragraph (f)(8)(ii) of this section cannot be changed from the actuarial assumptions that were used for the preceding plan year without the approval of the Commissioner if the changes in assumptions result in a decrease in the plan's funding shortfall (within the meaning of section 430(c)(4)) for the current plan year (disregarding the effect on the plan's funding shortfall resulting from changes in interest and mortality assumptions under sections 430(h)(2) and (h)(3)) that either exceeds $50,000,000, or exceeds $5,000,000 and is 5 percent or more of the funding target of the plan before such change.

(ii) Affected plans. A plan is described in this paragraph (f)(8)(ii) for a plan year if--

(A) The plan is a defined benefit plan (other than a multiemployer plan) to which Title IV of ERISA applies; and

(B) The aggregate unfunded vested benefits used to determine variable-rate premiums for the plan year (as determined under section 4006(a)(3)(E)(iii) of ERISA) of the plan and all other plans maintained by the contributing sponsors (as defined in section 4001(a)(13) of ERISA) and members of such sponsors' controlled groups (as defined in section 4001(a)(14) of ERISA) which are covered by Title IV of ERISA (disregarding multiemployer plans and disregarding plans with no unfunded vested benefits) exceed $50,000,000.

(iii) Automatic approval to resume use of previously used assumptions upon exiting at-risk status during phase-in. A plan that is not in at-risk status for the current plan year and that was in at-risk status for the prior plan year (but not for a period of 5 or more consecutive plan years) is granted automatic approval to use the actuarial assumptions that were applied before the plan entered at-risk status and that were used in combination with the required at-risk assumptions during the period the plan was in at-risk status.

(9) Examples. The following examples illustrate the rules of this section. Unless otherwise indicated, these examples are based on the following assumptions: the normal retirement age is 65, the minimum required contribution for the plan is determined under the rules of section 430 starting in 2008, the plan year is the calendar year, the valuation date is January 1, no plan-related expenses are paid or expected to be paid from plan assets, and the plan does not provide for mandatory employee contributions. The examples are as follows:

Example 1. (i) Plan P provides an accrued benefit equal to 1.0% of a participant's highest 3-year average compensation for each year of service. Plan P provides that an early retirement benefit can be received at age 60 equal to the participant's accrued benefit reduced by 0.5% per month for early commencement. On January 1, 2010, Participant A is age 60 and has 12 years of past service. Participant A's compensation for the years 2007 through 2009 was $47,000, $50,000, and $52,000, respectively. Participant A's rate of compensation at December 31, 2009, is $54,000 and A's rate of compensation for 2010 is assumed not to increase at any point during 2010. Decrements are applied at the beginning of the plan year.

(ii) Participant A's annual accrued benefit as of January 1, 2010, is $5,960 [0.01 x 12 x ($47,000 + $50,000 + $52,000) ÷ 3]. Participant A's expected benefit accrual for 2010 is $800 [0.01 x 13 x ($50,000 + $52,000 + $54,000) ÷ 3 - $5,960], to the extent that Participant A is expected to continue in employment for the full 2010 plan year.

(iii) Because the early retirement benefit is a function of the participant's accrued benefit, the allocation of the benefit for purposes of determining the target normal cost and funding target is made under paragraph (c)(1)(ii)(B) of this section. Accordingly, for Participant A, the early retirement benefit that is taken into account with respect to the decrement at age 60 when determining the 2010 funding target is $4,172 [$5,960 accrued benefit x (1 - 0.005 x 60 months)]. The expected accrual of the early retirement benefit during 2010 that is taken into account for Participant A with respect to the decrement at age 60 when determining the 2010 target normal cost is zero, because in this example the age-60 decrement would be applied as of January 1, 2010, before Participant A would earn any additional benefits. (But see paragraph (f)(7)(ii) of this section for an alternative approach for determining the expected accrual with respect to the decrement at age 60.)

(iv) The early retirement benefit for Participant A with respect to the decrement at age 61 that is taken into account in determining the funding target for the 2010 plan year is $4,529.60 [$5,960 accrued benefit x (1 - 0.005 x 48 months)]. The portion of the early retirement benefit that is taken into account for Participant A with respect to the decrement at age 61 that is taken into account in determining the target normal cost for the 2010 plan year is $608 [$800 expected annual accrual x (1 - 0.005 x 48 months)].

Example 2. (i) The facts are the same as in Example 1. In addition, the plan offers a $500 temporary monthly supplement to participants who complete 15 years of service and retire from active employment after attaining age 60. The temporary supplement is payable until the participant turns age 62. In addition, the supplement is limited so that it does not exceed the participant's Social Security benefit payable at age 62. On January 1, 2010, Participant B is age 55 and has 20 years of past service, and Participant C is age 60 and has 14 years of past service. For Participants B and C, the projected Social Security benefit is greater than $500 per month.

(ii) Because the temporary supplement is not a function of the participant's accrued benefit or service, the allocation of the benefit for purposes of determining the target normal cost and funding target is made under paragraph (c)(1)(ii)(D) of this section. The portion of the annual temporary supplement for Participant B with respect to the early retirement decrement occurring at age 60 that is taken into account in determining the funding target for the 2010 plan year is $4,800 [($500 x 12 months) x 20 years of past service ÷ 25 years of service at assumed early retirement age]. The portion of the annual temporary supplement for Participant B with respect to the early retirement decrement occurring at age 61 that is taken into account in determining the funding target for the 2010 plan year is $4,615 [($500 x 12 months) x 20 years of past service ÷ 26 years of service at assumed early retirement age]. In each case, the allocable portion of the benefit is assumed to be payable until age 62 (or the participant's death, if earlier).

(iii) For Participant B, the portion of the annual temporary supplement with respect to the early retirement decrement occurring at age 60 that is taken into account in determining the target normal cost for the 2010 plan year is $240 [($500 x 12 months) x 1 year of service expected to be earned during the plan year ÷ 25 years of service at assumed early retirement age]. The portion of the annual temporary supplement with respect to the early retirement decrement occurring at age 61 that is taken into account in determining the target normal cost for the 2010 plan year is $230.77 [($500 x 12 months) x 1 year of service expected to be earned during the plan year ÷ 26 years of service at assumed early retirement age]. The present value of these amounts reflects a payment period beginning with the decrement at age 60 or 61, as applicable, until age

62 (or assumed death, if earlier).

(iv) For Participant C, the portion of the annual temporary supplement with respect to the early retirement decrement occurring at age 61 (when the participant is first eligible for the benefit) that is taken into account in determining the funding target for the 2010 plan year is $5,600 [($500 x 12 months) x 14 years of past service ÷ 15 years of service at assumed early retirement age]. The present value of this amount reflects a payment period beginning with the decrement at age 61 until age 62 (or death if earlier).

Example 3. (i) The facts are the same as in Example 1. The plan also provides a single-sum death benefit (in addition to the qualified pre-retirement spouse's benefit) equal to the greater of the participant's annual accrued benefit at the time of death, or $10,000. The benefit is limited as necessary to ensure that the plan meets the incidental death benefit requirements of section 401(a).

(ii) The determination of the portion of the death benefit that is taken into account in determining the target normal cost and funding target is made under paragraph (c)(1)(ii)(B) of this section to the extent that it is a function of the participant's accrued benefit and under paragraph (c)(1)(ii)(D) of this section to the extent that it relates to the part of the death benefit that is not a function of the participant's accrued benefit.

(iii) The portion of the single-sum death benefit corresponding to the accrued benefit, or $5,960, is taken into account when determining the 2010 funding target for Participant A.

(iv) The excess of the death benefit over Participant A's accrued benefit is $4,040 (that is, $10,000 - $5,960). Because this part of the death benefit is not a function of the participant's accrued benefit nor is it a function of service, the determination of the corresponding portion of the death benefit taken into account in determining the target normal cost and funding target for 2010 is made under paragraph (c)(1)(ii)(D) of this section. For example, for Participant A, the portion of this benefit with respect to the death decrement occurring at age 64 that is taken into account for purposes of determining the funding target for the 2010 plan year is $3,030 ($4,040 x 12 years of past service ÷ 16 years of service at assumed age of death).

(v) The total single-sum death benefit for Participant A with respect to the death decrement at age 64 that is taken into account in determining the funding target for the 2010 plan year is $8,990 ($5,960 + $3,030).

(vi) Similarly, the portion of the single-sum death benefit for Participant A that is taken into account in determining the target normal cost for the 2010 plan year is equal to the sum of the expected increase in the accrued benefit during 2010, and the expected change in the allocable portion of the excess death benefit attributable to service during 2010 as determined in accordance with paragraph (c)(1)(ii)(D) of this section. As described in Example 1, the expected increase in Participant A's accrued benefit during 2010 is $800, to the extent that Participant A is expected to continue in employment for the full 2010 plan year.

(vii) At the end of 2010, Participant A's accrued benefit is expected to be $6,760 ($5,960 + $800). The excess portion of the single-sum death benefit to be allocated in accordance with paragraph (c)(1)(ii)(D) of this section is $3,240 ($10,000 - $6,760), and the allocable portion of the excess benefit for Participant A as of December 31, 2010, with respect to the death decrement at age 64, is $2,632.50 ($3,240 x 13 years of service as of December 31, 2010 ÷ 16 years of service at assumed age of death). The change in the allocable portion of Participant A's excess death benefit due to an additional year of service, with respect to the death decrement at age 64, is a decrease of $397.50. Therefore, the target normal cost for the 2010 plan year attributable to Participant A, with respect to the death decrement at age 64, will reflect a single-sum death benefit of $402.50 ($800 expected increase in Participant A's accrued benefit minus a $397.50 expected decrease in the allocable portion of the death benefit in excess of the accrued benefit).

Example 4. (i) The facts are the same as in Example 3, except that the plan provides a single-sum death benefit equal to the greater of the present value of the qualified pre-retirement survivor annuity or 100 times the amount of the participant's monthly retirement benefit with service projected to normal retirement age. The valuation is based on the assumption that all surviving spouses choose to receive their benefit in the form of a single sum. For Participant A, the value of the qualified pre-retirement survivor annuity is less than 100 times Participant A's projected monthly retirement benefit.

(ii) The allocation of the death benefit that is a function of Participant A's accrued benefit is based on service and compensation to the first day of the plan year for purposes of determining the funding target, and the allocation of the death benefit that is a function of the increase in Participant A's accrued benefit during the plan year for purposes of determining the target normal cost is made in accordance with paragraph (c)(1)(ii)(B) of this section. As described in Example 1, Participant A's accrued benefit based on service and compensation as of January 1, 2010, is $5,960, or $496.67 per month. Accordingly, the portion of the single-sum death benefit corresponding to the accrued benefit, or $49,667 (100 times $496.67), is taken into account when determining the 2010 funding target for Participant A.

(iii) In addition, the funding target and the target normal cost reflect a portion of Participant A's death benefit in excess of the amount based on Participant A's accrued benefit. Based on Participant A's average compensation as of the first day of the plan year, Participant A's accrued benefit with service projected to normal retirement is $8,443 [.01 x 17 years of service at age 65 x ($47,000 + $50,000 + $52,000) ÷ 3], or $703.61 per month. The corresponding death benefit is $70,361.

(iv) The excess of the death benefit over Participant A's accrued benefit as of January 1, 2010, is $20,694 (that is, $70,361 - $49,667). Because this part of the death benefit is not a function of Participant A's accrued benefit or service, the portion that is taken into account in determining the funding target is determined under paragraph (c)(1)(ii)(D) of this section. For Participant A, the portion of this benefit with respect to the death decrement occurring at age 64 that is taken into account when determining the funding target for the 2010 plan year is $15,521 ($20,694 x 12 years of past service ÷16 years of service at assumed age of death). The total single-sum death benefit for Participant A with respect to the death decrement at age 64 reflected in the funding target for the 2010 plan year is $65,188 ($49,667 + $15,521).

(v) Similarly, the portion of the single-sum death benefit for Participant A that is taken into account when determining the target normal cost for 2010 is equal to the sum of the death benefit based on the expected increase in the accrued benefit during 2010 and the expected change in the allocable portion of the excess death benefit attributable to service during 2010 as determined in accordance with paragraph (c)(1)(ii)(D) of this section.

(vi) At the end of 2010, Participant A's accrued benefit is expected to be $6,760 ($5,960 + $800), or $563.33 per month, and the associated death benefit is $56,333. The expected increase in the amount of the death benefit attributable to the increase in Participant A's accrued benefit is therefore $6,666 ($56,333 - $49,667).

(vii) Participant A's projected accrued benefit at normal retirement based on average compensation as of the end of 2010 is $8,840 [.01 x 17 years of service at age 65 x ($50,000 + $52,000 + $54,000) ÷ 3], or $736.67 per month. The corresponding death benefit is $73,667. The excess portion of the single-sum death benefit to be allocated in accordance with paragraph (c)(1)(ii)(D) of this section is $17,334 ($73,667 - $56,333), and the allocable portion of the excess benefit for Participant A as of December 31, 2010, with respect to the death decrement at age 64, is $14,084 ($17,334 x 13 years of service as of December 31, 2010 ÷ 16 years of service at assumed age of death).

(viii) The change in the allocable portion of Participant A's excess death benefit during 2010, with respect to the death decrement at age 64, is a decrease of $1,437 ($14,084 - $15,521). Therefore, the target normal cost for the 2010 plan year attributable to Participant A, with respect to the death decrement at age 64, will reflect a single-sum death benefit of $5,229 ($6,666 expected increase in Participant A's death benefit based on the expected increase in the accrued benefit, minus an expected decrease of $1,437 in the amount of the death benefit in excess of the amount attributable to the accrued benefit).

Example 5. (i) The facts are the same as in Example 1. In addition, the plan provides a disability benefit to participants who become disabled after completing 15 years of service. The disability benefit is payable at normal retirement age or an earlier date if elected by a participant. For purposes of calculating the disability benefit, service continues to accrue until normal retirement age (unless recovery or commencement of retirement benefits occurs earlier). Further, compensation is deemed to continue at the same rate as when the disability began.

(ii) Participant A will be eligible for the disability benefit at age 63 after completion of 15 years of service. Participant A's annual disability benefit at normal retirement age is $9,180 (that is, 1% of highest 3-year average compensation of $54,000 multiplied by 17 years of deemed service at normal retirement age).

(iii) The portion of the disability benefit based on the participant's accrued benefit as of the valuation date that is taken into account in determining the target normal cost and funding target is determined in accordance with paragraph (c)(1)(ii)(B) of this section. Accordingly, the portion of the disability benefit corresponding to Participant A's accrued benefit as of January 1, 2010, or $5,960, is taken into account when determining the 2010 funding target.

(iv) The excess of Participant A's disability benefit over the accrued benefit as of January 1, 2010, is $3,220 ($9,180 minus $5,960). Because this portion of the disability benefit is not based on Participant A's accrued benefit or service, the portion that is taken into account in determining the funding target is determined under paragraph (c)(1)(ii)(D) of this section. The portion of Participant A's excess disability benefit with respect to the disability decrement occurring at age 63 that is taken into account when determining the 2010 funding target is $2,576 [$3,220 x (12 years of past service ÷ 15 years of service at assumed date of disability)]. The total disability benefit for Participant A, with respect to the disability decrement occurring at age 63, that is taken into account in determining the funding target for the 2010 plan year is $8,536 ($5,960 + $2,576).

(v) The portion of Participant A's disability benefit with respect to the disability decrement occurring at age 64 that is taken into account when determining the 2010 funding target is $8,375 [$5,960 + $3,220 x (12 years of past service ÷ 16 years of service at assumed date of disability)].

(vi) If in fact Participant A becomes disabled at age 63, the funding target will reflect the full disability benefit to which Participant A will be entitled at normal retirement age, based on service projected to normal retirement age (17 years) and final average compensation reflecting compensation projected to normal retirement age at the rate Participant A was earning at the time of disablement.

Example 6. (i) The facts are the same as in Example 5, except that the disability benefit is based on the accrued benefit calculated using service and compensation earned to the date of disability.

(ii) Because the disability benefit is a function of the participant's accrued benefit, the portion of Participant A's disability benefit that is taken into account when determining the funding target for the 2010 plan year is Participant A's annual accrued benefit as of January 1, 2010, or $5,960, as determined in Example 1. This amount is taken into account for both the disability decrement occurring at age 63 and the disability decrement occurring at age 64.

(iii) Similarly, the benefit accrual for Participant A with respect to the disability decrements occurring at age 63 and age 64 that is taken into account when determining the target normal cost for the 2010 plan year is equal to Participant A's expected benefit accrual for 2010 determined in Example 1, or $800.

Example 7. (i) Retiree D, a participant in Plan P, is a male age 72 and is receiving a $100 monthly straight life annuity. The 2009 actuarial valuation is performed using the segment rates applicable for September 2008 (determined without regard to the transition rule of section 430(h)(2)(G)), and the 2009 annuitant and nonannuitant (male and female) mortality tables (published in Notice 2008-85). See §601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin.

(ii) The present value of Retiree D's straight life annuity on the valuation date is $10,535.79. This is equal to the sum of: $5,029.99, which is the present value of payments expected to be made during the first 5 years, using the first segment interest rate of 5.07%; $5,322.26, which is the present value of payments expected to be made during the next 15 years, using the second segment interest rate of 6.09%; and $183.54, which is the present value of payments expected to be made after 20 years, using the third segment interest rate of 6.56%.

Example 8. (i) The facts are same as in Example 7. Plan P does not provide for early retirement benefits or single-sum distributions. The actuary assumes that no participants terminate employment prior to age 50 (other than by death), there is a 5% probability of withdrawal at age 50, and that those participants who withdraw receive a deferred annuity starting at age 65. Participant E is a male age 46 on January 1, 2009, and has an annual accrued benefit of $23,000 beginning at age 65.

(ii) Before taking into account the 5% probability of withdrawal, the funding target associated with Participant E's assumed age 50 withdrawal benefit in the 2009 actuarial valuation is $68,396.75. This is equal to the sum of: $6,925.29, which is the present value of payments expected to be made during the year the participant turns age 65 (the 20^{th} year after the valuation date), using the second segment interest rate of 6.09%; and $61,471.46, which is the present value of payments expected to be made after the 20^{th} year, using the third segment interest rate of 6.56%.

(iii) Taking the 5% probability of withdrawal into account, the funding target for the 2009 plan year associated with Participant E's assumed age 50 withdrawal benefit is $3,419.84 ($68,396.75 x 5%).

Example 9. (i) The facts are the same as in Example 8, except the plan offers a single-sum distribution payable at normal retirement age (age 65) determined based on the applicable interest rates and the applicable mortality table under section 417(e)(3). The actuary assumes that 70% of the participants will elect a single sum upon retirement and the remaining 30% will elect a straight life annuity.

(ii) Before taking into account the 5% probability of withdrawal or the 70% probability of electing a single-sum payment, the portion of the 2009 funding target that is attributable to Participant E's assumed single-sum payment, deferred to age 65, is $70,052.30. This is calculated in the same manner as the present value of annuity payments, except that, for the period after the annuity starting date, the 2009 applicable mortality rates are substituted for the 2009 male annuitant mortality rates. This portion of the funding target for the 2009 plan year is equal to the sum of: $6,929.00, which is the present value of annuity payments expected to be made between age 65 and 66 (during the 20th year after the valuation date), using the second segment interest rate of 6.09%; and $63,123.30, which is the present value of annuity payments expected to be made after the 20th year following the valuation date, using the third segment interest rate of 6.56%. These present value amounts reflect the 2009 male nonannuitant mortality rates prior to the assumed commencement of benefits at age 65 and the 100% probability of retiring at age 65.

(iii) Taking the 5% probability of withdrawal and the 70% probability of electing a single-sum payment into account, the portion of the 2009 funding target attributable to Participant E's assumed single-sum payment based on withdrawal at age 50 is $2,451.83 ($70,052.30 x 5% x 70%). After taking into account the 5% probability of withdrawal and the 30% probability of electing a straight life annuity, the portion of the 2009 funding target that is attributable to Participant E's assumed straight life annuity (based on assumed withdrawal at age 50), deferred to age 65, is equal to 30% of the result obtained in Example 8.

Example 10. (i) The facts are the same as in Example 9, except the plan offers an immediate single sum upon withdrawal at age 50 determined based on the applicable interest rates and the applicable mortality table under section 417(e)(3). The actuary assumes that 70% of the participants will elect to receive a single-sum distribution upon withdrawal.

(ii) Before taking into account the 5% probability of withdrawal and the 70% probability of electing a single-sum payment, the portion of the funding target for the 2009 plan year that is attributable to Participant E's assumed single-sum payment based on withdrawal at age 50 is $68,908.39. This is calculated in the same manner as the present value of annuity payments, except that the 2009 applicable mortality rates are substituted for the 2009 male annuitant and nonannuitant mortality rates after the annuity starting date. This portion of the 2009 funding target is equal to the sum of $6,815.85, which is the present value of annuity payments expected to be made between age 65 and 66 (during the 20th year after the valuation date), using the second segment interest rate of 6.09%, and $62,092.54, which is the present value of annuity payments expected to be made after the 20th year following the valuation date, using the third segment interest rate of 6.56%. These present value amounts reflect the 2009 male nonannuitant mortality rates prior to the assumed single-sum distribution age of 50.

(iii) Applying the 5% probability of withdrawal at age 50 and the 70% probability of electing a single-sum payment, the portion of the funding target for the 2009 plan year that is attributable to Participant E's assumed single-sum payment (based on withdrawal at age 50) is $2,411.79 ($68,908.39 x 5% x 70%).

Example 11. (i) The facts are the same as in Example 8, except that the plan sponsor elects under section 430(h)(2)(D)(ii) to use the monthly corporate bond yield curve instead of segment rates. The enrolled actuary assumes payments are made monthly throughout the year and uses the interest rate from the middle of the monthly corporate bond yield curve because this mid-year yield rate most closely matches the average timing of benefits paid. In accordance with §1.430(h)(2)-1(e)(4), the applicable monthly corporate bond yield curve is the yield curve derived from December 2008 rates.

(ii) Before taking into account the 5% probability of withdrawal, the funding target associated with Participant E's assumed age 50 withdrawal benefit in the 2009 actuarial valuation is $67,394.12. This reflects the sum of each year's expected payments, discounted at the yield rates described in paragraph (i) of this Example 11, as shown below:

Age	Maturity	Yield rate	Present value
65	19.5	6.97%	$5,897.88
66	20.5	6.90%	5,524.69
67	21.5	6.84%	5,164.63
68 and over	Varies	Varies	50,806.92
Total			$67,394.12

(iii) Applying the 5% probability of withdrawal, the portion of the funding target for the 2009 plan year attributable to Participant E's assumed withdrawal at age 50 is $3,369.71 ($67,394.12 x 5%).

Example 12. (i) The facts are the same as in Example 10, except that the plan determines the amount of the immediate single-sum distribution upon withdrawal at age 50 based on the applicable interest rates under section 417(e)(3) or an interest rate of 6.25%, whichever produces the higher amount. The applicable mortality table under section 417(e)(3) is used for both calculations.

(ii) Before taking into account the 5% probability of withdrawal and the 70% probability of electing a single-sum payment, the present value of Participant E's single-sum distribution as of January 1, 2009, using an interest rate of 6.25%, based on withdrawal at age 50, is $77,391.88. This amount is determined by calculating the projected single-sum distribution at age 50 using the applicable mortality rate under section 417(e)(3) and an interest rate of 6.25%, or $94,789.10, and discounting the result to the January 1, 2009, valuation date using the first segment rate of 5.07% (because the single-sum distribution is assumed to be paid 4 years after the valuation date) and the male non-annuitant mortality rates for 2009.

(iii) Before taking into account the 5% probability of withdrawal and the 70% probability of electing a single-sum payment, the present value as of January 1, 2009, of Participant E's age-50 single-sum distribution using the applicable interest rates and applicable mortality table under section 417(e)(3) is $68,908.39, as developed in Example 10. Corresponding to plan provisions, the present value reflected in the funding target is the larger of this amount or the present value of the amount based on a 6.25% interest rate, or $77,391.88.

(iv) Applying the 5% probability of withdrawal at age 50 and the 70% probability of electing a single-sum payment, the portion of the funding target for the 2009 plan year that is attributable to Participant E's assumed single-sum payment (based on withdrawal at age 50) is $2,708.72 ($77,391.88 x 5% x 70%).

Example 13. (i) Plan Q is a cash balance plan that permits an immediate payment of a single sum equal to the participant's hypothetical account balance upon termination of employment. Plan Q's terms provide that the hypothetical account is credited with interest at a market-related rate, based on a specified index. The January 1, 2009, actuarial valuation is performed using the 24-month average segment rates applicable for September 2008 (determined without regard to the transition rule of section 430(h)(2)(G)). Participant F is a male age 61 on January 1, 2009, and has a hypothetical account balance equal to $150,000 on that date. In the 2009 actuarial valuation, the enrolled actuary assumes that the hypothetical account balances will increase with annual interest credits of 7% until the participant commences receiving his or her benefit, corresponding to the actuary's best estimate of future interest rates credited under the terms of the plan. The actuary also assumes that all participants will retire on the first day of the plan year in which they attain age 65 (that is, no participant will terminate employment prior to age 65 other than by death), and that 100% of participants will elect a single sum upon retirement.

(ii) Participant F's hypothetical account balance projected to January 1, 2013 (the plan year in which F attains age 65) is $196,619.40 based on the assumed annual interest crediting rate of 7%. The funding target for the 2009 plan year attributable to Participant F's benefit at age 65 is $158,525.81, which is calculated by discounting the projected hypothetical account balance of $196,619.40 using the first segment rate of 5.07% and the male non-annuitant mortality rates.

Example 14. (i) The facts are the same as in Example 13, except that the actuary assumes that 10% of the participants will choose to collect their benefits in the form of a straight life annuity. The plan provides that the participant's account balance at retirement is converted to an annuity using the applicable interest rates and applicable mortality table under section 417(e)(3).

(ii) Participant F's hypothetical account balance projected to January 1, 2013 (the plan year in which F attains age 65) is $196,619.40, as outlined in Example 13. This amount is converted to an annuity payable commencing at age 65 by dividing the projected account balance by an annuity factor based on the applicable mortality table for 2009 under section 417(e)(3) (corresponding to the valuation date) and the interest rates used for the valuation. The resulting annuity factor is 10.8321, reflecting one year of interest at the first segment rate (5.07%) corresponding to the first year of the expected annuity payments (the fifth year after the valuation date), 15 years of interest at the second segment rate (6.09%) and all remaining years at the third segment rate (6.56%). The projected future annuity is therefore $196,619.40 divided by 10.8321, or $18,151.55 per year.

(iii) Before taking into account the 10% probability that the participant will elect to take the distribution in the form of a lifetime annuity, the funding target associated with the future annuity payout for Participant F is $149,120.41. This is equal to the sum of $14,242.79, which is the present value of the annuity payment expected to made during the year the participant turns age 65 (the 5th year after the valuation date), using the first segment interest rate of 5.07%; $116,321.72, which is the present value of payments expected to be made during the 6th through the 20th years following the valuation date, using the second segment interest rate of 6.09%; and $18,555.90, which is the present value of payments expected to be made after the 20th year following the valuation date, using the third segment interest rate of 6.56%.

(iv) Applying the 10% probability of electing a lifetime annuity, the portion of the 2009 funding target attributable to Participant F's assumed lifetime annuity payable at age 65 is $14,912.04. The portion of the 2009 funding target attributable to Participant F's assumed single-sum payment is 90% of the result obtained in Example 13.

Example 15. (i) Plan H provides a monthly benefit of $50 times service for all participants. Plan H has a funding target of $1,000,000 and an actuarial value of assets of $810,000 as of January 1, 2010. No annuity contracts have been purchased, and Plan H has no funding standard carryover balance or prefunding balance as of January 1, 2010. The enrolled actuary certifies that the January 1, 2010, AFTAP is 81%. Effective July 1, 2010, Plan H is amended on June 14, 2010, to increase the plan's monthly benefit to $55 for years of service earned on or after July 1, 2010. The present value of the increase in plan benefits during 2010 (reflecting benefit accruals attributable to the six months between July 1, 2010, and December 31, 2010) is $25,000.

(ii) The amendment increases benefits for future service only, and so the funding target is unaffected. Since section 436(c) only restricts plan amendments that increase plan liabilities, the plan amendment can take effect.

(iii) If the $25,000 present value of the increase in plan benefits during 2010 were included in Plan H's funding target of $1,000,000, the total would be $1,025,000, and the AFTAP would be 79.02% (that is, $810,000 / $1,025,000). Since this is less than 80%, the amendment would not have been permitted to take effect if the 2010 increase were included in the funding target instead of target normal cost.

(iv) Because the amendment was adopted after the January 1, 2010, valuation date, the plan sponsor would generally have the option of deciding whether to reflect this amendment in the January 1, 2010, valuation or defer recognition of the amendment to the January 1, 2011, valuation. However, under paragraph (d)(2) of this section, because the plan amendment would not have been permitted to take effect under the provisions of section 436 if the increase in the target normal cost for the plan year had been taken into account in the funding target, the actuary must take into account the amendment in the January 1, 2010, valuation for purposes of section 430. Thus, the target normal cost for the plan year includes the $25,000 that results from the plan amendment.

(g) Effective/applicability dates and transition rules--(1) Statutory effective date/applicability date--(i) In general. Section 430 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 430 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of PPA ‘06.

(ii) Applicability of special adjustments. The special adjustments of paragraph (b)(1)(iii) of this section (relating to adjustments to the target normal cost for plan-related expenses and mandatory employee contributions) apply to plan years beginning after December 31, 2008. In addition, a plan sponsor may elect to make the special adjustments of paragraph (b)(1)(iii) of this section for a plan year beginning in 2008. This election must take into account both adjustments described in paragraph (b)(1)(iii) of this section. This election is subject to the same rules that apply to an election to add an amount to the plan’s prefunding balance pursuant to §1.430(f)-1(f), and it must be made in the same manner as the election made under §1.430(f)-1(f). Thus, the election can be made no later than the last day for making the minimum required contribution for the plan year to which the election relates.

(2) Effective date/applicability date of regulations. This section applies to plan years beginning on or after January 1, 2010, regardless of whether section 430 applies

to determine the minimum required contribution for the plan year. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in this section for purposes of satisfying the requirements of section 430.

(3) Approval for changes in funding method--(i) 2008 plan year. Any changes in a plan's funding method that are made for the first plan year beginning in 2008 that are not inconsistent with the requirements of section 430 are treated as having been approved by the Commissioner and do not require the Commissioner's specific prior approval.

(ii) Application of this section--(A) First plan year for which regulations are effective. Except as otherwise provided in paragraph (g)(3)(ii)(B) of this section, any change in a plan's funding method for the first plan year that begins on or after January 1, 2010, is treated as having been approved by the Commissioner and does not require the Commissioner's specific prior approval.

(B) Optional earlier application of regulations. For the first plan year that a plan applies all the provisions of this section, §§1.430(f)-1, 1.430(g)-1, 1.430(i)-1, and 1.436-1, any change in a plan's funding method for that plan year is treated as having been approved by the Commissioner and does not require the Commissioner's specific prior approval. For example, if the change in funding method includes a change in the valuation software, the change in the valuation software is treated as having been approved by the Commissioner and does not require the Commissioner's specific prior approval. If that plan year begins before January 1, 2010, the automatic approval for a change in funding method under paragraph (g)(3)(ii)(A) of this section does not apply to the plan.

(C) Special rule for changes in allocation. Any change in a plan’s funding method for a plan year earlier than the first plan year beginning on or after January 1, 2010, that is necessary to apply the rules of paragraph (c)(1)(ii) of this section is treated as having been approved by the Commissioner and does not require the Commissioner’s specific prior approval.

(iii) First plan year for which section 430 applies to determine minimum funding. For a plan for which the minimum required contribution is not determined under section 430 for the first plan year that begins on or after January 1, 2008, pursuant to sections 104 through 106 of PPA ’06, any change in a plan’s funding method for the first plan year to which section 430 applies to determine the plan’s minimum required contribution is treated as having been approved by the Commissioner and does not require the Commissioner’s specific prior approval.

(4) Approval for changes in actuarial assumptions. The Commissioner’s specific prior approval is not required with respect to any actuarial assumptions that are adopted for the first plan year for which section 430 applies to determine the minimum required contribution for the plan and that are not inconsistent with the requirements of section 430.

(5) Transition rule for determining funding target attainment percentage for the 2007 plan year--(i) In general. For purposes of the first plan year beginning on or after January 1, 2008, the funding target attainment percentage for the plan’s prior plan year (the 2007 plan year) is determined as the fraction (expressed as a percentage), the numerator of which is the value of plan assets determined under paragraph (g)(5)(ii) of this section, and the denominator of which is the plan’s current liability determined

pursuant to section 412(l)(7) (as in effect prior to amendment by PPA ’06) as of the valuation date for the 2007 plan year.

(ii) Determination of value of plan assets--(A) In general. The value of plan assets for the 2007 plan year under this paragraph (g)(5)(ii)(A) is determined as the value of plan assets as described in paragraph (g)(5)(ii)(B) of this section, reduced by the plan’s funding standard account credit balance for the 2007 plan year as described in paragraph (g)(5)(iii)(A) of this section except to the extent provided in paragraph (g)(5)(iii)(B) of this section.

(B) Value of plan assets. The value of plan assets for the 2007 plan year under this paragraph (g)(5)(ii)(B) is determined under section 412(c)(2) as in effect for the 2007 plan year, except that the value of plan assets prior to subtracting the plan’s funding standard account credit balance described in paragraph (g)(5)(iii)(A) of this section must be adjusted so that it is neither 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 the value of plan assets prior to adjustment under this paragraph (g)(5)(ii)(B) is less than 90 percent of the fair market value of plan assets on the valuation date, then the value of plan assets under this paragraph (g)(5)(ii)(B) is equal to 90 percent of the fair market value of plan assets. If the value of plan assets determined under this paragraph (g)(5)(ii)(B) is greater than 110 percent of the fair market value of plan assets on the valuation date, then the value of plan assets under this paragraph (g)(5)(ii)(B) is equal to 110 percent of the fair market value of plan assets.

(iii) Subtraction of credit balance--(A) In general. If a plan has a funding standard account credit balance as of the valuation date for the 2007 plan year, then, except as described in paragraph (g)(5)(iii)(B) of this section, that balance is subtracted from the value of plan assets described in paragraph (g)(5)(ii)(B) of this section as of that valuation date to determine the value of plan assets for the 2007 plan year. However, the value of plan assets is not reduced below zero.

(B) Effect of funding standard carryover balance reduction for the 2008 plan year. Notwithstanding the rules of paragraph (g)(5)(iii)(A) of this section, for the first plan year beginning in 2008, if 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 2007 plan year using the valuation interest rate for that 2007 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 value of plan assets pursuant to paragraph (g)(5)(iii)(A) of this section.

Par. 3. 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 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's prefunding balance and a plan sponsor's election to maintain a funding standard carryover 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 transition rules.

(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) Maintenance of balances--(1) Prefunding balance--(i) In general. A plan sponsor is permitted to elect 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 plan sponsor's initial election to add to the prefunding balance under paragraph (b)(1)(ii) of this section constitutes an election to maintain a prefunding balance. 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 a 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 present value of the excess contributions for the preceding plan year determined under paragraph (b)(1)(ii)(B) of this section, increased for interest in accordance with paragraph (b)(1)(iv)(A) of this section.

(B) Present value of excess contribution. The present value of the excess contribution for the preceding plan year is the excess, if any, of--

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

(2) The minimum required contribution for such preceding plan year.

(C) Treatment of unpaid minimum required contributions. For purposes of this paragraph (b)(1)(ii), a contribution made during a plan year to correct an unpaid minimum required contribution (within the meaning of section 4971(c)(4)) for a prior plan year is not treated as a contribution for the current plan year.

(iii) Decreases. As of the first day of each plan year, the prefunding balance of a plan is decreased (but not below zero) by the sum of--

(A) 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) 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 present value 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 plan 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, except to the extent provided in paragraph (b)(3)(iii) of this section.

(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 automatically established for a plan that had a positive balance in the funding standard account under section 412(b) (as in effect prior to amendment by the Pension Protection Act of 2006 (PPA ’06), Public Law 109-280 (120 Stat. 780)) 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 in effect prior to

amendment by PPA ’06) as of the end of the pre-effective plan year for the plan. After that date, the funding standard carryover balance is 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. As of the first day of each plan year, the funding standard carryover balance of a plan is decreased (but not below zero) by the sum of--

(A) 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) Any reduction in the funding standard carryover balance under paragraph (e) of this section for the plan year.

(3) Adjustments for investment experience--(i) In general. A plan’s prefunding balance under paragraph (b)(1) of this section and a plan’s funding standard carryover balance under paragraph (b)(2) of this section as of the first day of a plan year must be adjusted to reflect the actual rate of return on plan assets for the preceding plan year. 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.

(ii) Ordering rules for adjustments. In general, the adjustment for actual rate of return on plan assets is applied to the balance after any reduction of prefunding and funding standard carryover balances for that preceding plan year under paragraph (e) of this section and after subtracting amounts used to offset the minimum required contribution for the preceding plan year pursuant to paragraph (d) of this section. However, see paragraph (d)(1)(ii)(D) of this section for a special ordering rule when adjusting for investment experience.

(iii) Special rule for excess contributions attributable to use of funding balances. Notwithstanding paragraph (b)(1)(iv)(A) of this section, to the extent that a contribution is included in the present value of excess contributions solely because the minimum required contribution has been offset under paragraph (d) of this section, the contribution is adjusted for investment experience under the rules of this paragraph (b)(3).

(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, then, solely for purposes of applying paragraphs (c), (d), and (e) of this section, the plan's prefunding and funding standard carryover balances (if any) determined under this paragraph (b) are increased from the first day of the plan year 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. In the case of a plan with a valuation date that is not the first day of the plan year, for purposes of applying the subtraction under paragraph (b)(3)(ii) of this section for amounts used to offset the minimum required contribution for the preceding plan year and the decreases under paragraphs (b)(1)(iii) and (b)(2)(ii) of this section, the amount of the prefunding balance or funding standard carryover balance that is used to offset the minimum required contribution under paragraph (d) of this section or reduced under paragraph (e) of this section is discounted from the valuation date to the first day of the plan year using the effective interest rate under section 430(h)(2)(A) for the plan year.

(5) Special rule for quarterly contributions--(i) Quarterly contributions due on or after the valuation date. For purposes of applying a prefunding balance or funding standard carryover balance to required installments described in section 430(j)(3) that are due on or after the valuation date for the plan year for which they are due, the respective balances are increased from the beginning of the year to the date of the election (using the plan's effective interest rate for the plan year) to determine the amount available to offset the required quarterly installment. The amounts used to offset required quarterly installments are then discounted from that date to the first day of the plan year for purposes of the subtraction under paragraph (b)(3)(ii) of this section and the decreases under paragraphs (b)(1)(iii) and (b)(2)(ii) of this section, using the effective interest rate for the plan year. However, see paragraph (d)(1)(i)(B) of this section for a special rule regarding late quarterly installments when determining the amount that is used to offset the minimum required contribution for the plan year.

(ii) Quarterly contributions due before the valuation date. [Reserved.]

(c) Effect of balances on the value of 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 is subtracted from the value of plan assets for purposes of sections 430 and 436, except as otherwise provided in paragraphs (c)(2), (c)(3), and (d)(3) of this section and §1.436-1(j)(1)(ii)(B).

(2) Subtraction of balances in determining new shortfall amortization base--(i) Prefunding 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

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 plan has no prefunding balance and a $20 million funding standard carryover balance, a PBGC agreement provides that $5 million of a plan’s funding standard carryover balance is unavailable to offset the minimum required contribution for a plan year, and the plan’s assets are $100 million, then 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.

(d) Election to apply balances against minimum required contribution--(1) In general--(i) Amount of offset to minimum required contribution--(A) Effect of use of balances. Subject to the limitations provided in this paragraph (d), in the case of any plan year with respect to 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 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.

(B) Special rule for late quarterly contributions--(1) Quarterly contributions due on or after the valuation date. Notwithstanding paragraph (d)(1)(i)(A) of this section, if the plan sponsor elects to use all or a portion of the prefunding balance or the funding standard carryover balance to satisfy a required installment under section 430(j)(3) that is due on or after the valuation date, the amount used to offset the minimum required contribution for the plan year is the portion of the balance so used, discounted in accordance with the rules of paragraph (b)(5) of this section, unless the date of the election is after the due date of the required installment. If the election to use all or a portion of the prefunding balance or the funding standard carryover balance to satisfy the required installments under section 430(j)(3) is made after the due date for the required installment, then the amount used to offset the minimum required contribution for the plan year is the portion of the balance so used, discounted from the date of the election to the due date of the required installment at the effective interest rate plus 5 percentage points, and then further discounted from the installment due date to the valuation date at the effective interest rate. For example, if a quarterly installment of $20,250 is due on April 15 for a calendar year plan with a valuation date on January 1 and an effective interest rate of 6 percent, and the installment is satisfied by an election to apply the funding standard carryover balance that is made on July 1 (2 ½ months after the April 15 due date), then the amount used to offset the minimum required contribution under this paragraph (d)(1)(i) is $19,481 (that is, $\$20,250 \div 1.11^{(2.5/12)} \div 1.06^{(3.5/12)}$). However, the amount by which the funding standard carryover balance is reduced under paragraph (b)(2)(ii) of this section is $19,669 (that is, $\$20,250 \div 1.06^{(6/12)}$).

(2) Quarterly contributions due before the valuation date. [Reserved.]

(ii) Maximum amount of available balances and coordination of elections--(A) General requirement to follow chronology. In general, the amount of prefunding and funding standard carryover balances that may be used to offset the minimum required contribution for a plan year must take into account any decrease in those balances which results from a prior election either to use the prefunding balance or funding standard carryover balance under section 430(f)(3) and this paragraph (d) or to reduce those balances under section 430(f)(5) and paragraph (e) of this section (including deemed elections under section 436(f)(3) and §1.436-1(a)(5)). For example, for a calendar plan year with a January 1 valuation date, a deemed election under section 436(f)(3) and §1.436-1(a)(5) on April 1, 2010 (the first day of the 4th month of the plan year) will reduce the available prefunding balance or funding standard carryover balance that can be used with respect to an election made after April 1, 2010.

(B) Exception to chronological rule. Notwithstanding the general rule of paragraph (d)(1)(ii)(A) of this section, all elections under section 430(f)(5) and paragraph (e) of this section to reduce the prefunding balance or funding standard carryover balance for the current plan year (including deemed elections under section 436(f)(3) and §1.436-1(a)(5)) are deemed to occur on the valuation date for the plan year and before any election under section 430(f)(3) and this paragraph (d) to offset the minimum required contribution for the current plan year. Accordingly, if an election to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution for the plan year (including an election to satisfy the quarterly contribution requirement) has been made prior to the election to reduce the prefunding balance or funding standard carryover balance, then the amount available for use to offset the otherwise applicable minimum required contribution for the plan year under this paragraph (d) will be retroactively reduced. However, an election to reduce a prefunding balance or funding standard carryover balance for a plan year does not affect a prior election to use a prefunding balance or funding standard carryover balance to offset a minimum required contribution for a prior plan year.

(C) Investment experience. In addition to reflecting any decrease in the prefunding balance or the funding standard carryover balance which results from a prior election for the previous year either to use the prefunding balance or funding standard carryover balance under section 430(f)(3) and this paragraph (d) to offset the minimum required contribution for such prior plan year or to reduce those balances under section 430(f)(5) and paragraph (e) of this section (including deemed elections under section 436(f)(3) and §1.436-1(a)(5)), the prior plan year's prefunding and funding standard carryover balances must be adjusted under the rules of paragraph (b)(3) of this section for investment experience for that prior plan year before determining the amount of those balances available for such an election for the current plan year.

(D) Special rule for current year elections that are made before prior year elections. This paragraph (d)(1)(ii)(D) sets forth a special rule that applies if, for the current plan year, a plan sponsor makes an election under this paragraph (d) or paragraph (e) of this section (including a deemed election under section 436(f)(3) and §1.436-1(a)(5)), and then subsequently makes an election under this paragraph (d) to offset the minimum required contribution for the prior plan year. This special rule applies solely for purposes of determining the amount of prefunding and funding standard carryover balances available for that subsequent election. Under this special rule, in lieu of decreasing the funding standard carryover balance or prefunding balance as of the valuation date for the current year to take into account the current year election, the funding standard carryover balance or prefunding balance as of the valuation date for the prior plan year is decreased by the amount of the prior year equivalent of the current year election. The prior year equivalent of the current year election is determined by dividing the amount of the current year election (as of the first day of the current plan year) by a number equal to 1 plus the rate of investment return for the prior plan year determined under paragraph (b)(3) of this section. If this paragraph (d)(1)(ii)(D) applies for a plan year, then the funding standard carryover balance and prefunding balance are nonetheless adjusted in accordance with the rules of paragraph (b) of this section, after the application of the rules of this paragraph (d)(1)(ii)(D). Thus, the amount used to offset the minimum required contribution for the earlier plan year is subtracted from the prefunding balance or funding standard carryover balance as of the valuation date for that year prior to the adjustment for investment return under paragraph (b)(3) of this section for that plan year, and the amount by which the prefunding balance or funding standard carryover balance is decreased for the second year is based on the elections made for the second year.

(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--(i) In general. An election to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution under this paragraph (d) is not available for a plan year if the plan's prior plan year funding ratio is less than 80 percent. For purposes of this paragraph (d)(3), except as otherwise provided in this paragraph (d)(3) or paragraph (h)(3) of this section, the plan's prior plan year funding ratio is the fraction (expressed as a percentage)--

(A) 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

(B) 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)).

(ii) Special rule for second year of a new plan with no past service. In the case of a new plan that was neither the result of a merger nor involved in a spinoff, if the prior plan year was the first year of the plan and the funding target for the prior plan year was zero, then the plan's prior plan year funding ratio is deemed to be 80 percent for purposes of this paragraph (d)(3).

(iii) Special rule for plans that are the result of a merger. [Reserved]

(iv) Special rules for plans that are involved in a spinoff. [Reserved]

(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 and funding standard carryover balances under this paragraph (e). If such an election is made, the amount of those balances that must be subtracted from the value of plan assets pursuant to paragraph (c)(1) of this section will be smaller and, accordingly, the value of plan assets taken into account for purposes of sections 430 and 436 will be larger. Thus, this election to reduce a plan's prefunding and funding standard carryover balances is taken into account in the determination of the value 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 plan 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). The rules of paragraph (d)(1)(ii) of this section also apply for purposes of determining the maximum amount of prefunding balance or funding standard carryover balance that is available for an election under this paragraph (e).

(2) Requirement to reduce funding standard carryover balance before prefunding 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--(i) In general. 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 dollar amount involved in the election (except as provided in paragraph (f)(1)(ii) of this section). Thus, except as provided in paragraph (f)(1)(ii) of this section, a conditional or formula-based election generally does not satisfy the requirements of this paragraph (f).

(ii) Standing elections to increase or use balances. A plan sponsor may provide a standing election in writing to the plan's enrolled actuary to use the funding standard carryover balance and the prefunding balance to offset the minimum required contribution for the plan year to the extent needed to avoid an unpaid minimum required contribution under section 4971(c)(4) taking into account any contributions that are or are not made. In addition, a plan sponsor may provide a standing election in writing to the plan's enrolled actuary to add the maximum amount possible each year to the prefunding balance. Any election made pursuant to a standing election under this paragraph (f)(1)(ii) is deemed to occur on the last day available to make the election for the plan year as provided under paragraph (f)(2)(i) of this section. Any standing election under this paragraph (f)(1)(ii) remains in effect for the plan with respect to the enrolled actuary named in the election, unless--

(A) The standing election is revoked under the rules of paragraph (f)(3) of this section; or

(B) The enrolled actuary who signs the actuarial report under section 6059 (Schedule SB, “Single-Employer Defined Benefit Plan Actuarial Information” of Form 5500, “Annual Return/Report of Employee Benefit Plan”) for the plan for the plan year is not the enrolled actuary named in the standing election.

(2) Timing of elections--(i) General rule. Except as otherwise provided in paragraph (f)(2)(ii) or (iii) of this section, any election under this section with respect to a plan year must be made no later than the last date for making the minimum required contribution for the plan year as described in section 430(j)(1). For this purpose, an election to add to the prefunding balance relates to the plan year for which excess contributions were made. For example, an election to add to the prefunding balance as of the first day of the plan year that begins on January 1, 2010 (in an amount not in excess of the present value of the excess contribution as of the valuation date in 2009, adjusted for interest under the rules of paragraph (b)(1)(ii) of this section), must be made no later than September 15, 2010, even though the election is reported on the 2010 Schedule SB of Form 5500, which is not due until 2011. Except for the standing elections covered by paragraph (f)(1)(ii) of this section, an election under this section may not be made prior to the first day of the plan year to which the election relates.

(ii) Special rule for standing election revoked by a change in enrolled actuary. If there is a change in enrolled actuary for the plan year which would result in a revocation of the standing election under the rule of paragraph (f)(1)(ii)(B) of this section, then the plan sponsor may reinstate the revoked standing election by providing a replacement to the new enrolled actuary by the due date of the Schedule SB of Form 5500.

(iii) 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 or terminate a benefit restriction under section 436) must be made by the end of the plan year to which the election relates.

(iv) Earlier elections. This paragraph (f)(2) sets forth the latest date that an election can be made. A plan sponsor is permitted to make an earlier election, and in certain circumstances may need to make such an election in order to timely satisfy a quarterly contribution requirement under section 430(j)(3).

(3) Irrevocability of elections--(i) In general. Except as otherwise provided in this paragraph (f)(3), a plan sponsor’s election under this section with respect to the plan’s prefunding balance or funding standard carryover balance is irrevocable (and must be unconditional). A standing election by the plan sponsor may be revoked by providing written notification of the revocation to the plan’s enrolled actuary and the plan administrator on or before the date the corresponding election is deemed to occur pursuant to paragraph (f)(1)(ii) of this section.

(ii) Exception for certain elections. An election to use the prefunding balance or funding standard carryover balance to offset the minimum required contribution for a plan year (including an election to satisfy the quarterly contribution requirements for a plan year) is permitted to be revoked to the extent the amount the plan sponsor elected to use to offset the minimum contribution requirements (including an election used to satisfy the quarterly contribution requirements) exceeds the minimum required contribution for a plan year (determined without regard to the election under paragraph

(d) of this section) if and only if the election is revoked by providing written notification of the revocation to the plan's enrolled actuary and the plan administrator by the deadline set forth in paragraph (f)(3)(iii) of this section. If no such revocation is made, then, under paragraph (b) of this section, the funding standard carryover balance or prefunding balance is decreased by the entire amount that the plan sponsor elected to use to offset the minimum required contribution for a plan year (including an election to satisfy the quarterly contribution requirements for a plan year).

(iii) Deadline for revoking election. The deadline for revoking the election described in paragraph (f)(3)(ii) of this section is generally the end of the plan year. However, for plans with a valuation date other than the first day of the plan year, the deadline for the revocation is the deadline for contributions for the plan year as described in section 430(j)(1). In addition, for the first plan year beginning in 2008, the deadline for the revocation for all plans is deferred to the due date (including extensions) of the Schedule SB, “Single-Employer Defined Benefit Plan Actuarial Information” of Form 5500, “Annual Return/Report of Employee Benefit Plan”.

(4) Plan sponsor--(i) In general. For purposes of the elections described in this section, except as otherwise 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 rules 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 and the prefunding balance is zero as of the beginning of the 2010 plan year. The sponsor of Plan P, Sponsor S, does not elect to use any portion of the balance to offset the minimum required contribution for 2010 pursuant to paragraph (d)(1) of this section, or to reduce any portion of the funding standard carryover balance prior to the determination of the value of plan assets for 2010, pursuant to paragraph (e)(1) of this section. The actual rate of return on Plan P's assets for 2010 is 2%. Plan P's effective interest rate for 2010 is 6%. The minimum required contribution for Plan P under section 430 for 2010 is $100,000, and no quarterly installments are required for Plan P for the 2010 plan year. As of January 1, 2010, the value of plan assets is $1,100,000 and the funding target is $1,000,000. Therefore, the prior plan year funding ratio for Plan P for 2010, as determined under paragraph (d)(3) of this section, is 110%.

(ii) Sponsor S makes a contribution to Plan P of $150,000 on December 1, 2010, for the 2010 plan year and makes no other contributions for the 2010 plan year. Because this contribution was made on a date other than the valuation date for the 2010 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 interest rate for the 2010 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 2010 over the minimum required contribution for 2010, 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, 2011, cannot exceed $44,730 (which is the present value of the excess contribution of $42,198 adjusted for 12 months of interest at an effective interest rate of 6%).

(iv) Plan P's funding standard carryover balance as of January 1, 2011, is $25,500 (which is the funding standard carryover balance as of January 1, 2010, adjusted for investment experience during 2010 at a 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, 2011, for the 2010 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, 2011, cannot exceed $43,273 (which is the present value of the excess contribution of $40,824 adjusted for 12 months of interest at an effective interest rate of 6%).

(iii) Plan P's funding standard carryover balance as of January 1, 2011, is

$25,500, as developed in Example 1 of this section. If Sponsor S elects to increase the prefunding balance as of January 1, 2011, by the present value of the excess contribution adjusted for interest, or $43,273, the total of the funding standard carryover balance and prefunding balance as of January 1, 2011, is $68,773.

Example 3. (i) The facts are the same as in Example 1, except that Sponsor S contributes $90,539 to Plan P on February 1, 2011, for the 2010 plan year and makes no other contributions to Plan P for the 2010 plan year. In addition, on February 1, 2011, Sponsor S elects to use $15,000 of the funding standard carryover balance to offset P's minimum required contribution for 2010, pursuant to paragraph (d)(1) of this section. This is permitted because Plan P's prior-year funding ratio determined under paragraph (d)(3) of this section is 110%, and is therefore not less than 80%.

(ii) Because the contribution was made on a date other than the valuation date for the 2010 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 interest rate for the 2010 plan year. The amount of the contribution after adjustment is $85,000, determined as $90,539 discounted for 13 months of compound interest at an effective interest rate of 6%. The adjusted contribution of $85,000 plus the $15,000 of the funding standard carryover balance used to offset the minimum required contribution equals the minimum required contribution for the 2010 plan year of $100,000. Therefore, no excess contributions are available to increase the prefunding balance, and the prefunding balance as of January 1, 2011, remains zero.

(iii) The funding standard carryover balance as of January 1, 2011, is adjusted for investment experience during the 2010 plan year, in accordance with paragraph (b)(3) of this section. The amount of the adjustment is $200, determined as the actual rate of return on plan assets for 2010 as applied to the 2010 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%).

(iv) The funding standard carryover balance, as of January 1, 2011, is $10,200, determined as the 2010 funding standard carryover balance less the amount used to offset the 2010 minimum required contribution, adjusted for investment experience during the 2010 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 $150,000 (instead of $90,539) to Plan P on February 1, 2011, for the 2010 plan year.

(ii) Because the contribution was made on a date other than the valuation date for the 2010 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 interest rate for the 2010 plan year. The amount of the contribution after adjustment is $140,824, determined as $150,000 discounted for 13 months of interest at an effective interest rate of 6%.

(iii) Because Sponsor S elected to use $15,000 of the funding standard carryover balance to offset the minimum required contribution for 2010 of $100,000, the cash contribution requirement for 2010, adjusted with interest to January 1, 2010, is $85,000. The adjusted contribution of $140,824 exceeds this amount by $55,824. Of this amount, $15,000 exceeds the minimum required contribution only because of Sponsor S's election to use the funding standard carryover balance to offset the minimum required contribution as provided in paragraph (d)(1) of this section. The remaining $40,824 ($140,824 minus $100,000) results from cash contributions made in excess of the minimum required contribution before offset by the funding standard carryover balance.

(iv) The portion of the excess contribution resulting solely because the minimum required contribution was offset by a portion of the funding standard carryover balance is adjusted for investment experience during 2009, pursuant to paragraph (b)(3)(iii) of this section. Accordingly, this portion of the present value of the excess contribution adjusted for interest as of January 1, 2011, is $15,300 ($15,000 adjusted for investment experience during 2010 at a rate of 2%).

(v) The excess contribution resulting from cash contributions in excess of the minimum required contribution before offset by the funding standard carryover balance is adjusted for interest at the effective interest rate for 2010, pursuant to paragraph (b)(1)(iv)(A) of this section. Accordingly, this portion of the present value of the excess contribution adjusted for interest as of January 1, 2011, is $43,273 ($40,824 increased by the effective interest rate of 6%). The increase in Plan P's prefunding balance as of January 1, 2011, cannot exceed the total present value of the excess contribution adjusted for interest of $58, 573 ($15,300 plus $43,273).

(vi) The funding standard carryover balance as of January 1, 2011, is $10,200, determined as the 2010 funding standard carryover balance less the $15,000 used to offset the 2010 minimum required contribution, adjusted for investment experience during the 2010 plan year as developed in Example 3 ($25,000 less $15,000 plus $200).

(vii) Sponsor S elects to increase the prefunding balance by the maximum amount of the present value of the excess contribution adjusted for interest of $58,573, resulting in a total of the funding standard carryover balance and the prefunding balance as of January 1, 2011, of $68,773, the same amount as that developed in Example 2.

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, 2010, the beginning of the 2010 plan year. The prefunding balance of Plan Q as of the beginning of the 2010 plan year is $0. The actual rate of return on Plan Q's assets for 2010 is 10%. Plan Q's effective interest rate for 2010 is 6.25%. The funding ratio for Plan Q for 2009 (the prior plan year funding ratio with respect to 2010, as determined under paragraph (d)(3) of this section) is 85%, which is not less than 80%. The minimum required contribution for Plan Q for 2010 is $200,000. Sponsor T makes a contribution to Plan Q of $190,000 on July 1, 2010, for the 2010 plan year, and makes no other contributions for the 2010 plan year. Sponsor T elects to use $10,000 of the funding standard carryover balance to offset Plan Q's minimum required contribution in 2010.

(ii) Pursuant to paragraph (b)(4) of this section, the funding standard carryover balance is increased to $51,539 as of July 1, 2010 (that is, an increase to reflect 6 months of interest at an effective interest rate of 6.25%) for the purpose of adjusting plan assets under paragraph (c) of this section, and for applying any election to use or reduce Plan Q's funding standard carryover balance under paragraph (d) or (e) of this section. However, Sponsor T does not elect in 2010 to reduce any portion of the funding standard carryover balance pursuant to paragraph (e) of this section. The funding standard carryover balance ($51,539) is subtracted from the value of plan assets, as of July 1, 2010, prior to the determination of the minimum funding contribution, and $51,539 is the maximum amount that may applied against the minimum required contribution.

(iii) The value of the funding standard carryover balance as of January 1, 2011, is determined by first discounting the amount used to offset the minimum required contribution for 2010 from July 1, 2010, to January 1, 2010, using the effective interest rate of 6.25%, and subtracting the discounted amount from the January 1, 2010, funding standard carryover balance. The resulting amount is adjusted for investment experience to January 1, 2011, using a rate equal to the actual rate of return on plan assets of 10% during 2010. Thus, the $10,000 used to offset Plan Q's minimum required contribution as of July 1, 2010, is discounted for 6 months of interest, at an effective interest rate of 6.25%, to obtain an amount of $9,701 as of January 1, 2010. The remaining funding standard carryover balance as of January 1, 2010, solely for purposes of determining the adjustment for investment experience during 2010, is $40,299 ($50,000 - $9,701), and the adjustment for investment experience is $4,030 ($40,299 x 10%). The value of the funding standard carryover balance as of January 1, 2011, is $44,329 (that is, $50,000 - $9,701 + $4,030).

<u>Example 6</u>. (i) The facts are the same as in <u>Example 5</u>, except that Sponsor T contributes $200,000 on July 1, 2010, for the 2010 plan year.

(ii) The cash contribution required for 2010, after offsetting the minimum required contribution by $10,000 of the funding standard carryover balance in accordance with T's election, is $190,000. The difference, or $10,000, must be adjusted to January 1, 2011, to determine the maximum amount that can be added to the prefunding balance as of that date.

(iii) The excess contribution is first adjusted to January 1, 2010, by discounting for 6 months of interest using the effective interest rate for 2010 of 6.25%. This results in an excess contribution of $9,701 ($10,000 ÷ $1.0625^{0.5}$). Because this amount is an excess contribution solely because of Sponsor T's election to offset the minimum required contribution for 2010 by a portion of the funding standard carryover balance, the amount is then adjusted for investment experience during 2010 at a rate of 10%, in accordance with paragraph (b)(3)(iii) of this section, for a present value of the excess contribution adjusted for interest of $10,671 ($9,701 x 1.10) as of January 1, 2011.

<u>Example 7</u>. (i) The facts are the same as in <u>Example 4</u>. Plan P's effective interest rate for 2011 is 6.5%, and the rate of return on investments during 2011 is 7%. All required quarterly installments for the 2011 plan year were made by the applicable due dates. On February 1, 2012, Sponsor S elects to use $50,000 of Plan P's prefunding and funding standard carryover balances to offset the minimum required contribution for the 2011 plan year. On April 15, 2012, Sponsor S elects to use Plan P's prefunding and funding standard carryover balances to offset the 2012 minimum required contribution by $20,000, in accordance with paragraph (d) of this section, in order to offset the required quarterly installment then due.

(ii) When adjusting Plan P's prefunding and funding standard carryover balances to reflect Sponsor S's election to use them to offset the 2011 minimum required contribution, the remaining $10,200 in the funding standard carryover balance as of January 1, 2011, must be used before any portion of the prefunding balance. The prefunding balance is reduced by the remaining $39,800 ($50,000 total election minus $10,200 from the funding standard carryover balance).

(iii) The amount available for Sponsor S's election to use Plan P's prefunding and funding standard carryover balances to offset the 2012 minimum required contribution is determined by reducing the January 1, 2011, prefunding and funding standard carryover balances to reflect the election to use the prefunding and funding standard carryover balances to offset the 2011 minimum required contribution, and by adjusting the resulting amount to January 1, 2012, using the rate of investment return for Plan P during 2011. Accordingly, the available amount in Plan P's funding standard carryover balance as of January 1, 2012, is zero. The available amount in Plan P's prefunding balance as of January 1, 2012, is $20,087 ($58,573 minus $39,800, increased by 7%). Therefore, Sponsor S has $20,087 available to offset the minimum required contribution for the 2012 plan year.

<u>Example 8</u>. (i) The facts are the same as in <u>Example 7</u>, except that based on the enrolled actuary's certification of the AFTAP on July 1, 2012, Sponsor S is deemed to elect to reduce the January 1, 2012, prefunding balance by $15,000 under section 436(f)(3).

(ii) In accordance with paragraph (d)(1)(ii)(B) of this section, the deemed election to reduce the prefunding balance is deemed to occur on the first day of the plan year, and before the date of any election to offset the minimum required contribution for the 2012 plan year. The deemed election does not affect Sponsor S's election to offset the 2011 minimum contribution because that election was made on February 1, 2012, before the date of the deemed election, July 1, 2012.

(iii) As shown in Example 7, the available prefunding balance as of January 1, 2012, after reflecting the February 1, 2012, election to offset the 2011 minimum required contribution but before reflecting the April 15, 2012, election to offset the 2012 minimum required contribution, is $20,087. Adjusting this amount to reflect the deemed election to reduce the prefunding balance by $15,000 leaves a balance of $5,087 available to offset the minimum required contribution for 2012.

(iv) The portion of the quarterly installment due April 15, 2012 that was not covered by the remaining $5,087 prefunding balance is considered unpaid retroactive to April 15, 2012.

Example 9. (i) The facts are the same as in Example 8, except that Sponsor S does not make the election to offset the 2011 minimum required contribution until August 1, 2012, and the deemed election as of July 1, 2012, reduces Plan P's prefunding and funding standard carryover balances as of January 1, 2012, by $68,500. Sponsor S does not elect to use Plan P's prefunding and funding standard carryover balances to offset the 2012 minimum contribution.

(ii) In accordance with paragraph (d)(1)(ii)(A) of this section, the July 1, 2012, deemed election to reduce Plan P's prefunding and funding standard carryover balances must be taken into account before determining the amount available to offset the 2011 minimum required contribution because the election to offset the 2011 minimum required contribution was made after the date of the deemed election, July 1, 2012.

(iii) Pursuant to paragraph (d)(1)(ii)(C) of this section, the January 1, 2011, prefunding and funding standard carryover balances are adjusted to January 1, 2012, using Plan P's rate of investment return for 2011 of 7%. This results in an available funding standard carryover balance of $10,914 ($10,200 x 1.07) and an available prefunding balance of $62,673 (58,573 x 1.07) as of January 1, 2012.

(iv) Paragraph (d)(2) of this section requires that the funding standard carryover balance must be used before reducing Plan P's prefunding balance. Accordingly, the funding standard carryover balance is eliminated, and the prefunding balance is reduced by the remaining $57,586 ($68,500 - $10,914), resulting in an available prefunding balance of $5,087 ($62,673 - $57,586) as of January 1, 2012.

(v) In accordance with paragraph (d)(1)(ii)(D) of this section, the remaining balance is adjusted to January 1, 2011, to determine the amount available to offset the 2011 minimum required contribution. This adjustment is done by dividing the remaining balance by 1 plus the rate of investment return for 2011. Accordingly, the amount available to offset the 2011 minimum required contribution is $4,754 ($5,087 ÷ 1.07).

(vi) If the plan sponsor elects to use the $4,754 available balance to offset the 2011 minimum required contribution, the funding standard carryover balance as of January 1, 2012 (prior to the deemed reduction under section 436(f)(3)) is $5,827

($10,200 less $4,754, plus $381 for investment experience at a rate of 7%). The prefunding balance as of January 1, 2012 (prior to the deemed reduction under section 436(f)(3)) is $62,673 (that is, $58,573 x 1.07). The deemed election to reduce Plan P's balance is first applied to eliminate the funding standard carryover balance, and the remaining $62,673 ($68,500 less $5,827) reduces the January 1, 2012, prefunding balance to zero.

Example 10. (i) Plan V is a defined benefit plan with a plan year that is the calendar year and a valuation date of December 31. The valuation is based on the fair market value of plan assets, which amounts to $1,000,000 as of December 31, 2010, before any adjustments. As of January 1, 2010, Plan V's funding standard carryover balance is $0 and its prefunding balance is $125,000. Plan V's effective interest rate for 2010 is 5.5%. The enrolled actuary's certification of AFTAP for 2010 on March 31, 2010, results in a deemed reduction of $15,000 in the plan's prefunding balance as of January 1, 2010. Plan V's sponsor elected to use the prefunding balance to offset any portion of the minimum required contribution for 2010 not covered by cash contributions.

(ii) In accordance with paragraph (b)(4)(i) of this section, the amount of the prefunding balance subtracted from plan assets is increased from the first day of the plan year to the valuation date using the effective interest rate of 5.5% for 2009. Accordingly, the prefunding balance used for this purpose is $116,050 [($125,000 - $15,000 deemed reduction) x 1.055].

(iii) The fair market value of plan assets used for the December 31, 2010, valuation is $883,950 ($1,000,000 - $116,050).

Example 11. (i) The facts are the same as in Example 10. The minimum contribution for Plan V for the 2010 plan year is $45,000; no quarterly installments are required for Plan V for 2010. Plan V's sponsor makes a contribution of $20,000 for the 2010 plan year on July 1, 2011. The actual rate of return on assets for Plan V during 2010 is 10%.

(ii) The contribution of $20,000 is discounted to December 31, 2010, using the effective interest rate of 5.5% to determine the remaining balance of the 2010 minimum required contribution. Accordingly, the contribution is adjusted to $19,472 ($\$20,000 \div 1.055^{0.5}$) as of December 31, 2010, and the balance of the minimum required contribution is $25,528 ($45,000 - $19,472). This balance will be covered by the plan sponsor's election to use the prefunding balance to offset any portion of the minimum required contribution not covered by cash contributions.

(iii) Under section (b)(4)(ii) of this section, the amount used to offset the 2010 minimum required contribution for the purpose of adjusting the prefunding balance is discounted to January 1, 2010, using the effective interest rate for 2010. This amount is calculated as $24,197 ($25,528 ÷ 1.055).

(iv) The prefunding balance as of January 1, 2011, is reduced by the deemed election of $15,000 and the discounted amount used to offset the 2010 minimum required contribution ($24,197), and adjusted for investment experience for 2010 using the actual rate of return of 10%. Accordingly, the prefunding balance as of January 1, 2011 is $94,383 [($125,000 - $15,000 - $24,197) x 1.10].

Example 12. (i) The facts are the same as in Example 11, except that the enrolled actuary's certification of the AFTAP as of March 31, 2011, results in a deemed reduction of the prefunding balance as of January 1, 2011, of $75,000.

(ii) Under paragraph (d)(1)(ii) of this section, the deemed reduction of the prefunding balance is applied before the election to use the prefunding balance to offset the balance of the minimum required contribution for 2010. To determine the amount of the prefunding balance available to cover the remaining minimum required contribution for 2010, the deemed reduction is adjusted for investment experience to January 1, 2010, using the actual rate of return of 10% for 2010. Accordingly, the adjusted deemed reduction is $68,182 ($75,000 ÷ 1.10) and the available prefunding balance as of January 1, 2010, is $41,818 ($125,000 - $15,000 adjusted deemed reduction for 2010 - $68,182 adjusted deemed reduction for 2011).

(iii) This amount is then adjusted to December 31, 2010, using the effective interest rate of 5.5%. The amount of the prefunding balance available to offset the 2009 minimum required contribution as of December 31, 2010, is $44,118 ($41,818 x 1.055). This amount is larger than the election made by Plan V's sponsor to offset the minimum required contribution for 2010 ($25,528) and so the election remains valid.

(h) Effective/applicability date and transition rules--(1) Statutory effective date/applicability date. Section 430 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 430 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of PPA '06.

(2) Effective date/applicability date of regulations. This section applies to plan years beginning on or after January 1, 2010. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in this section for purposes of satisfying the requirements of section 430.

(3) Special lookback rule for 2007 plan year's funding ratio--(i) Plan assets. For purposes of determining a plan's prior plan year funding ratio under paragraph (d)(3) of

this section with respect to the first plan year beginning on or after January 1, 2008, the value of plan assets on the valuation date of the preceding plan year (the "2007 plan year") is determined under section 412(c)(2) as in effect for the 2007 plan year, except that, for this purpose--

(A) If the value of plan assets is less than 90 percent of the fair market value of plan assets for the 2007 plan year on that date, 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 for the 2007 plan year on that date, such value is considered to be 110 percent of the fair market value.

(ii) Funding target. For purposes of determining a plan's prior plan year funding ratio under paragraph (d)(3) of this section with respect to the first plan year beginning on or after January 1, 2008, the funding target of the plan for the preceding plan year is equal to the plan's current liability under section 412(l)(7) (as in effect prior to amendment by PPA '06) on the valuation date for the 2007 plan year.

(iii) Special rules for new plans, mergers, and spinoffs. In the case of a plan described in paragraph (d)(3)(ii), (d)(3)(iii), or (d)(3)(iv) of this section, the plan's prior plan year funding ratio with respect to the first plan year beginning on or after January 1, 2008 is determined using rules similar to the rules of paragraphs (d)(3)(ii), (d)(3)(iii), and (d)(3)(iv) of this section.

(4) First effective plan year. For purposes of this section, the term first effective plan year means the first plan year beginning on or after the date section 430 applies for purposes of determining the minimum required contribution for the plan.

(5) Pre-effective plan year. For purposes of this section, the term pre-effective plan year means the plan year immediately preceding the first effective plan year.

Par. 4. Section 1.430(g)-1 is added to read as follows:

§1.430(g)-1 Valuation date and valuation of plan assets.

(a) In general--(1) Overview. This section provides rules relating to a plan's valuation date and the valuation of a plan's assets for a plan year under section 430(g). Section 430 and this section apply to single employer defined benefit plans (including multiple employer plans as defined in section 413(c)) that are subject to the rules of section 412, but do not apply to multiemployer plans (as defined in section 414(f)). Paragraph (b) of this section describes valuation date rules. Paragraph (c) of this section describes rules regarding the determination of the asset value for purposes of a plan's actuarial valuation. Paragraph (d) of this section contains rules for taking employer contributions into account in the determination of the value of plan assets. Paragraph (e) of this section contains examples. Paragraph (f) of this section sets forth effective/applicability dates and transition rules.

(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 section 430 and this section are applied separately for each employer under the plan as if each employer maintained a separate plan. Thus, in such a case, the value of plan assets is determined separately for each employer under 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 section 430 and this section are applied as if all participants in the plan were employed by a single

employer.

(b) Valuation date--(1) In general. The determination of the funding target, target normal cost, and value of plan assets for a plan year is made as of the valuation date for that plan year. Except as otherwise provided in paragraph (b)(2) of this section, the valuation date for any plan year is the first day of the plan year.

(2) Exception for small plans--(i) In general. If, on each day during the preceding plan year, a plan had 100 or fewer participants determined by applying the rules of §1.430(d)-1(e)(1) and (2) (including active and inactive participants and all other individuals entitled to future benefits), then the plan may designate any day during the plan year as its valuation date for that plan year and succeeding plan years. For purposes of this paragraph (b)(2)(i), all defined benefit plans (other than multiemployer plans as defined in section 414(f)) maintained by an employer are treated as one plan, but only participants with respect to that employer are taken into account.

(ii) Employer determination. For purposes of this paragraph (b)(2), the employer includes all members of the employer's controlled group determined pursuant to section 414(b), (c), (m), and (o) and includes any predecessor of the employer that, during the prior year, employed any employees of the employer who are covered by the plan.

(iii) Application of exception in first plan year. In the case of the first plan year of any plan, the exception for small plans under paragraph (b)(2)(i) of this section is applied by taking into account the number of participants that the plan is reasonably expected to have on each day during the first plan year.

(iv) Valuation date is part of funding method. The selection of a plan's valuation date is part of the plan's funding method and, accordingly, may only be changed with the consent of the Commissioner. A change of a plan's valuation date that is required by section 430 is treated as having been approved by the Commissioner and does not require the Commissioner's prior specific approval. Thus, if a plan that ceases to be eligible for the small plan exception under this paragraph (b)(2) for a plan year because the number of participants exceeded 100 in the prior plan year, then the resulting change in the valuation date to the first day of the plan year is automatically approved by the Commissioner.

(c) Determination of asset value--(1) In general--(i) General use of fair market value. Except as otherwise provided in this paragraph (c), the value of plan assets for purposes of section 430 is equal to the fair market value of plan assets on the valuation date. Prior year contributions made after the valuation date and current year contributions made before the valuation date are taken into account to the extent provided in paragraph (d) of this section.

(ii) Fair market value. The fair market value of an asset is determined as the price at which the asset would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. Except as otherwise provided by the Commissioner, any guidance on the valuation of insurance contracts under Subchapter D of Chapter 1 the Internal Revenue Code applies for purposes of this paragraph (c)(1)(ii).

(2) Averaging of fair market values--(i) In general. Subject to the plan asset corridor rules of paragraph (c)(2)(iii) of this section, a plan is permitted to determine the value of plan assets on the valuation date as the average of the fair market value of assets on the valuation date and the adjusted fair market value of assets determined for

one or more earlier determination dates (adjusted using the method described in paragraph (c)(2)(ii) of this section). The method of determining the value of assets is part of the plan's funding method and, accordingly, may only be changed with the consent of the Commissioner.

(ii) Adjusted fair market value--(A) Determination dates. The period of time between each determination date (treating the valuation date as a determination date) must be equal and that period of time cannot exceed 12 months. In addition, the earliest determination date with respect to a plan year cannot be earlier than the last day of the 25th month before the valuation date of the plan year (or a similar period in the case of a valuation date that is not the first day of a month). In a typical situation, the earlier determination dates will be the two immediately preceding valuation dates. However, these rules also permit the use of more frequent determination dates. For example, monthly or quarterly determination dates may be used.

(B) Adjustments for contributions and distributions. The adjusted fair market value of plan assets for a prior determination date is the fair market value of plan assets on that date, increased for contributions included in the plan's asset balance on the valuation date that were not included in the plan's asset balance on the earlier determination date, reduced for benefits and all other amounts paid from plan assets during the period beginning with the prior determination date and ending immediately before the valuation date, and adjusted for expected earnings as described in paragraph (c)(2)(ii)(D) of this section. For this purpose, the fair market value of assets as of a determination date includes any contribution for a plan year that ends with or prior to the determination date that is receivable as of the determination date (but only if the contribution is actually made within 8½ months after the end of the applicable plan year). If the contribution that is receivable as of the determination date is for a plan year beginning on or after January 1, 2008, then only the present value as of the determination date (determined using the effective interest rate under section 430(h)(2)(A) for the plan year for which the contribution is made) is included in the fair market value of assets.

(C) Treatment of spin-offs and plan-to-plan transfers. For purposes of determining the adjusted fair market value of plan assets, assets spun-off from a plan as a result of a spin-off described in §1.414(l)-1(b)(4) are treated as an amount paid from plan assets. Except as otherwise provided by the Commissioner, for purposes of determining the adjusted fair market value of plan assets, assets that are added to a plan as a result of a plan-to-plan transfer described in §1.414(l)-1(b)(3) are treated in the same manner as contributions.

(D) Adjustments for expected earnings. [Reserved]

(E) Assumed rate of return. [Reserved]

(F) Limitation on the assumed rate of return for periods within plan years for which the three segment rates were used. [Reserved]

(G) Limitation on the assumed rate of return for periods within plan years for which the full yield curve was used. [Reserved]

(iii) Restriction to 90-110 percent corridor--(A) In general. This paragraph (c)(2)(iii) provides rules for applying the 90 to 110 percent corridor set forth in section 430(g)(3)(B)(iii). The rules for accounting for contribution receipts under paragraphs (d)(1) and (d)(2) of this section are applied prior to the application of the 90 to 110 percent corridor under this paragraph (c)(2)(iii).

(B) Asset value less than 90 percent of fair market value. If the value of plan assets determined under paragraph (c)(2)(i) of this section is less than 90 percent of the fair market value of plan assets, then the value of plan assets under this paragraph (c)(2) is equal to 90 percent of the fair market value of plan assets.

(C) Asset value greater than 110 percent of fair market value. If the value of plan assets determined under paragraph (c)(2)(i) of this section is greater than 110 percent of the fair market value of plan assets, then the value of plan assets under this paragraph (c)(2) is equal to 110 percent of the fair market value of plan assets.

(3) Qualified transfers to health benefit accounts. In the case of a qualified transfer (as defined in section 420), any assets so transferred are not treated as plan assets for purposes of section 430 and this section.

(d) Accounting for contribution receipts--(1) Prior year contributions--(i) In general. For purposes of determining the value of plan assets under paragraph (c) of this section, if an employer makes a contribution to the plan after the valuation date for the current plan year and the contribution is for an earlier plan year, then the present value of the contribution determined as of that valuation date is taken into account as an asset of the plan as of the valuation date, but only if the contribution is made before the deadline for contributions as described in section 430(j)(1) for the plan year immediately preceding the current plan year. For this purpose, the present value is determined using the effective interest rate under section 430(h)(2)(A) for the plan year for which the contribution is made.

(ii) Special rule for contributions for the 2007 plan year--(A) Timely contributions.

Notwithstanding paragraph (d)(1)(i) of this section, if the employer makes a contribution to the plan after the valuation date for the first plan year that begins on or after January 1, 2008, and the contribution is for the immediately preceding plan year and is made by the deadline for contributions for that preceding plan year under section 412(c)(10) (as in effect before amendment by the Pension Protection Act of 2006 (PPA ’06), Public Law 109-280 (120 Stat. 780)), then the contribution is taken into account as a plan asset under paragraph (d)(1)(i) of this section without applying any present value discount.

(B) Late contributions. If a contribution is for the plan year that immediately precedes the first plan year that beings on or after January 1, 2008, and is not described in paragraph (d)(1)(ii)(A) of this section, then the rules of paragraph (d)(1)(i) apply to the contribution except that the present value is determined using the valuation interest rate under section 412(c)(2) for that plan year.

(iii) Ordering rules. For purposes of this paragraph (d)(1), the ordering rules of section 4971(c)(4)(B) apply for purposes of determining the plan year for which a contribution is made.

(2) Current year contributions made before valuation date. In the case of a plan with a valuation date that is not the first day of the plan year, for purposes of determining the value of plan assets under paragraph (c) of this section, if an employer makes a contribution for a plan year before that year’s valuation date, that contribution (and any interest on the contribution for the period between the contribution date and the valuation date, determined using the effective interest rate under section 430(h)(2)(A) for the plan year) must be subtracted from plan assets in determining the

value of plan assets as of the valuation date. If the result of this subtraction is a number less than zero, the value of plan assets as of the valuation date is equal to zero.

(e) Examples. [Reserved]

(f) Effective/applicability dates and transition rules--(1) Statutory effective date/applicability date. Section 430 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 430 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of PPA'06.

(2) Effective date/applicability date of regulations--(i) In general. This section applies to plan years beginning on or after January 1, 2010, regardless of whether section 430 applies to determine the minimum required contribution for the plan year. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in this section for purposes of satisfying the requirements of section 430.

(ii) Permission to use averaging for 2008. For purposes of determining the actuarial value of assets for a plan year beginning during 2008 using the averaging rules of paragraph (c)(2) of this section, a plan is permitted to apply an assumed earnings rate of zero under paragraph (c)(2)(ii)(E) of this section (even if zero is not the actuary's best estimate of the anticipated annual rate of return on plan assets).

(3) Approval for changes in the valuation date and valuation method. Any change in a plan's valuation date or asset valuation method that satisfies the rules of this section and is made for either the first plan year beginning in 2008, the first plan year beginning in 2009, or the first plan year beginning in 2010 is treated as having

been approved by the Commissioner and does not require the Commissioner's specific prior approval. In addition, a change in a plan's valuation date or asset valuation method for the first plan year to which section 430 applies to determine the plan's minimum required contribution (even if that plan year begins after December 31, 2010) that satisfies the rules of this section is treated as having been approved by the Commissioner and does not require the Commissioner's specific prior approval.

Par. 5. Section 1.430(h)(2)-1 is added to read as follows:

§1.430(h)(2)-1 Interest rates used to determine present value.

(a) In general--(1) Overview. This section provides rules relating to the interest rates to be applied for a plan year under section 430(h)(2). Section 430(h)(2) and this section apply to single employer defined benefit plans (including multiple employer plans as defined in section 413(c)) that are subject to section 412 but do not apply to multiemployer plans (as defined in section 414(f)). Paragraph (b) of this section describes how the segment interest rates are used for a plan year. Paragraph (c) of this section describes those segment rates. Paragraph (d) of this section describes the monthly corporate bond yield curve that is used to develop the segment rates. Paragraph (e) of this section describes certain elections that are permitted to be made under this section. Paragraph (f) of this section describes other rules related to interest rates. Paragraph (g) of this section contains examples. Paragraph (h) of this section contains effective/applicability dates and transition rules.

(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 section 430 and 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 make elections with respect to the interest rate rules under this section that are independent of the elections of other employers under 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 section 430 and this section are applied as if all participants in the plan were employed by a single employer.

(b) Interest rates for determining plan liabilities--(1) In general. The interest rates used in determining the present value of the benefits that are included in the target normal cost and the funding target for the plan for a plan year are determined as set forth in this paragraph (b).

(2) Benefits payable within 5 years--(i) Plans with valuation dates at the beginning of the plan year. If the valuation date is the first day of the plan year, in the case of benefits expected to be payable during the 5-year period beginning on the valuation date for the plan year, the interest rate used in determining the present value of the benefits that are included in the target normal cost and the funding target for the plan is the first segment rate with respect to the applicable month, as described in paragraph (c)(2)(i) of this section.

(ii) Plans with valuation dates other than the first day of the plan year. [Reserved]

(3) Benefits payable after 5 years and within 20 years. In the case of benefits expected to be payable during the 15-year period beginning after the end of the period described in paragraph (b)(2) of this section, the interest rate used in determining the

present value of the benefits that are included in the target normal cost and the funding target for the plan is the second segment rate with respect to the applicable month, as described in paragraph (c)(2)(ii) of this section.

(4) Benefits payable after 20 years. In the case of benefits expected to be payable after the period described in paragraph (b)(3) of this section, the interest rate used in determining the present value of the benefits that are included in the target normal cost and the funding target for the plan is the third segment rate with respect to the applicable month, as described in paragraph (c)(2)(iii) of this section.

(5) Applicable month. Except as otherwise provided in paragraph (e) of this section, the term applicable month for purposes of this paragraph (b) means the month that includes the valuation date of the plan for the plan year.

(6) Special rule for certain airlines--(i) In general. Pursuant to section 6615 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Public Law 110-28 (121 Stat. 112), for a plan sponsor that makes the election described in section 402(a)(2) of the Pension Protection Act of 2006 (PPA '06), Public Law 109-280 (120 Stat. 780), the interest rate required to be used to determine the plan's funding target for each of the 10 years under that election is 8.25 percent (rather than the segment rates otherwise described in this paragraph (b) or the full yield curve as permitted under paragraph (e)(4) of this section).

(ii) Special interest rate not applicable for other purposes. The special interest rate described in paragraph (b)(6)(i) of this section does not apply for other purposes such as the determination of the plan's target normal cost.

(c) Segment rates--(1) Overview. This paragraph (c) sets forth rules for determining the first, second, and third segment rates for purposes of paragraph (b) of this section. The first, second, and third segment rates are set forth in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin. See §601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin. See paragraph (h)(4) of this section for a transition rule under which the definition of the segment rates is modified for plan years beginning in 2008 and 2009.

(2) Definition of segment rates--(i) First segment rate. For purposes of this section, except as otherwise provided under the transition rule of paragraph (h)(4) of this section, the first segment rate is, with respect to any month, the single rate of interest determined by the Commissioner on the basis of the average of the monthly corporate bond yield curves (described in paragraph (d) of this section) for the 24-month period ending with the month preceding that month, taking into account only the first 5 years of each of those yield curves.

(ii) Second segment rate. For purposes of this section, except as otherwise provided under the transition rule of paragraph (h)(4) of this section, the second segment rate is, with respect to any month, the single rate of interest determined by the Commissioner on the basis of the average of the monthly corporate bond yield curves (described in paragraph (d) of this section) for the 24-month period ending with the month preceding that month, taking into account only the portion of each of those yield curves corresponding to the 15-year period that follows the end of the 5-year period described in paragraph (c)(2)(i) of this section.

(iii) Third segment rate. For purposes of this section, except as otherwise provided

provided under the transition rule of paragraph (h)(4) of this section, the third segment rate is, with respect to any month, the single rate of interest determined by the Commissioner on the basis of the average of the monthly corporate bond yield curves (described in paragraph (d) of this section) for the 24-month period ending with the month preceding that month, taking into account only the portion of each of those yield curves corresponding to the 40-year period that follows the end of the 15-year period described in paragraph (c)(2)(ii) of this section.

(d) Monthly corporate bond yield curve--(1) In general. For purposes of this section, the monthly corporate bond yield curve is, with respect to any month, a yield curve that is prescribed by the Commissioner for that month based on yields for that month on investment grade corporate bonds with varying maturities that are in the top three quality levels available.

(2) Determination and publication of yield curve. A description of the methodology for determining the monthly corporate bond yield curve is provided in guidance issued by the Commissioner that is published in the Internal Revenue Bulletin. The yield curve for a month will be set forth in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin. See §601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin.

(e) Elections--(1) In general. This paragraph (e) describes elections for a plan year that a plan sponsor can make to use alternative interest rates under this section. Any election under this paragraph (e) must be made by providing written notification of the election to the plan's enrolled actuary. Any election in this paragraph (e) may be adopted for a plan year without obtaining the consent of the Commissioner, but, once adopted, that election will apply for that plan year and all future plan years and may be changed only with the consent of the Commissioner.

(2) Election for alternative applicable month. As an alternative to defining the applicable month as the month that includes the valuation date for the plan year, a plan sponsor that is using segment rates as provided under paragraph (b) of this section may elect to use one of the 4 months preceding that month as the applicable month.

(3) Election not to apply transition rule. The plan sponsor may elect not to apply the transition rule in paragraph (h)(4) of this section.

(4) Election to use full yield curve--(i) In general. For purposes of determining the plan's funding target and target normal cost, and for all other purposes under section 430 (including the determination of shortfall amortization installments, waiver installments, and the present values of those installments as described in paragraph (f)(2) of this section), the plan sponsor may elect to use interest rates under the monthly corporate bond yield curve described in paragraph (d) of this section for the month preceding the month that includes the valuation date in lieu of the segment rates determined under paragraph (c) of this section. In order to address the timing of benefit payments during a year, reasonable approximations are permitted to be used to value benefit payments that are expected to be made during a plan year.

(ii) Reasonable techniques permitted. In the case of a plan sponsor using the monthly corporate bond yield curve under this paragraph (e)(4), if with respect to a decrement the benefit is only expected to be paid for one-half of a year (because the decrement was assumed to occur in the middle of the year), the interest rate for that year can be determined as if the benefit were being paid for the entire year. See §1.430(d)-1(f)(7) for additional reasonable techniques that can be used in determining present value.

(5) Plan sponsor. For purposes of the elections described in this section, any reference to the plan sponsor generally means the employer or employers responsible for making contributions to or under the plan. 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).

(f) Interest rates used for other purposes--(1) Effective interest rate--(i) In general. Except as otherwise provided in paragraph (f)(2) of this section, the effective interest rate determined under section 430(h)(2)(A) for the plan year is the single interest rate that, if used to determine the present value of the benefits that are taken into account in determining the plan's funding target for the plan year, would result in an amount equal to the plan's funding target determined for the plan year under section 430(d) as described in §1.430(d)-1(b)(2) (without regard to calculations for plans in at-risk status under section 430(i)).

(ii) Zero funding target. If, for the plan year, the plan's funding target is equal to zero, then the effective interest rate determined under section 430(h)(2)(A) for the plan year is the single interest rate that, if used to determine the present value of the benefits that are taken into account in determining the plan's target normal cost for the plan year, would result in an amount equal to the plan's target normal cost determined for the plan year under section 430(b) as described in §1.430(d)-1(b)(1) (without regard to calculations for plans in at-risk status under section 430(i)).

(2) Interest rates used for determining shortfall amortization installments and waiver amortization installments. The interest rates used to determine the amount of shortfall amortization installments and waiver amortization installments and the present value of those installments are determined based on the dates those installments are assumed to be paid, using the same timing rules that apply in determining target normal cost as described in paragraph (b) of this section. Thus, for a plan that uses the segment rates described in paragraph (c) of this section, the first segment rate applies to the installments assumed to be paid during the first 5 year period beginning on the valuation date for the plan year, and the second segment rate applies to the installments assumed to be paid during the subsequent 15-year period. For purposes of this paragraph (f)(2), the shortfall amortization installments for a plan year are assumed to be paid on the valuation date for that plan year. For example, for a plan that uses the segment rates described in paragraph (c) of this section, the shortfall amortization installment for the fifth plan year following the current plan year (the sixth installment) is assumed to be paid on the valuation date for that year so that such shortfall amortization installment will be determined using the second segment rate.

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

Example 1. (i) The January 1, 2009, valuation of Plan P is performed using the segment rates applicable for September 2008 (determined without regard to the transition rule of section 430(h)(2)(G)), and the 2009 annuitant and nonannuitant (male and female) mortality tables as published in Notice 2008-85. See §601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin. Plan P provides for early retirement benefits as early as age 50, and offers a single-sum distribution payable immediately at retirement. The single-sum payment is equal to the present value of the participant's accrued benefit, based on the applicable interest rates and the applicable mortality table under section 417(e)(3). Participant E is the only participant in the plan, and is a male age 46 as of January 1, 2009, with an annual accrued benefit of $23,000 payable beginning at age 65. The actuary assumes a 100% probability that Participant

E will terminate at age 50 and will elect to receive his benefit in the form of a single-sum payment.

(ii) Plan P's funding target is $68,908 as of January 1, 2009. This figure is based on the male nonannuitant rates for ages prior to age 50, the applicable mortality rates under section 417(e)(3) for ages 50 and later, and segment interest rates of 5.07% for the first 5 years after the valuation date, 6.09% for the next 15 years, and 6.56% for periods more than 20 years after the valuation date. (See §1.430(d)-1(f)(9), Example 10, for additional details.)

(iii) The present value of Participant E's benefits as of January 1, 2009, is $68,908 if a single interest rate of 6.52805% is substituted for the segment interest rates but all other assumptions remain the same. Thus (rounded), the effective interest rate for Plan P is 6.53% for 2009.

Example 2. (i) The facts are the same as for Example 1, except that Plan P offers a single-sum distribution equal to the present value of the accrued benefit based on the applicable interest rates under section 417(e)(3) or an interest rate of 6.25%, whichever produces the higher amount. The applicable mortality table under section 417(e)(3) is used for both calculations.

(ii) The present value of Participant E's age-50 single-sum distribution as of January 1, 2009 (when Participant E is age 46) is $77,392. This amount is determined by calculating the projected single-sum distribution at age 50 using the applicable mortality table under section 417(e)(3) and an interest rate of 6.25%, and discounting the result to January 1, 2009, using the first segment rate of 5.07% and male nonannuitant mortality rates for 2009. Because this amount is larger than the present value of Participant E's single-sum payment based on the applicable interest rates under section 417(e)(3) (that is, $68,908), the funding target for Plan P is $77,392 as of January 1, 2009. (See §1.430(d)-1(f)(9), Example 12 for additional details.)

(iii) The effective interest rate is the single interest rate that will produce the same funding target if substituted for the segment interest rates keeping all other assumptions the same, including the fixed interest rate used by the plan to determine single-sum payments. The only segment interest rate used to develop the funding target of $77,392 was the first segment rate of 5.07%. Therefore, considering only this calculation, the single interest rate that would produce the same funding target would be 5.07%.

(iv) However, the effective interest rate must also reflect the fact that the single-sum payment under Plan P is equal to the greater of the present value of Participant E's accrued benefit based on the fixed rate of 6.25% or the applicable interest rates under section 417(e)(3). If the single rate of 5.07% is substituted for the segment rates used to calculate the present value of the single-sum payment based on the applicable interest rates, the resulting funding target would be higher than $77,392.

(v) Using a single interest rate of 6.0771%, the January 1, 2009, present value of Participant E’s single-sum payment based on the applicable interest rates is $77,392, and the present value of Participant E’s single sum payment based on the plan’s interest rate of 6.25% is $74,494. Plan P’s funding target is the larger of the two, or $77,392, which is the same as the funding target based on the segment interest rates used for the 2009 valuation. Therefore, Plan P’s effective interest rate for 2009 (rounded) is 6.08%.

(h) Effective/applicability dates and transition rules--(1) Statutory effective date/applicability date. Section 430 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 430 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of PPA ‘06.

(2) Effective date/applicability date of regulations. This section applies to plan years beginning on or after January 1, 2010, regardless of whether section 430 applies to determine the minimum required contribution for the plan year. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in this section for purposes of satisfying the requirements of section 430.

(3) Approval for changes in interest rate. Any change to an election under paragraph (e) of this section that is made for the first plan year beginning in 2009 or the first plan year beginning in 2010 is treated as having been approved by the Commissioner and does not require the Commissioner’s specific prior approval.

(4) Transition rule--(i) In general. Notwithstanding the general rules for determination of segment rates under paragraph (c)(2) of this section, for plan years beginning in 2008 or 2009, the first, second, or third segment rate for a plan with respect to any month is equal to the sum of--

(A) The product of that rate for that month determined without regard to this paragraph (h)(4), multiplied by the applicable percentage; and

(B) The product of the weighted average interest rate determined under the rules of paragraph (h)(4)(iii) of this section, multiplied by a percentage equal to 100 percent minus the applicable percentage.

(ii) Applicable percentage. For purposes of this paragraph (h)(4), the applicable percentage is 33-1/3 percent for plan years beginning in 2008 and 66-2/3 percent for plan years beginning in 2009.

(iii) Weighted average interest rate. The weighted average interest rate for purposes of paragraph (h)(4)(i)(B) of this section is the weighted average interest rate under section 412(b)(5)(B)(ii)(II) (as that provision was in effect for plan years beginning in 2007) as of--

(A) The month which contains the first day of the plan year;

(B) The month which contains the valuation date (if the applicable month is determined under paragraph (b)(5) of this section); or

(C) The applicable month (if the applicable month is determined under paragraph (e)(2) of this section).

(iv) New plans ineligible. The transition rule of this paragraph (h)(4) does not apply if the first plan year of the plan begins on or after January 1, 2008.

Par. 6. Section 1.430(i)-1 is added to read as follows:

§1.430(i)-1 Special rules for plans in at-risk status.

(a) In general--(1) Overview. This section provides special rules related to determining the funding target and making other computations for certain defined benefit plans that are in at-risk status for the plan year. Section 430(i) and this section apply to single employer defined benefit plans (including multiple employer plans) but do not apply to multiemployer plans (as defined in section 414(f)). Paragraph (b) of this section describes rules for determining whether a plan is in at-risk status for a plan year, including the determination of a plan's funding target attainment percentage and at-risk funding target attainment percentage. Paragraph (c) of this section describes the funding target for a plan in at-risk status. Paragraph (d) of this section describes the target normal cost for a plan in at-risk status. Paragraph (e) of this section describes rules regarding how the funding target and the target normal cost are determined for a plan that has been in at-risk status for fewer than 5 consecutive plan years. Paragraph (f) of this section sets forth effective/applicability dates and transition rules.

(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 section 430 and this section are applied separately for each employer under the plan, as if each employer maintained a separate plan. For example, at-risk status is determined separately for each employer 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 rules of section 430 and this section are applied as if all participants in the plan were employed by a single employer.

(b) Determination of at-risk status of a plan--(1) General rule. Except as otherwise provided in this section, a plan is in at-risk status for a plan year if--

(i) The funding target attainment percentage for the preceding plan year (determined under paragraph (b)(3) of this section) is less than 80 percent; and

(ii) The at-risk funding target attainment percentage for the preceding plan year (determined under paragraph (b)(4) of this section) is less than 70 percent.

(2) Small plan exception. If, on each day during the preceding plan year, a plan had 500 or fewer participants (including both active and inactive participants), determined in accordance with the same rules that apply for purposes of §1.430(g)-1(b)(2)(ii), then the plan is not treated as being in at-risk status for the plan year.

(3) Funding target attainment percentage. For purposes of this section, except as otherwise provided in paragraph (b)(5) of this section, the funding target attainment percentage of a plan for a plan year is the funding target attainment percentage as defined in §1.430(d)-1(b)(3).

(4) At-risk funding target attainment percentage. Except as otherwise provided in paragraph (b)(5) of this section, the at-risk funding target attainment percentage of a plan for a plan year is a fraction (expressed as a percentage)--

(i) The numerator of which is the value of plan assets for the plan year after subtraction of the prefunding balance and the funding standard carryover balance under section 430(f)(4)(B); and

(ii) The denominator of which is the at-risk funding target of the plan for the plan year (determined under paragraph (c) of this section, but without regard to the loading factor imposed under paragraph (c)(2)(ii) of this section).

(5) Special rules--(i) Special rule for new plans. Except as otherwise provided in paragraph (b)(5)(iii) of this section, in the case of a new plan that was neither the result of a merger nor involved in a spinoff, the funding target attainment percentage under paragraph (b)(3) of this section and the at-risk funding target attainment percentage

under paragraph (b)(4) of this section are equal to 100 percent for years before the plan exists.

(ii) Special rule for plans with zero funding target. Except as otherwise provided in paragraph (b)(5)(iii) of this section, if the funding target of the plan is equal to zero for a plan year, then the funding target attainment percentage under paragraph (b)(3) of this section and the at-risk funding target attainment percentage under paragraph (b)(4) of this section are equal to 100 percent for that plan year.

(iii) Exception when plan has predecessor plan that was in at-risk status. [Reserved]

(iv) Special rules for plans that are the result of a merger. [Reserved]

(v) Special rules for plans that are involved in a spinoff. [Reserved]

(6) Special rule for determining at-risk status of plans of specified automobile manufacturers. See section 430(i)(4)(C) for special rules for determining the at-risk status of plans of specified automobile and automobile parts manufacturers.

(c) Funding target for plans in at-risk status--(1) In general. If the plan has been in at-risk status for 5 consecutive years, including the current plan year, then the funding target for the plan is the at-risk funding target determined under paragraph (c)(2) of this section. See paragraph (e) of this section for the determination of the funding target where the plan is in at-risk status for the plan year but was not in at-risk status for one or more of the 4 preceding plan years.

(2) At-risk funding target--(i) Use of modified actuarial assumptions. Except as otherwise provided in this paragraph (c)(2), the at-risk funding target of the plan under this paragraph (c)(2) for the plan year is equal to the present value of all benefits

accrued or earned under the plan as of the beginning of the plan year, as determined in accordance with §1.430(d)-1 but using the additional actuarial assumptions described in paragraph (c)(3) of this section.

(ii) Funding target includes load. The at-risk funding target is increased by the sum of--

(A) $700 multiplied by the number of participants in the plan (including active participants, inactive participants, and beneficiaries); plus

(B) Four percent of the funding target (determined under §1.430(d)-1(b)(2) as if the plan was not in at-risk status) of the plan for the plan year.

(iii) Minimum amount. Notwithstanding any otherwise applicable provisions of this section, the at-risk funding target of a plan for a plan year is not less than the plan's funding target for the plan year determined without regard to this section.

(3) Additional actuarial assumptions--(i) In general. The actuarial assumptions used to determine a plan's at-risk funding target for a plan year are the actuarial assumptions that are applied under section 430, with the modifications described in this paragraph (c)(3).

(ii) Special retirement age assumption--(A) Participants eligible to retire and collect benefits within 11 years. Subject to paragraph (c)(3)(ii)(B) of this section, if a participant would be eligible to commence an immediate distribution by the end of the 10th plan year after the current plan year (that is, the end of the 11th plan year beginning with the current plan year), that participant is assumed to commence an immediate distribution at the earliest retirement age under the plan, or, if later, at the end of the current plan year. The rule of this paragraph (c)(3)(ii)(A) does not affect the application of plan assumptions regarding an employee's termination of employment prior to the employee's earliest retirement age.

(B) Participants otherwise assumed to retire immediately. The special retirement age assumption of paragraph (c)(3)(ii)(A) of this section does not apply to a participant to the extent the participant is otherwise assumed to commence benefits during the current plan year under the actuarial assumptions for the plan. For example, if generally applicable retirement assumptions would provide for a 25 percent probability that a participant will commence benefits during the current plan year, the special retirement age assumption of paragraph (c)(3)(ii)(A) of this section requires the plan's enrolled actuary to assume a 75 percent probability that the participant will commence benefits at the end of the plan year.

(C) Definition of earliest retirement date. For purposes of this paragraph (c)(3)(ii), a plan's earliest retirement date for an employee is the earliest date on which the employee can commence receiving an immediate distribution of a fully vested benefit under the plan. See §1.401(a)-20, Q&A-17(b).

(iii) Requirement to assume most valuable benefit. All participants and beneficiaries who are assumed to retire on a particular date are assumed to elect the optional form of benefit available under the plan that would result in the highest present value of benefits commencing at that date.

(iv) Reasonable techniques permitted. The plan's actuary is permitted to use reasonable techniques in determining the actuarial assumptions that are required to be used pursuant to this paragraph (c)(3). For example, the plan's actuary is permitted to use reasonable assumptions in determining the optional form of benefit under the plan that would result in the highest present value of benefits for this purpose.

(d) Target normal cost of plans in at-risk status--(1) General rule. If the plan has been in at-risk status for 5 consecutive years, including the current plan year, then the target normal cost for the plan is the at-risk target normal cost determined under paragraph (d)(2) of this section. See paragraph (e) of this section for the determination of the target normal cost where the plan is in at-risk status for the plan year but was not in at-risk status for one or more of the 4 preceding plan years.

(2) At-risk target normal cost--(i) Use of modified actuarial assumptions--(A) In general. Except as otherwise provided in this paragraph (d)(2), the at-risk target normal cost of a plan for the plan year is equal to the present value (determined as of the valuation date) of all benefits that accrue during, are earned during, or are otherwise allocated to service in the plan year, as determined in accordance with §1.430(d)-1 but using the additional actuarial assumptions described in paragraph (c)(3) of this section.

(B) Special adjustments. The target normal cost of the plan for the plan year (determined under paragraph (d)(2)(i)(A) of this section) is adjusted (not below zero) by adding the amount of plan-related expenses expected to be paid from plan assets during the plan year and subtracting the amount of any mandatory employee contributions expected to be made during the plan year.

(C) Plan-related expenses. For purposes of this paragraph (d)(2), plan-related expenses are determined using the rules of §1.430(d)-1(b)(1)(iii)(B).

(ii) Loading factor. The at-risk target normal cost is increased by a loading factor equal to 4 percent of the present value (determined as of the valuation date) of all benefits under the plan that accrue, are earned, or are otherwise allocated to service for the plan year under the applicable rules of §1.430(d)-1(c)(1)(ii)(B), (C), or (D), determined as if the plan were not in at-risk status.

(iii) Minimum amount. The at-risk target normal cost of a plan for a plan year is not less than the plan's target normal cost determined without regard to section 430(i) and this section.

(e) Transition between applicable funding targets and applicable target normal costs--(1) Funding target. If a plan that is in at-risk status for the plan year has not been in at-risk status for one or more of the preceding 4 plan years, the plan's funding target for the plan year is determined as the sum of--

(i) The funding target determined without regard to section 430(i) and this section; plus

(ii) The phase-in percentage for the plan year multiplied by the excess of--

(A) The at-risk funding target determined under paragraph (c)(2) of this section (determined taking into account paragraph (e)(4) of this section); over

(B) The funding target determined without regard to section 430(i) and this section.

(2) Target normal cost. If a plan that is in at-risk status for the plan year has not been in at-risk status for one or more of the preceding 4 plan years, the plan's target normal cost for the plan year is determined as the sum of--

(i) The target normal cost determined without regard to section 430(i) and this section; plus

(ii) The phase-in percentage for the plan year multiplied by the excess of--

(A) The at-risk target normal cost determined under paragraph (d)(2) of this section (determined taking into account paragraph (e)(4) of this section); over

(B) The target normal cost determined without regard to section 430(i) and this section.

(3) Phase-in percentage. For purposes of this paragraph (e), the phase-in percentage is 20 percent multiplied by the number of consecutive plan years that the plan has been in at-risk status (including the current plan year) and not taking into account years before the first effective plan year for a plan.

(4) Transition funding target and target normal cost determined without load. Notwithstanding paragraph (c)(2)(ii) of this section, if a plan has not been in at-risk status for 2 or more of the preceding 4 plan years (not taking into account years before the first effective plan year for a plan), then the plan's at-risk funding target that is used for purposes of paragraph (e)(1)(ii)(A) of this section (to calculate the plan's funding target where the plan has been in at-risk status for fewer than 5 plan years) is determined without regard to the loading factor set forth in paragraph (c)(2)(ii) of this section. Similarly, if a plan has not been in at-risk status for 2 or more of the preceding 4 plan years (not taking into account years before the first effective plan year for a plan), then the plan's at-risk target normal cost that is used for purposes of paragraph (e)(2)(ii)(A) of this section (to calculate the plan's target normal cost where the plan has been in at-risk status for fewer than 5 plan years) is determined without regard to the loading factor set forth in paragraph (d)(2)(ii) of this section.

(f) Effective/applicability dates and transition rules--(1) Statutory effective date/applicability date--(i) General rule. Section 430 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 430 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of the Pension Protection Act of 2006 (PPA ’06), Public Law 109-280 (120 Stat. 780).

(ii) Applicability of special adjustments to target normal cost. The special adjustments of paragraph (d)(2)(i)(B) of this section (relating to adjustments to the target normal cost for plan-related expenses and mandatory employee contributions) apply to plan years beginning after December 31, 2008. In addition, a plan sponsor may elect to make the special adjustments of paragraph (d)(2)(i)(B) of this section for plan years beginning in 2008. This election is made in the same manner and is subject to the same rules as an election to add an amount to the plan’s prefunding balance pursuant to §1.430(f)-1(f). Thus, the election can be made no later than the last day for making the minimum required contribution for the plan year to which the election relates.

(2) Effective date/applicability date of regulations. This section applies to plan years beginning on or after January 1, 2010. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in this section for purposes of satisfying the requirements of section 430.

(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 section 430 applies to the plan for purposes of determining the minimum required contribution.

(4) Transition rule for determining at-risk status. In the case of plan years beginning in 2008, 2009, and 2010, paragraph (b)(1)(i) of this section is applied by substituting the following percentages for “80 percent”--

(i) 65 percent in the case of 2008;

(ii) 70 percent in the case of 2009; and

(iii) 75 percent in the case of 2010.

Par. 7. Section 1.436-0 is added to read as follows:

§1.436-0 Table of contents.

This section contains a listing of the major headings of §1.436-1.

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

of 2008. [Reserved]

Par. 8. 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 limitations 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 prohibited payments. Paragraph (e) of this section describes limitations on benefit accruals. Paragraph (f) of this section provides rules relating to methods to avoid or terminate 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 and requirements relating to certifications. 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. Except as otherwise provided by the Commissioner in guidance of general

applicability, plan years of the plan include the following (in addition to plan years during which the plan was maintained by the employer or plan sponsor):

(A) Plan years when the plan was maintained by a predecessor employer within the meaning of §1.415(f)-1(c)(1).

(B) Plan years of another defined benefit plan maintained by a predecessor employer within the meaning of §1.415(f)-1(c)(2) within the preceding five years if any participants in the plan participated in that other defined benefit plan (even if the plan maintained by the employer is not the plan that was maintained by the predecessor employer).

(C) Plan years of another defined benefit plan maintained by the employer within the preceding five years if any participants in the plan participated in that other defined benefit plan.

(ii) Application of section 436 after termination of a plan--(A) In general. Except as otherwise provided in paragraph (a)(3)(ii)(B) of this section, any section 436 limitations in effect immediately before the termination of a plan do not cease to apply thereafter.

(B) Exception for payments pursuant to plan termination. The limitations under section 436(d) and paragraph (d) of this section do not apply to prohibited payments (within the meaning of paragraph (j)(6) of this section) that are made to carry out the termination of a plan in accordance with applicable law. For example, a plan sponsor's purchase of an irrevocable commitment from an insurer to pay benefit liabilities in connection with the standard termination of a plan in accordance with section 4041(b)(3) of the Employee Retirement Income Security Act of 1974, as amended

(ERISA), and in accordance with 29 CFR § 4041.28, does not violate section 436(d) or this section.

(iii) 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) Application to prohibited payments and accruals--(A) Resumption of prohibited payments. If a limitation on prohibited payments under paragraph (d) of this section applied to a plan as of a section 436 measurement date (as defined in paragraph (j)(8) of this section), but that limit no longer applies to the plan as of a later section 436 measurement date, then the limitation on prohibited payments under the plan does not apply to benefits with annuity starting dates (as defined in paragraph (j)(2) of this section) that are on or after that later section 436 measurement date. Any amendment to eliminate an optional form of benefit that contains a prohibited payment with respect to an annuity starting date during a period in which the limitations of section 436(d) and paragraph (d) of this section do not apply to the plan is subject to the rules of section 411(d)(6).

(B) Resumption of benefit accruals. If a limitation on benefit accruals under paragraph (e) 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 that limitation does not apply to benefit accruals that are based on service on or after that later section 436 measurement date, except to the extent that the plan provides that benefit accruals will not resume when the limitation ceases to apply. The plan must comply with the rules relating to partial years of participation and the prohibition on double proration under Department of Labor regulation 29 CFR §2530.204-2(c) and (d).

(ii) Restoration of options and missed benefit accruals--(A) Option to amend plan. A plan is permitted to be amended to provide participants who had an annuity starting date within a period during which a limitation under paragraph (d) of this section applied to the plan with the opportunity to make a new election under which the form of benefit previously elected is modified, subject to applicable qualification requirements. A participant who makes such a new election is treated as having a new annuity starting date under sections 415 and 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. A plan is permitted to provide that participants who had an annuity starting date within a period during which a limitation under paragraph (d) of this section applied to the plan will be provided with the opportunity to have a new annuity starting date (which would constitute a new annuity starting date under sections 415 and 417) under which the form of benefit previously elected may be modified, subject to applicable qualification requirements, once the limitations of paragraph (d) of this section cease to apply. In addition, subject to the rules of paragraph (c)(3) of this section, 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.

(iii) Shutdown and other unpredictable contingent event benefits. If unpredictable contingent event benefits with respect to an unpredictable contingent event that occurs during the plan year are not permitted to be paid after the occurrence of the event because of the limitations of section 436(b) and paragraph (b) of this section, but are permitted to be paid later in the plan year as a result of additional contributions under paragraph (f)(2) of this section or pursuant to the enrolled actuary's certification of the adjusted funding target attainment percentage for the plan year that meets the requirements of paragraph (g)(5)(ii)(B) of this section, then those unpredictable contingent event benefits must automatically become payable, retroactive to the period those benefits would have been payable under the terms of the plan (other than plan terms implementing the requirements of section 436(b)). If the benefits do not become payable during the plan year in accordance with the preceding sentence, then the plan is treated as if it does not provide for those benefits. However, all or any portion of those benefits can be restored pursuant to a plan amendment that meets the requirements of section 436(c) and paragraph (c) of this section and other applicable qualification requirements.

(iv) Treatment of plan amendments that do not take effect. If a plan amendment does not take effect as of the effective date of the amendment because of the limitations of section 436(c) and paragraph (c) of this section, but is permitted to take effect later in the plan year as a result of additional contributions under paragraph (f)(2) of this section or pursuant to the enrolled actuary's certification of the adjusted funding target attainment percentage for the plan year that meets the requirements of paragraph (g)(5)(ii)(C) of this section, then the plan amendment must automatically take effect as of the first day of the plan year (or, if later, the original effective date of the amendment). If the plan amendment cannot take effect during the plan year, then it must be treated as if it were never adopted, unless the plan amendment provides otherwise.

(v) Example. The following example illustrates the rules 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 prohibited payments under paragraph (d)(3) of this section based on a presumed adjusted funding target attainment percentage (AFTAP) of 75%.

(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. Plan T may pay only a portion (generally, 50%) of the prohibited payment. Accordingly, U elects in accordance with paragraph (d)(3)(ii) of this section to receive 50% of U's benefit in a single sum (up to the 2011 PBGC maximum benefit guarantee amount described in paragraph (d)(3)(iii)(C) of this section) 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 with respect to an annuity starting date between January 1, 2011, and February 28, 2011, 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, would still be 80%. The amendment is permitted to take effect because Plan T would have 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 prohibited payments under paragraphs (d)(1) and (d)(3) of this section. Accordingly, Participant U may elect, within the specified period and subject to otherwise applicable qualification rules, including spousal consent, to receive the remainder of U's 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)(1) or (d)(3) 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 the applicable threshold (60 or 80 percent, as the case may be) in order for the benefit limitation not to apply to the plan. The determination of whether a benefit limitation under paragraph (d) of this section would apply to a plan is based on whether the plan provides for an optional form of benefit that would be limited under section 436(d) and is not based on whether any participant elects payment of benefits in such a form.

(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 the applicable threshold (60 or 80 percent, as the case may be) in order for the benefit limitation not to apply to the plan, taking into account the adjustments described in paragraph (g)(2)(iii)(A), (g)(3)(ii)(A), or (g)(5)(i)(B) of this section, whichever applies.

(B) Collectively bargained plans. A plan is considered a collectively bargained plan for purposes of this paragraph (a)(5)(ii) if--

(1) At least 50 percent of the employees benefiting under the plan (within the meaning of §1.410(b)-3(a)) are members of collective bargaining units for which the benefit levels under the plan are specified under a collective bargaining agreement; or

(2) 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. During any period when a plan is presumed to have an adjusted funding target attainment percentage of less than 60 percent as a result of paragraph (h)(3) of this section, the plan is treated as if the prefunding balance and the funding standard carryover balance are insufficient to increase the adjusted funding target attainment percentage to the threshold percentage of 60 percent. Accordingly, the deemed election to reduce those balances pursuant to paragraphs (a)(5)(i) and (a)(5)(ii) of this section does not apply to the plan.

(iv) Other rules--(A) Date of deemed election. If an election is deemed to be made pursuant to this paragraph (a)(5), then the plan sponsor is treated as having made that election on the date as of which the applicable benefit limitation would otherwise apply.

(B) Coordination with section 436 contributions. The determination of whether one of the benefit limitations described in paragraph (a)(5)(ii)(A) of this section would otherwise apply is made without regard to any contribution described in paragraph (f)(2) of this section. Thus, the requirement to reduce the prefunding balance or funding standard carryover balance under paragraph (a)(5)(ii) of this section cannot be avoided through the use of a section 436 contribution.

(C) Coordination with elections to offset minimum required contribution. See §1.430(f)-1(d)(1)(ii) for rules on the coordination of elections to offset the minimum required contribution and the deemed election to reduce the prefunding and funding standard carryover balances under this paragraph (a)(5).

(v) Example. The following example illustrates the rules 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.

(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)(4)(i) of this section 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 in determining the funding target.

(iii) Because the AFTAP would be below the 80% threshold if the benefits attributable to the plan amendment were taken into account in determining the funding target, Sponsor X is deemed pursuant to paragraph (a)(5)(ii) of this section to have made an election to reduce Plan W's prefunding and funding standard carryover balances by the amount necessary for the AFTAP to reach the 80% threshold (reflecting the increase in funding target attributable to the plan amendment), provided that the amount of those balances is sufficient for this purpose.

(iv) If the deemed election described in paragraph (iii) of this example occurs, the plan amendment takes effect on its effective date (May 1, 2010). See paragraph (f) of this section for other methods to avoid or terminate benefit limitations (where, for example, the amount necessary for a benefit limitation not to apply for a plan year exceeds the sum of the prefunding balance and the funding standard carryover balance).

(6) Notice requirements. See section 101(j) of ERISA for rules requiring the plan administrator of a single employer plan to provide a written notice to participants and beneficiaries within 30 days after certain specified dates, which depend on whether the plan has become subject to a restriction described in the ERISA provisions that are parallel to Internal Revenue Code sections 436(b), 436(d), and 436(e) (ERISA sections 206(g)(1), 206(g)(3), and 206(g)(4), respectively).

(b) Limitation on shutdown benefits and other unpredictable contingent event benefits--(1) In general. Except as otherwise provided in this paragraph (b), a plan satisfies section 436(b) and this paragraph (b) only if it provides that unpredictable contingent event benefits with respect to any unpredictable contingent events occurring during a plan year will not be paid if the adjusted funding target attainment percentage for the plan year is--

(i) Less than 60 percent; or

(ii) 60 percent or more, but would be less than 60 percent if the adjusted funding target attainment percentage were redetermined applying an actuarial assumption that the likelihood of occurrence of the unpredictable contingent event during the plan year is

100 percent.

(2) Exemption if section 436 contribution is made. The prohibition on payment of unpredictable contingent event benefits under paragraph (b)(1) of this section ceases to apply with respect to benefits attributable to an unpredictable contingent event occurring during the plan year upon payment by the plan sponsor of the contribution described in paragraph (f)(2)(iii) of this section with respect to that event. If the prior sentence applies with respect to an unpredictable contingent event, then all benefits with respect to the unpredictable contingent event must be paid, including benefits for periods prior to the contribution. See paragraph (f) of this section for additional rules.

(3) Rules of application--(i) Participant-by-participant application. The limitations of section 436(b) and this paragraph (b) apply on a participant-by-participant basis. Thus, whether payment or commencement of an unpredictable contingent event benefit under a plan is restricted with respect to a participant is determined based on whether the participant satisfies the plan's eligibility requirements (other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability) for such a benefit in a plan year in which the limitations of section 436(b) and this paragraph (b) apply.

(ii) Multiple contingencies. In the case of a plan that provides for a benefit that depends upon the occurrence of more than one unpredictable contingent event with respect to a participant, the unpredictable contingent event for purposes of section 436(b) and this paragraph (b) occurs upon the last to occur of those unpredictable contingent events.

(iii) Cessation of benefits. Cessation of a benefit under a plan upon the occurrence of a specified event is not an unpredictable contingent event for purposes of section 436(b) and this paragraph (b). Thus, section 436(b) and this paragraph (b) do not prohibit provisions of a plan that provide for cessation, suspension, or reduction of any benefits upon occurrence of any event. However, upon any subsequent recommencement of benefits (including any restoration of benefits), the rules of section 436 and this section will apply.

(4) 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 benefits contingent upon that plant shutdown are not subject to the limitation described in this paragraph (b) for that calendar plan year, this paragraph (b) does not apply to restrict payment of those benefits even if another plant shutdown occurs in 2012 that results in the restriction of benefits that are contingent upon that later plant shutdown under this paragraph (b) (where the plan's adjusted funding target attainment percentage for 2012 would be less than 60 percent taking into account the liability attributable to those shutdown benefits).

(c) Limitations on plan amendments increasing liability for benefits--(1) In general. Except as otherwise provided in this paragraph (c), a plan satisfies section 436(c) and this paragraph (c) 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 will take effect in a plan year if the adjusted funding target attainment percentage for the plan year is--

(i) Less than 80 percent; or

(ii) 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 if section 436 contribution is made--(i) General rule. The limitations on plan amendments in paragraph (c)(1) of this section cease to apply with respect to an amendment upon payment by the plan sponsor of the contribution described in paragraph (f)(2)(iv) of this section, so that 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. See paragraph (f) of this section for additional rules.

(ii) Amendments that do not increase funding target. If the amount of the contribution described in paragraph (f)(2)(iv) of this section is $0 (because the amendment increases benefits solely for future periods), the amendment is permitted to take effect without regard to this paragraph (c). However, see §1.430(d)-1(d)(2) for a rule that requires such an amendment to be taken into account in determining the funding target and the target normal cost in certain situations.

(3) Rules of application regarding pre-existing plan provisions. If a plan contains a provision that provides for the automatic restoration of benefit accruals that were not permitted to accrue because of the application of section 436(e) and paragraph (e) of this section, the restoration of those accruals is generally treated as a plan amendment that is subject to section 436(c). However, such a provision is permitted to take effect

without regard to the limits of section 436(c) and this paragraph (c) if--

(i) The continuous period of the limitation is 12 months or less; and

(ii) The plan's enrolled actuary certifies that the adjusted funding target attainment percentage for the plan would not be less than 60 percent taking into account the restored benefit accruals for the prior plan year.

(4) Exceptions--(i) Benefit increases based on compensation--(A) In general. In accordance with section 436(c)(3), section 436(c) and this paragraph (c) do 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.

(B) Application to participants who are not currently employed. If an amendment applies to both currently employed participants and other participants, all participants to whom the amendment applies are included in determining the increase in average wages of the participants covered by the amendment for purposes of this paragraph (c)(4)(i). For this purpose, participants who are not employees at any time during the period from the effective date of the most recent earlier benefit increase applicable to all of the participants who are covered by the current amendment and ending on the effective date of the current amendment are treated as having no increase or decrease in wages for the period after severance from employment.

(C) Separate amendments for different plan populations. In lieu of a single amendment that applies to both currently employed participants and other participants as described in paragraph (c)(4)(i)(B) of this section, the employer can adopt multiple amendments -- such as one that increases benefits for participants currently employed on the effective date of the current amendment and another one that increases benefits for other participants. In that case, the two amendments are considered separately in determining the increase in average wages, and the exception in this paragraph (c)(4)(i) applies separately to each amendment. Thus, the increase in benefits for currently employed participants takes effect if it satisfies the exception under this paragraph (c)(4), but the amendment increasing benefits for other participants who received no increase in wages from the employer during the period over which the increase in average wages is separately subject to the rules of this paragraph (c) without regard to the rules of this paragraph (c)(4).

(ii) Plan provisions providing for accelerated vesting. To the extent that any amendment provides for (or any pre-existing plan provision results in) a mandatory increase in the vesting of benefits under the Code or ERISA (such as vesting rate increases pursuant to statute, plan termination amendments or partial terminations under section 411(d)(3), and vesting increases required by the rules for top-heavy plans under section 416), that amendment (or pre-existing plan provision) does not constitute an amendment that changes the rate at which benefits become nonforfeitable for purposes of section 436(c) and this paragraph (c). However, this paragraph (c)(4)(ii) applies only to the extent the increase in vesting is necessary to enable the plan to continue to satisfy the requirements for qualified plans.

(iii) Authority for additional exceptions. The Commissioner may, in guidance of general applicability, issue additional rules under which other amendments to a plan are not treated as amendments to which section 436(c) and this paragraph (c) apply. See §601.601(d)(2) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the Internal Revenue Bulletin.

(5) Rule for determining when an amendment takes effect. For purposes of section 436(c) and this paragraph (c), in the case of an amendment that increases benefits, the amendment takes effect under a plan on the first date on which any individual who is or could be a participant or beneficiary under the plan would obtain a legal right to the increased benefit if the individual were on that date to satisfy the applicable requirements for entitlement to the benefit (such as the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death, disability, or severance from employment).

(6) Treatment of mergers, consolidations, and transfers of plan assets into a plan. [Reserved]

(d) Limitations on prohibited payments--(1) AFTAP less than 60 percent. 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, a participant or beneficiary is not permitted to elect an optional form of benefit that includes a prohibited payment, and the plan will not pay any prohibited payment, with an annuity starting date on or after the applicable section 436 measurement date.

(2) Bankruptcy. A plan satisfies the requirements of section 436(d)(2) and this paragraph (d)(2) only if the plan provides that a participant or beneficiary is not permitted to elect an optional form of benefit that includes a prohibited payment, and the plan will not pay any prohibited payment, with an annuity starting date that occurs 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 within a plan year with an annuity starting date that occurs 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.

(3) Limited payment if AFTAP 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 not permitted to elect the payment of an optional form of benefit that includes a prohibited payment, and the plan will not pay any prohibited payment, with an annuity starting date on or after the applicable section 436 measurement date, unless the present value, determined in accordance with section 417(e)(3), of the portion of the benefit that is being paid in a prohibited payment (which portion is determined under paragraph (d)(3)(iii)(B) of this section) does not exceed the lesser of--

(A) 50 percent of the present value (determined in accordance with section 417(e)(3)) of the benefit payable in the optional form of benefit that includes the prohibited payment; or

(B) 100 percent of the PBGC maximum benefit guarantee amount described in paragraph (d)(3)(iii)(C) of this section.

(ii) Bifurcation if optional form unavailable--(A) Requirement to offer bifurcation. 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 permit the participant or beneficiary to elect to--

(1) Receive the unrestricted portion of that optional form of benefit (determined under the rules of paragraph (d)(3)(iii)(D) of this section) at that annuity starting date, determined by treating the unrestricted portion of the benefit as if it were the participant's or beneficiary's entire benefit under the plan;

(2) Commence benefits with respect to the participant's or beneficiary's entire benefit under the plan in any other optional form of benefit available under the plan at the same annuity starting date that satisfies paragraph (d)(3)(i) of this section; or

(3) Defer commencement of the payments to the extent described in paragraph (d)(5) of this section.

(B) Rules relating to bifurcation. If the participant or beneficiary elects payment of the unrestricted portion of the benefit as described in paragraph (d)(3)(ii)(A)(1) of this section, then the plan must permit the participant or beneficiary to elect payment of the remainder of the participant's or beneficiary's benefits under the plan in any optional form of benefit at that annuity starting date otherwise available under the plan that would not have included a prohibited payment if that optional form applied to the entire benefit of the participant or beneficiary. The rules of §1.417(e)-1 are applied separately to the separate optional forms for the unrestricted portion of the benefit and the remainder of the benefit (the restricted portion).

(C) Plan alternative that anticipates election of payment that includes a prohibited payment. With respect to an optional form of benefit that includes a prohibited payment and that is not permitted to be paid under paragraph (d)(3)(i) of this section, for which no additional information from the participant or beneficiary (such as information regarding a social security leveling optional form of benefit) is needed to make that determination, rather than wait for the participant or beneficiary to elect such optional form of benefit, a plan is permitted to provide for separate elections with respect to the restricted and unrestricted portions of that optional form of benefit. However, the rule in the preceding sentence applies only if--

(1) The plan applies the rule to all such optional forms; and

(2) The plan identifies the option that the bifurcation election replaces.

(iii) Definitions applicable to limited payment option--(A) In general. The definitions in this paragraph (d)(3)(iii) apply for purposes of this paragraph (d)(3).

(B) Portion of benefit being paid in a prohibited payment. If a benefit is being paid in an optional form for which any of the payments is greater than the amount payable under a straight life annuity to the participant or beneficiary (plus any social security supplements described in the last sentence of section 411(a)(9) payable to the participant or beneficiary) with the same annuity starting date, then the portion of the benefit that is being paid in a prohibited payment is the excess of each payment over the smallest payment during the participant’s lifetime under the optional form of benefit (treating a period after the annuity starting date and during the participant’s lifetime in which no payments are made as a payment of zero).

(C) PBGC maximum benefit guarantee amount. The PBGC maximum benefit guarantee amount described in this paragraph (d)(3)(iii)(C) is 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 with respect to a participant (based on the participant's age or the beneficiary's age at the annuity starting date) under section 4022 of ERISA for the year in which the annuity starting date occurs.

(D) Unrestricted portion of the benefit--(1) General rule. Except as otherwise provided in this paragraph (d)(3)(iii)(D), the unrestricted portion of the benefit with respect to any optional form of benefit is 50 percent of the amount payable under the optional form of benefit.

(2) Special rule for forms which include social security leveling or a refund of employee contributions. For an optional form of benefit that is a prohibited payment on account of a social security leveling feature (as defined in §1.411(d)-3(g)(16)) or a refund of employee contributions feature (as defined in §1.411(d)-3(g)(11)), the unrestricted portion of the benefit is the optional form of benefit that would apply if the participant's or beneficiary's accrued benefit were 50 percent smaller.

(3) Limited to PBGC maximum benefit guarantee amount. After the application of the preceding rules of this paragraph (d)(3)(iii)(D), the unrestricted portion of the benefit with respect to the optional form of benefit is reduced, to the extent necessary, so that the present value (determined in accordance with section 417(e)) of the unrestricted portion of that optional form of benefit does not exceed the PBGC maximum benefit guarantee amount (described in paragraph (d)(3)(iii)(C) of this

section).

(iv) Other rules--(A) One time application. A plan satisfies the requirements of this paragraph (d)(3) only if the plan provides that, in the case of a participant with respect to whom a prohibited payment (or series of prohibited payments under a single optional form of benefit) is made pursuant to paragraph (d)(3)(i) or (ii) of this section, no additional prohibited payment may be made with respect to that participant during any period of consecutive plan years for which prohibited payments are limited under this paragraph (d).

(B) Treatment of beneficiaries. For purposes of this paragraph (d)(3), benefits provided with respect to a participant and any beneficiary of the participant (including an alternate payee, as defined in section 414(p)(8)) are aggregated. If the only benefits paid under the plan with respect to the participant are death benefits payable to the beneficiary, then paragraph (d)(3)(iii)(B) of this section is applied by substituting the lifetime of the beneficiary for the lifetime of the participant. If the accrued benefit of a participant is allocated to such an alternate payee and one or more other persons, then the unrestricted amount under paragraph (d)(3)(iii)(D) 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. See paragraphs (j)(2)(ii) and (j)(6)(ii) of this section for other special rules relating to beneficiaries.

(C) Treatment of annuity purchases and plan transfers. This paragraph (d)(3)(iv)(C) applies for purposes of applying paragraphs (d)(3)(i) and (iii)(D) of this section. In the case of a prohibited payment described in paragraph (j)(6)(i)(B) of this section (relating to purchase from an insurer), the present value of the portion of the benefit that is being paid in a prohibited payment is the cost to the plan of the irrevocable commitment and, in the case of a prohibited payment described in paragraph (j)(6)(i)(C) of this section (relating to certain plan transfers), the present value of the portion of the benefit that is being paid in a prohibited payment is the present value of the liabilities transferred (determined in accordance with section 414(l)). In addition, the present value of the accrued benefit is substituted for the present value of the benefit payable in the optional form of benefit that includes the prohibited payment in paragraph (d)(3)(i)(A) of this section. (Further, see §1.411(d)-4, A-2(a)(3)(ii), for a rule under section 411(d)(6) that applies to an optional form of benefit that includes a prohibited payment described in paragraph (j)(6)(i)(B) of this section.)

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

Example 1. (i) Plan A has a plan year that is the calendar year, and is subject to the restriction on prohibited payments under paragraph (d)(3) of this section for the 2010 plan year. 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.

(ii) The PBGC guaranteed monthly benefit for a straight life annuity payable at age 65 in 2010 (for purposes of this example) is assumed to be $4,500. The PBGC maximum benefit guarantee amount at age 65 is assumed to be $637,200 for 2010.

(iii) 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 present value of the portion of Participant P’s benefit that is being paid in a prohibited payment exceeds the lesser of 50% of the benefit or the PBGC maximum benefit guarantee amount, it cannot be paid under paragraph (d)(3)(i) of this section. Accordingly, the maximum single sum that P can receive is $637,200 (that is, the lesser of 50% of $1,416,000 or $637,200).

(iv) Pursuant to paragraph (d)(3)(ii) of this section, Plan A must offer P the option to bifurcate the benefit into unrestricted and restricted 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, Plan A must permit P to elect any form of benefit that would otherwise be permitted with respect to the full $10,000 and that is not a prohibited payment. Alternatively, Plan A may provide that P is permitted 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.

(iii) Because the present value of the portion of Q's benefit that is being paid in a prohibited payment ($99,120) does not exceed the lesser of 50% of the present value of benefits (50% of $424,800) or 100% of the PBGC maximum benefit guarantee amount ($637,200 at age 65 for 2010), the optional form described in paragraph (i) of this Example 2 is permitted to be paid under paragraph (d)(3)(i) of this section.

Example 3. (i) The facts are the same as in Example 1. In addition, Plan A provides an optional form of payment under a social security leveling option (subject to any benefit restrictions under section 436) that consists of an increased temporary benefit payable until age 62, with reduced payments beginning at age 62. The benefit is structured so that the combination of the participant's pension benefit and Social Security benefit provides an approximately level income for the participant's lifetime. The PBGC maximum benefit guarantee amount at age 55 is assumed to be $362,776 for 2010.

(ii) Participant R retires at age 55 in 2010 and is eligible to receive a level lifetime annuity of $1,200 per month beginning immediately. Instead, Participant R elects to receive a benefit under the social security leveling optional form of payment. Participant R's Social Security benefit payable at age 62 is projected, under the terms specified in Plan A, to be $1,500 per month. The Plan A adjustment factor for the social security leveling option using the minimum present value requirements of section 417(e)(3) is .590 at age 55. Therefore, Participant R's benefit payable from age 55 to age 62 is $2,085 per month ($1,200 + .590 x $1,500), and the benefit payable for Participant's lifetime, beginning after age 62, is $585 per month ($2,085 - $1,500).

(iii) Because the optional form provides some payments which are greater than payments described in paragraph (j)(6)(i)(A) of this section ($1,200), the portion of the benefit that is being paid in a prohibited payment is $1,500 per month which is payable from age 55 to age 62. Using the applicable interest and mortality rates under section 417(e) as in effect for Plan A at the time the benefit commences, the present value of a temporary benefit of $1,500 per month ($2,085 - $585) payable from age 55 to age 62 is $106,417, and the present value of the entire benefit (a temporary benefit of $2,085 per month payable from age 55 to age 62 plus a deferred lifetime benefit of $585 commencing at age 62) is $207,468.

(iv) Because $106,417 is more than 50% of $207,468 (and because 50% of Participant R's benefit is less than $362,776, which is the PBGC maximum guaranteed benefit amount at age 55 for 2010), Participant R can only receive 50% of the benefit in the form of the social security leveling option. Pursuant to paragraph (d)(3)(ii) of this section, Plan A must offer Participant R the option to bifurcate the benefit into unrestricted and restricted portions. Participant R elects to receive the restricted portion of the early retirement benefit as a level lifetime annuity of $600 commencing at age 55.

(v) Participant R elects to receive the unrestricted portion of the early retirement benefit in the social security leveling form of payment. This portion of the benefit is determined under the social security leveling form of payment as if Participant R's benefit was one-half of the early retirement benefit, or $600. However, using a monthly level lifetime benefit of $600 and a monthly social security benefit of $1,500, Participant R would have a negative benefit after age 62 ($600 + .590 x $1,500 is only $1,485; offsetting $1,500 at age 62 would produce a negative amount). Plan A provides that in this situation, the benefit under the social security leveling option is an actuarially equivalent monthly annuity payable until age 62, with zero payable thereafter. Using the actuarial equivalence factor of .590 at age 55, the plan administrator determines that the unrestricted portion of Participant R's benefit is $1,463 per month, payable from age 55 to age 62 ($600 + .590 x $1,463 = $1,463 payable until age 62; $1,463 - $1,463 = zero payable after age 62).

(vi) Combining the unrestricted and restricted portions of the benefit, Participant R will receive a total of $2,063 per month from age 55 to age 62 ($1,463 from the unrestricted portion of the benefit plus $600 from the restricted portion of the benefit), and $600 per month beginning at age 62 (zero from the unrestricted portion of the benefit plus $600 from the restricted portion of the benefit).

(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 on or after September 1, 2005 (treating benefit increases pursuant to a plan amendment as benefit accruals), this paragraph (d)(4) ceases to apply for the plan as of the date any benefits accrue under the plan (or the date the amendment takes effect). For example, the exception in this paragraph (d)(4) does not apply to a plan after the plan increases benefits to take into account increases in the limitations under section 415(b) on or after September 1, 2005.

(5) Right to delay commencement. If a participant or beneficiary requests a distribution in an optional form of benefit that includes a prohibited payment that is not permitted to be paid under paragraph (d)(1), (d)(2), or (d)(3) of this section, the participant retains the right to delay commencement of benefits in accordance with the terms of the plan and applicable qualification requirements (such as sections 411(a)(11) and 401(a)(9)).

(6) Plan alternative for special optional forms. A plan is permitted to offer optional forms of benefit that are solely available during the period in which paragraph (d)(1), (d)(2), or (d)(3) of this section applies to limit prohibited payments under the plan. For example, a plan may permit participants or beneficiaries who commence benefits during the period in which paragraph (d)(1) of this section (or paragraph (d)(2) of this section) applies to limit prohibited payments under the plan to elect, within a specified period after the date on which that paragraph ceases to apply to limit prohibited

payments under the plan, to receive the remaining benefit in the form of a single-sum payment equal to the present value of the remaining benefit, but only to the extent then permitted under this paragraph (d). As another example, during a period when paragraph (d)(3) of this section applies to a plan, the plan may permit participants and beneficiaries to elect payment in 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, such as sections 411(a)(11) and 401(a)(9)), or may satisfy paragraph (d)(3)(i) of this section by permitting participants and beneficiaries to elect an optional form of benefit that combines an unsubsidized single-sum payment for over 50 percent of the accrued benefit with a subsidized early retirement life annuity for the remainder of the accrued benefit. Any such optional forms must satisfy this paragraph (d) and applicable qualification requirements, including satisfaction of section 417(e) and section 415 (at each annuity starting date).

(7) <u>Exception for distributions permitted without consent of the participant under section 411(a)(11)</u>. [Reserved]

(e) <u>Limitation on benefit accruals for plans with severe funding shortfalls</u>--(1) <u>In general</u>. Except as otherwise provided in this paragraph (e), 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)(2) or (c)(3) of this section.

(2) Exemption if section 436 contribution is made. The prohibition on additional benefit accruals under a plan described in paragraph (e)(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)(v) of this section. See paragraph (f) of this section for additional rules.

(3) Special rule under section 203 of the Worker, Retiree, and Employer Recovery Act of 2008. [Reserved]

(f) Methods to avoid or terminate benefit limitations--(1) In general. This paragraph (f) sets forth rules relating to employer contributions and other methods to avoid or terminate 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) that 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 or terminate 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 or terminate 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 plan year under section 430(h)(2)(A) is subsequently determined to be less than that highest rate, the excess is recharacterized as an employer contribution taken into account under section 430 for the current plan year.

(B) Timing requirement for section 436 contributions. Any contribution described in this paragraph (f)(2) must be paid before the unpredictable contingent event benefits are permitted to be paid, the plan amendment is permitted to take effect, or the benefit accruals are permitted to resume. In addition, any contribution described in this paragraph (f)(2) must be paid during the plan year.

(C) 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 sections 436(b)(2), 436(c)(2), and 436(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 fails 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 maximum addition to the prefunding balance under section 430(f)(6) and §1.430(f)-1(b)(1)(ii).

(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), including designation of the benefits or amendments to which the limits do not apply because of the contribution. Except as specifically provided in paragraph (f)(2)(i)(A)(2), (g) or (h) of this section, such a contribution cannot be subsequently 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 the prefunding and funding standard carryover balances.

(C) Requirement to recertify AFTAP. If the plan's enrolled actuary has already certified the adjusted funding target attainment percentage for the plan year, a plan sponsor is treated as making the contribution described in paragraph (f)(2)(iii)(B), (f)(2)(iv)(B), or (f)(2)(v) of this section for the plan year only after the plan's enrolled actuary certifies an updated adjusted funding target attainment percentage for the plan year that takes into account the increased liability for the unpredictable contingent event benefits, the plan amendments, or restored accruals, and the associated section 436 contribution, under the rules of paragraph (h)(4)(v) of this section. See also paragraph (g)(4)(i) of this section for a requirement to modify the presumed adjusted funding target attainment percentage to take the liability for the unpredictable contingent event benefits or plan amendments, and the associated section 436 contribution, into account (if the contribution described in paragraph (f)(2)(iii)(B), (f)(2)(iv)(B), or (f)(2)(v) of this section is made before the plan's enrolled actuary certifies the adjusted funding target attainment percentage for the plan year).

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

(A) In the event that 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, 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) In the event that 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, 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 the contribution (and any prior section 436 contributions made for the plan year) were included as part of the plan assets and the funding target were to take into account the adjustments described in paragraph (g)(2)(iii)(A), (g)(3)(ii)(A), or (g)(5)(i)(B) of this section, whichever applies.

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

(A) In the event that 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, 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) In the event that 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, 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 the contribution (and any prior section 436 contributions made for the plan year) were included as part of the plan assets and the funding target were to take into account the adjustments described in paragraph (g)(2)(iii)(A), (g)(3)(ii)(A), or (g)(5)(i)(B) of this section, whichever applies.

(v) Contribution required for continued benefit accruals. In the case of a contribution to avoid or terminate 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 (and any prior section 436 contributions made for the plan year) were included as part of the plan assets and the funding target were to take into account the adjustments described in paragraph (g)(2)(iii)(A) or (g)(5)(i)(B) of this section, whichever applies.

(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 plan years, the valuation date for the last plan 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 to the plan sponsor together with any interest accrued thereon) as provided in the agreement governing the security, 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)) or until replacement security has been provided in accordance with paragraph (f)(3)(vi) of this section.

(v) Contribution of security to plan. Any 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 taken into account 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.

(vi) Replacement security. If security has been provided to a plan pursuant to this paragraph (f)(3), the plan sponsor may provide new security to the plan and subsequently or simultaneously have the original security released, but only if--

(A) The new security is in a form that satisfies the requirements of paragraph (f)(3)(ii) of this section;

(B) The amount of the new security is no less than the amount of the original security, determined at the time the original security is released; and

(C) The period described in paragraph (f)(3)(iii)(A)(3) of this section with respect to the new security is the same as the period that applied under that paragraph to the original security.

(4) Examples. The following examples illustrate the rules 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 Plan Z 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, and is not in at-risk status. 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 interest rate 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 the 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 the amendment to be permitted to take effect, 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 $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 liabilities attributable to the plan amendment were included in the funding target, the AFTAP would be 81.36% (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 from the valuation date to the date of the contribution, at Plan Z's effective interest rate 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 with respect to the May 1, 2011, plan amendment. 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 takes effect in accordance with its terms.

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 78.43% (determined taking into account the at-risk status of Plan Z), 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 this paragraph (f) to avoid benefit limitations.

(iii) In order for this amendment to be permitted to take effect, 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 from the valuation date to the date of the contribution, at Plan Z's effective interest rate 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 with respect to the May 1, 2011, plan amendment. 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 takes effect in accordance with its terms.

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%. Other than this amendment, no other amendment or unpredictable contingent event has occurred that requires a recertification. As of May 1, 2011, the plan's effective interest rate for the 2011 plan year has not yet been determined. 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)(iii) 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 from the valuation date to 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) A contribution of $407,845 is made on May 1, 2011, and is designated as a contribution under paragraph (f)(2) of this section with respect to the May 1, 2011, plan amendment. 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 takes effect in accordance with its terms.

(vi) After the plan's effective interest rate for 2011 has been determined to be 5.5%, the amount of excess interest previously contributed is recharacterized as an employer contribution taken into account under section 430 for 2011 (because that rate for the year is less than 6%).

(g) <u>Rules of operation for periods prior to and after certification</u>--(1) <u>In general</u>.

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 the 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 the 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) and paragraph (h) of this section applies. Paragraph (g)(3) of this section sets forth rules that apply to periods during which no presumptions under section 436(h) and paragraph (h) of this section 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 for modifying the plan's presumed adjusted funding target attainment percentage in certain situations. Paragraph (g)(5) 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)(6) of this section sets forth examples illustrating the rules in 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 a presumption under section 436(h) and paragraph (h)(1), (2), or (3) of this section applies to the plan, the limitations applicable under section 436 and paragraphs (b), (c), (d), and (e) of this section are applied to the plan as if the adjusted funding target attainment percentage for the year were the presumed adjusted funding target attainment percentage determined under the rules of section 436(h) and paragraph (h)(1), (2), or (3) of this section, as applicable, updated to take into account certain unpredictable contingent event benefits and plan amendments in accordance with

section 436 and the rules of this paragraph (g).

(ii) Determination of amount of reduction in balances--(A) In general. 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 adjusted funding target attainment percentage. This paragraph (g)(2)(ii) provides rules for the determination of the reduction that applies as of the first day of the plan year, and, in certain circumstances, that applies later in the plan year. Paragraph (g)(2)(iii) of this section provides additional rules that apply with respect to unpredictable contingent event benefits or plan amendments, which rules must be applied prior to the application of paragraph (g)(2)(iv) of this section relating to section 436 contributions. The reapplication of the rules under this paragraph (g)(2) regarding the deemed election in paragraph (a)(5) of this section may require an additional reduction in the prefunding and funding standard carryover balances if the amount of the reduction in those balances that is necessary to reach the applicable threshold to avoid the application of a section 436 limitation exceeds the amount that was initially reduced. Prior reductions of the prefunding and funding standard carryover balances continue to apply.

(B) Reduction in balances at the first day of plan year--(1) Plans with a certified AFTAP for the prior plan year. If section 436(h)(1) and paragraph (h)(1) of this section apply to determine the presumed adjusted funding target attainment percentage as of the first day of the current plan year based on the plan's enrolled actuary certification of the adjusted funding target attainment percentage for the prior plan year made during that prior plan year, then, in order to determine the amount of the reduction (if any) in the funding standard carryover balance and prefunding balance under this paragraph (g)(2)(ii), a presumed adjusted funding target must be established as of the first day of the plan year, and that amount is then compared to the interim value of adjusted plan assets as of that date. For this purpose, the interim value of adjusted plan assets is equal to the value of adjusted plan assets (within the meaning of paragraph (j)(1)(ii) of this section) as of the first day of the plan year, determined without regard to future contributions and future elections with respect to the plan's prefunding and funding standard carryover balances under section 430(f) (for example, elections to add to the prefunding balance for the prior plan year, elections to use the prefunding and funding standard carryover balances to offset the minimum required contribution for a year, and 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. As provided in §1.430(f)-1(e)(1), the rules of §1.430(f)-1(d)(1)(ii) apply for purposes of determining the amount of the prefunding balance or the funding standard carryover balance that is available for reduction.

(2) Plans with presumed AFTAP deemed under 60 percent. If paragraph (g)(2)(ii)(B)(1) of this section does not apply to the plan for a plan year and the last day of the plan year is on or after the first day of the 10th month of the plan year, such that the presumed adjusted funding target attainment percentage for the prior plan year is conclusively presumed to be less than 60 percent under section 436(h)(2) and paragraph (h)(3) of this section, then no reduction in the funding standard carryover

balance and prefunding balance is required under this paragraph (g)(2)(ii)(B). However, see paragraph (g)(2)(iv)(A) of this section for rules for determining the amount of a section 436 contribution that would permit unpredictable contingent event benefits to be paid in such a case.

(3) Treatment of short plan years. If paragraph (g)(2)(ii)(B)(1) of this section does not apply to the plan for a plan year but the last day of the plan year is before the first day of the 10th month of the plan year, such that section 436(h)(2) and paragraph (h)(3) of this section did not apply for that plan year, then paragraph (g)(2)(ii)(B)(1) of this section must be applied as of the first day of the next plan year based on the presumed adjusted funding target attainment percentage as of that last day of the prior short plan year.

(C) Change in presumed AFTAP later in the plan year. If the presumed adjusted funding target attainment percentage for the plan year changes during the year, the rules regarding the deemed election to reduce the prefunding and funding standard carryover 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 at a different date if the enrolled actuary certifies the adjusted funding target attainment percentage for the prior plan year during the current plan year. In order to determine the amount of any reduction in the prefunding and funding standard carryover balances that would apply in such a situation, a new presumed adjusted funding target must be established, which is then compared to the updated interim value of adjusted plan assets. For this purpose, the updated interim value of adjusted plan assets for the plan year is determined as the interim value of adjusted plan assets as of the first day of the plan year updated to take into account contributions for the prior plan year and section 430(f) elections with respect to the plan's prefunding and funding standard carryover balances made before the date of the change in the presumed adjusted funding target attainment percentage, and the new presumed adjusted funding target is equal to the updated interim value of adjusted plan assets divided by the new presumed adjusted funding target attainment percentage.

(D) Plans funded below the threshold. If, after application of paragraph (g)(2)(ii)(B) and (C) of this section, the presumed adjusted funding target attainment percentage under this paragraph (g)(2)(ii) is less than the 60 percent threshold under section 436(e), then no benefit accruals are permitted under the plan unless the plan sponsor makes a section 436 contribution as provided in paragraph (g)(2)(iv)(A) of this section. See paragraph (g)(5)(ii) of this section for rules that apply 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.

(iii) Calculation of inclusive presumed AFTAP for application to unpredictable contingent event benefits and plan amendments--(A) Requirement to calculate inclusive presumed AFTAP. For purposes of applying the limitations under paragraphs (b) and (c) of this section during the period described in this paragraph (g)(2), an inclusive presumed adjusted funding target attainment percentage must be calculated. The inclusive presumed adjusted funding target attainment percentage is the ratio (expressed as a percentage) of the interim value of adjusted plan assets (updated to take into account contributions for the prior plan year, any prior section 436 contributions made for the plan year to the extent not previously taken into account in the interim value of adjusted plan assets for the plan year, and section 430(f) elections with respect to the plan's prefunding and funding standard carryover balances made before the date of the unpredictable contingent event or the date the plan amendment would take effect) to the inclusive presumed adjusted funding target. The inclusive presumed adjusted funding target is calculated as the presumed adjusted funding target determined under paragraph (g)(2)(ii)(B) or (C) of this section, increased to take into account--

(1) The unpredictable contingent event benefits or plan amendment;

(2) Any unpredictable contingent event benefits that are permitted to be paid as a result of any unpredictable contingent event that occurred, or plan amendment that has taken effect, in the prior plan year to the extent not taken into account in the prior plan year adjusted funding target attainment percentage; and

(3) Any other unpredictable contingent event benefits that are permitted to be paid as a result of any unpredictable contingent event that occurred, or plan amendment that has taken effect, in the current plan year to the extent not previously taken into account in the presumed adjusted funding target for the plan year.

(B) Mandatory reduction for collectively bargained plans. During the period described in this paragraph (g)(2), the rules of paragraph (a)(5)(ii) of this section (relating to the deemed election to reduce the funding standard carryover balance and the prefunding balance) must be applied by treating the inclusive presumed adjusted funding target attainment percentage determined under this paragraph (g)(2)(iii) as if it were the adjusted funding target attainment percentage.

(C) 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 carryover balance and the prefunding balance under the rules of paragraph (a)(5)(ii) of this section) is permitted to elect to reduce those balances in order to increase the updated interim value of adjusted plan assets that is used to determine the inclusive presumed adjusted funding target attainment percentage under this paragraph (g)(2)(iii).

(D) Plans funded below the threshold. If, after application of paragraph (g)(2)(iii)(B) and (C) of this section, the inclusive presumed adjusted funding target attainment percentage determined under this paragraph (g)(2)(iii) is less than the applicable threshold under section 436(b) or 436(c), then the plan is not permitted to provide any benefits attributable to the unpredictable contingent event, nor is the plan amendment permitted to take effect, unless the plan sponsor makes a section 436 contribution as provided in paragraph (g)(2)(iv) of this section. See paragraph (g)(5)(ii) of this section for rules that apply 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.

(E) Plans funded at or above the threshold. If, after application of paragraph (g)(2)(iii)(B) or (C) of this section, the inclusive presumed adjusted funding target attainment percentage is greater than or equal to the applicable threshold under section 436(b) or 436(c), 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 liabilities described in paragraph (c) of this section from taking effect, based on an expectation that the limitations under paragraph (b) or (c) of this section will apply following the enrolled actuary's certification of the adjusted funding target attainment percentage for the plan year.

(iv) Section 436 contributions--(A) Plans with presumed AFTAP below 60 percent--(1) Unpredictable contingent event benefits. If the presumed adjusted funding target attainment percentage for a plan is less than 60 percent, then unpredictable contingent event benefits are permitted to be paid as a result of an unpredictable contingent event occurring during the period described in this paragraph (g)(2) if the plan sponsor makes the section 436 contribution described in paragraph (f)(2)(iii)(A) of this section.

(2) Plan amendments. If the presumed adjusted funding target attainment percentage for a plan is less than 60 percent, then no plan amendment increasing plan liabilities is permitted to take effect during the period described in this paragraph (g)(2). See paragraph (e)(1) of this section.

(3) Benefit accruals. If the presumed adjusted funding target attainment percentage for a plan year of less than 60 percent is determined based on the plan's enrolled actuary certification of the adjusted funding target attainment percentage for the prior plan year made during that prior plan year (as opposed to being presumed to be less than 60 percent under the rules of section 436(h)(2) and paragraph (h)(3) of this section because the actuary has not certified the adjusted funding target attainment percentage for the prior plan year before the first day of the 10th month of the prior plan year), then benefits are permitted to accrue if the plan sponsor makes a section 436

contribution in the amount necessary to bring the ratio of the updated interim value of adjusted plan assets to the presumed adjusted funding target up to 60 percent, as described in paragraph (f)(2)(v) of this section.

(B) Plan amendments for plans with presumed AFTAP below 80 percent. If the presumed adjusted funding target attainment percentage for a plan is less than 80 percent, but is not less than 60 percent, then a plan amendment increasing plan liabilities is permitted to take effect during the period described in this paragraph (g)(2) if the plan sponsor makes a section 436 contribution described in paragraph (f)(2)(iv)(A) of this section.

(C) Contributions required to reach threshold. If a plan is described in paragraph (g)(2)(iii)(D) of this section and neither paragraph (g)(2)(iv)(A) nor (B) of this section apply to the plan, then unpredictable contingent event benefits are permitted to be paid or the plan amendment is permitted to become effective during the period this paragraph (g)(2) applies to the plan only if the plan sponsor makes a section 436 contribution in the amount necessary to bring the ratio of the updated interim value of adjusted plan assets to the inclusive presumed adjusted funding target up to the applicable threshold under section 436(b) or (c), as described in paragraph (f)(2)(iii)(B) or (f)(2)(iv)(B) of this section. This paragraph (g)(2)(iv)(C) applies, for example, if an unpredictable contingent event occurs in the case of a plan with a presumed adjusted funding target attainment percentage of more than 60 percent where taking into account the unpredictable contingent event benefit in the inclusive presumed adjusted funding target would cause the ratio of the interim value of adjusted plan assets to the inclusive presumed adjusted funding target to be less than 60 percent.

(v) 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), no prohibited payment within the meaning of paragraph (j)(6) of this section may be paid 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. 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)(v).

(3) Periods prior to certification during which no presumption applies--(i) Prohibited 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 prohibited payments 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)(v) 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 and plan amendments increasing benefit liabilities under paragraph (c) of this section must be applied during that period by following the rules of paragraphs (g)(2)(iii) of this section, based on the inclusive presumed adjusted funding target determined using the prior plan year adjusted funding target attainment percentage. Thus, whether unpredictable contingent event benefits are permitted to be paid or a plan amendment is permitted to take effect during a plan year is determined by calculating the ratio of the interim value of adjusted plan assets to the inclusive presumed adjusted funding target, where the inclusive presumed adjusted funding target is determined by dividing the interim value of adjusted plan assets by the prior plan year adjusted funding target attainment percentage and then adding the adjustments described in paragraphs (g)(2)(iii)(A)(1), (2) and (3) of this section. If, after application of paragraphs (g)(2)(iii)(B) and (C) of this section, that ratio is less than the applicable threshold under section 436(b) or 436(c), then the plan is not permitted to provide any benefits attributable to the unpredictable contingent event, nor is the plan amendment permitted to take effect, unless the plan sponsor makes the contribution described in paragraph of (g)(2)(iv)(C) of this section.

(B) Recharacterization of contributions made to avoid benefit limitations. In any case where, pursuant to paragraph (g)(3)(ii)(A) of this section, the plan sponsor makes section 436 contributions to avoid the application of the applicable benefit limitation, to the extent those contributions would not be needed to permit the payment of the unpredictable contingent event benefits or for the plan amendment to go into effect based on a subsequent certification of the adjusted funding target attainment percentage for the current plan year that takes into account the increase in the liability attributable to the unpredictable contingent event benefits or plan amendment, the excess section 436 contributions are recharacterized as employer contributions taken into account under section 430 for the current plan year.

(4) Modification of the presumed AFTAP--(i) Section 436 contributions. If, in accordance with the rules of paragraph (g)(2)(iv) of this section, unpredictable contingent event benefits are permitted to be paid, or a plan amendment takes effect, during the plan year because the plan sponsor makes a contribution described in paragraph (f)(2)(iii)(B) or (f)(2)(iv)(B) of this section, then the presumed adjusted funding target must be adjusted to reflect any increase in the funding target attributable to the unpredictable contingent event benefits or the plan amendment and the interim value of plan assets must be increased by the present value of the contribution. Similarly, if benefit accruals are permitted to resume in a plan year because the plan sponsor makes the contribution described in paragraph (f)(2)(v) of this section, then the presumed adjusted funding target must be adjusted to reflect any increase in the funding target attributable to the benefit accruals for the prior plan year and the interim value of adjusted plan assets must be increased by the present value of the contribution. The adjustment to the presumed adjusted funding target is made as of the date of the contribution, and that date is a section 436 measurement date.

(ii) Modification of the presumed AFTAP for reduction in balances. If a plan's funding standard carryover balance or prefunding balance is reduced under the rules of paragraph (g)(2) or (g)(3) of this section, then the presumed adjusted funding target attainment percentage for the plan year is increased to reflect the higher interim value of adjusted plan assets resulting from the reduction in the funding standard carryover balance or prefunding balance. The date of the event that causes the reduction is a section 436 measurement date.

(5) Periods after certification of AFTAP--(i) Plan must follow certified AFTAP--(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. For example, the plan must provide that the limitations on prohibited payments apply 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.

(B) Unpredictable contingent events and plan amendments. 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 takes effect on or after the date of the enrolled actuary's certification. Thus, the plan administrator must determine if the adjusted funding target attainment percentage would be at or above the applicable threshold if it were modified to take into account--

(1) The unpredictable contingent event or plan amendment;

(2) Any other unpredictable contingent event benefits that were permitted to be paid as a result of any unpredictable contingent event that occurred, and any other plan amendment that took effect, earlier during the plan year to the extent not taken into account in the certified adjusted funding target attainment percentage for the plan year; and

(3) Any earlier section 436 contributions made for the plan year to the extent those contributions were not taken into account in the certified adjusted funding target attainment percentage.

(C) 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 the prefunding and funding standard carryover 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). The reapplication of the rules under this paragraph (g)(5) regarding the deemed election in paragraph (a)(5) of this section may require an additional reduction in the prefunding and funding standard carryover balances if the amount of the reduction in the prefunding and funding standard carryover balances that is necessary to reach the applicable threshold to avoid the application of a section 436 limitation exceeds the amount that was initially reduced. Prior reductions of the prefunding and funding standard carryover balances continue to apply.

(ii) Applicability to prior periods--(A) In general. Except as otherwise provided in this paragraph (g)(5)(ii), the enrolled actuary's certification of the adjusted funding target attainment percentage for the plan for the plan year does not affect prior periods. For example, the certification does not affect the application of the limitation under paragraph (d) of this section for distributions with annuity starting dates before the certification or 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. Except as otherwise provided in this paragraph (g)(5)(ii), 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) or (c) of this section to unpredictable contingent event benefits, or a plan amendment that increases the liability for benefits, where the unpredictable contingent event occurs or the amendment takes effect during the periods to which paragraphs (g)(2) and (g)(3) of this section apply.

(B) Special rule for unpredictable contingent event benefits. If a plan does not pay benefits attributable to an unpredictable contingent event because of the application of paragraph (g)(2)(iii)(D) or (g)(3)(ii)(A) of this section, then the plan must pay the benefits attributable to that event that were not previously paid if such benefits would be permitted under the rules of section 436 based on a certified adjusted funding target attainment percentage for the plan year that takes into account the increase in the funding target that would be attributable to those unpredictable contingent event benefits.

(C) Special rule for plan amendments that increase liability. If a plan amendment does not take effect because of the application of paragraph (g)(2)(iii)(D) or (g)(3)(ii)(A) of this section, the plan amendment must go into effect if it would be permitted under the rules of section 436 based on a certified actual adjusted funding target attainment percentage for the plan year that takes into account the increase in the funding target attributable to the plan amendment, unless the plan amendment provides otherwise.

(D) Ordering rule for multiple unpredictable contingent events or plan amendments. [Reserved]

(6) Examples. The following examples illustrate the rules 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; section 436 applies to the plan beginning in 2008; the plan has no funding standard carryover balance; the plan sponsor is not in bankruptcy; no annuity purchases have been made from the plan; and the plan offers a lump sum form of payment. No plan is in at-risk status for the years discussed in the examples. The examples read as follows:

Example 1. (i) The plan's certified AFTAP as of January 1, 2010, is 75%. As of January 1, 2011, Plan A has assets of $3,300,000 and a prefunding balance of $300,000. 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 continue to 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 adjusted 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). Pursuant to paragraph (g)(4)(ii) of this section, the presumed adjusted funding target attainment percentage for Plan A is redetermined as 80% and 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. (i) The facts are the same as in Example 1. As of April 1, 2011, the enrolled actuary for Plan A has not certified the 2011 AFTAP. Therefore, beginning April 1, 2011, Plan A's AFTAP is presumed to be reduced by 10 percentage points to 70%, in accordance with paragraph (h)(2) of this section. Under the provisions of paragraph (g)(2)(ii)(B) of this section, the deemed election to reduce the prefunding and funding standard carryover balances described in paragraph (a)(5) of this section must be reapplied based on the new presumed AFTAP.

(ii) In accordance with paragraph (g)(2)(ii)(C) of this section, a new presumed adjusted funding target must be determined based on the new presumed AFTAP and must be compared to an updated interim value of adjusted plan assets. The new presumed adjusted funding target is $3,200,000 divided by the new presumed AFTAP of 70%, or $4,571,429.

(iii) 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 additional increase in Plan A's adjusted plan assets of $457,143 (that is, 80% of the new presumed adjusted funding target of $4,571,429, minus the updated interim value of the adjusted plan assets of $3,200,000 reflecting the deemed reduction in Plan A's prefunding balance).

(iv) Plan A's remaining prefunding balance as of January 1, 2011, is only $100,000, which is not enough to avoid the restriction on prohibited payments under paragraph (d)(3) of this section. Accordingly, unless Plan A's sponsor utilizes one of the methods described in paragraph (f) of this section to avoid the restriction, Plan A is subject to the restriction on prohibited payments in paragraph (d)(3) of this section and cannot pay accelerated benefit distributions elected by participants with an annuity starting date of April 1, 2011, or later.

(v) Plan A's prefunding balance remains at $100,000 because, under paragraph (a)(5)(iii) of this section, the deemed reduction rules do not apply if the prefunding balance is not large enough to increase the adjusted value of plan assets enough to avoid the restriction. However, the earlier deemed reduction of $200,000 continues to apply because all elections (including deemed elections) to reduce a plan's funding standard carryover balance or prefunding balance are irrevocable and must be unconditional in accordance with paragraph (g)(2)(ii)(A) of this section.

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)(5)(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. On August 14, 2010, the enrolled actuary for Plan B certified the AFTAP for 2010 to be 83%. No unpredictable contingent events giving rise to unpredictable contingent event benefits occurred during 2010 and no plan amendments took effect in 2010 that were not taken into account in the certified AFTAP.

(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)(3) of this section, the determination of whether the amendment is permitted to take effect is based on a comparison of the inclusive presumed adjusted funding target with the updated interim value of adjusted plan assets.

(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 an inclusive presumed adjusted funding target of $3,181,325 and would result in 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 inclusive 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 would be less than 80% if the amendment were taken into account, 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 inclusive presumed AFTAP would be increased to 80%. This would require an additional amount of $195,060 (that is, 80% of the inclusive 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 unless the plan sponsor makes a contribution described in paragraph (f)(2) of this section.

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. As of February 1, 2011, Plan B's effective interest rate for the 2011 plan year has not yet been determined. Pursuant to paragraph (f)(2)(i)(A)(2) of this section, Plan B's effective interest rate for 2011 is treated as 6.25%, which is the largest of the three segment interest rates applicable to the 2011 plan year, as provided in paragraph (f)(2)(i)(A)(2) of this section.

(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 interest rate for the 2011 plan year. The amount of the required contribution after adjustment is $196,048, determined as $195,060 increased for one month of compound interest at an effective annual interest rate of 6.25%.

(iii) In accordance with paragraph (g)(4)(i) of this section, the inclusive presumed AFTAP as of February 1, 2011, is 80 percent.

Example 6. (i) The facts are the same as in Example 5. As of April 1, 2011, the enrolled actuary for the plan has not certified the 2011 AFTAP. Beginning April 1, 2011, Plan A's presumed AFTAP is equal to be 70%, 10 percentage points lower than the inclusive presumed AFTAP as of February 1, 2011, in accordance with paragraphs (g)(2)(iii)(A) and (h)(2) of this section. 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 determines the actual effective interest rate for 2011 to be 5.25%. On this basis, 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%.

(ii) Based on the calculated adjusted funding target, the amount that was necessary to avoid the benefit restriction under paragraph (c) of this section was $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, was $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).

(iii) Under paragraph (g)(3)(ii)(B) of this section, the contribution made on February 1, 2011, is recharacterized as an employer contribution under section 430 to the extent that it exceeded the amount necessary to avoid application of the restriction on plan amendments under paragraph (c) of this section. Therefore, $105,663 (that is, the $196,048 actual contribution paid on February 1, 2011, minus the $90,385 required contribution based on the actual 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.

(iv) This recharacterization applied only because the 436 contribution was made during a period prior to the certification of Plan B's actual AFTAP for 2011 and during which no presumption applied (that is, when section 436 is applied based on the 2010 AFTAP, which was high enough that no restrictions applied for 2010). If the contribution had been made during a time when the presumptions applied (for instance, after April 1, 2011, when the presumed AFTAP was under 80%) then the only portion of the 436 contribution that would be recharacterized as an employer contribution under section 430 would be the portion of the interest adjustment attributable to the difference between the highest segment rate (6.25%) and the plan's actual effective interest rate (5.25%), in accordance with paragraph (f)(2)(i)(A)(2) of this section.

(v) After reflecting the plan amendment and the present value of the portion of the section 436 contribution that is not recharacterized as an employer contribution under section 430, the adjusted assets as of January 1, 2011, for purposes of section 436 are $2,440,000 ($2,350,000 plus $90,000) and the inclusive adjusted funding target is $3,050,000. Accordingly, the enrolled actuary certifies the inclusive AFTAP for 2011 as 80% ($2,440,00 ÷ $3,050,000). Note that assets for section 430 purposes are not increased to reflect the section 436 contribution as of January 1, 2011.

Example 7. (i) The facts are the same as in Example 6, 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)(5)(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 to the amendment, because the amendment to Plan B took effect 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 regardless of the extent to which the certified AFTAP for the plan year is less than the presumed inclusive AFTAP.

(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 a plan year if a limitation under paragraph (b), (c), (d), or (e) of this section applied to the plan on the last day of the preceding 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 of the plan year and ending on the date specified in paragraph (h)(1)(iv) of this section.

(ii) Rule where preceding year certification issued during preceding year--(A) General rule. 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 plan year before the first day of the current plan year, the presumed adjusted funding target attainment percentage of the plan for the current plan year is equal to the prior plan year adjusted funding target attainment percentage until it is changed under paragraph (h)(1)(iv) of this section.

(B) Special rule for late certifications. If the certification of the adjusted funding target attainment percentage for the prior plan year occurred after the first day of the 10th month of that prior plan year, the plan is treated as if no such certification was made, unless the certification took into account the effect of any unpredictable contingent event benefits that are permitted to be paid based on unpredictable contingent events that occurred, and any plan amendments that became effective, during the prior plan year but before the certification (and any associated section 436 contributions).

(iii) No certification for preceding year issued during preceding year--(A) Deemed percentage continues. 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 plan year during that prior plan year, the presumed adjusted funding target attainment percentage of the plan for the current plan year is equal to the presumed adjusted funding target attainment percentage that applied on the last day of the preceding plan year until the presumed adjusted funding target attainment percentage is changed under paragraph (h)(1)(iii)(B) or (h)(1)(iv) of this section. Thus, if the prior plan year was a 12-month plan year (so that the last day of the plan year was after the first day of the 10th month of the plan year and the rules of section 436(h)(2) and paragraph (h)(3) of this section applied to the plan for that plan year), then the presumed adjusted funding target attainment percentage for the current plan year is presumed to be less than 60 percent. By contrast, if the prior plan year was less than 9 months, the presumed adjusted funding target attainment percentage for the current plan year is the presumed adjusted funding target attainment percentage at the last day of the preceding plan year.

(B) Enrolled actuary's certification in 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 plan year on or after the first day of the current plan year, the date of that prior plan year certification is a new section 436 measurement date for the current plan year. In such a case, the presumed adjusted funding target attainment percentage for the current plan year is equal to the prior plan year adjusted funding target attainment percentage (reduced by 10 percentage points if paragraph (h)(2)(iv) of this section applies to the plan) until it is changed under paragraph (h)(1)(iv) of this section. The rules of paragraph (h)(1)(ii)(B) of this section apply for purposes of determining whether the enrolled actuary has issued a certification of the adjusted funding target attainment percentage for the prior plan year during the current plan year.

(iv) Duration of use of presumed adjusted funding target attainment percentage. If this paragraph (h)(1) applies to a plan for a plan year, the presumed adjusted funding target attainment percentage determined under this paragraph (h)(1) applies until the earliest of--

(A) The first day of the 4th month of the plan year if paragraph (h)(2) of this section applies;

(B) The first day of the 10th month of the plan year if paragraph (h)(3) of this section applies;

(C) The date of a change in the presumed adjusted funding target attainment percentage under paragraph (g)(4) of this section; or

(D) 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.

(2) Presumption of underfunding beginning on first day of 4th month for certain underfunded plans--(i) In general. This paragraph (h)(2) applies to a plan for a plan year if--

(A) The enrolled actuary for the plan has not issued a certification of the adjusted funding target attainment percentage for the plan year before the first day of the 4th month of the plan year; and

(B) The plan's adjusted funding target attainment percentage for the preceding plan year was either--

(1) At least 60 percent but less than 70 percent; or

(2) At least 80 percent but less than 90 percent.

(ii) Special rule for first plan year a plan is subject to section 436. This paragraph (h)(2) also applies to a plan for the first effective plan year if--

(A) The enrolled actuary for the plan has not issued a certification of the adjusted funding target attainment percentage for the plan year before the first day of the 4th month of the plan year; and

(B) The prior plan year adjusted funding target attainment percentage is at least 70 percent but less than 80 percent.

(iii) Presumed adjusted funding target attainment percentage. If this paragraph (h)(2) applies to a plan for a plan year and the date of the enrolled actuary's certification of the adjusted funding target attainment percentage under paragraph (h)(4) of this section for the prior plan year (taking into account the special rules for late certifications under paragraph (h)(1)(ii)(B) of this section) 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--

(A) The presumed adjusted funding target attainment percentage of the plan for the plan year is reduced by 10 percentage points; and

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

(iv) Certification for prior plan year. If this paragraph (h)(2) applies to a plan and the date of the enrolled actuary's certification of the adjusted funding target attainment percentage under paragraph (h)(4) of this section for the prior plan year (taking into account the rules for late certifications under paragraph (h)(1)(ii)(B) of this section) occurs on or after the first day of the 4th month of the current plan year, then, commencing on the date of that prior plan year certification--

(A) The presumed adjusted funding target attainment percentage of the plan for the current plan year is equal to 10 percentage points less than the prior plan year adjusted funding target attainment percentage; and

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

(v) Duration of use of presumed adjusted funding target attainment percentage. If this paragraph (h)(2) applies to a plan for a plan year, the presumed adjusted funding target attainment percentage determined under this paragraph (h)(2) applies until the earliest of--

(A) The first day of the 10th month of the plan year if paragraph (h)(3) of this section applies;

(B) The date of a change in the presumed adjusted funding target attainment percentage under paragraph (g)(4) of this section; or

(C) 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.

(3) Presumption of underfunding beginning on first day of 10th month. 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, then, commencing on the first day of the 10th month of the current plan year--

(i) The presumed adjusted funding target attainment percentage of the plan for the plan year is presumed to be less than 60 percent; and

(ii) The first day of the 10th month of the plan year is a section 436 measurement date.

(4) Certification of AFTAP--(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 signed and dated to show the date of the signature, must be provided to the plan administrator, and, except as otherwise provided in paragraph (h)(4)(ii) of this section, must certify the plan's adjusted funding target attainment percentage for the plan year. Except in the case of a range certification described in paragraph (h)(4)(ii) of this section, the certification must set forth the value of plan assets, the prefunding balance, the funding standard carryover balance, the value of the funding target used in the determination, the aggregate amount of annuity purchases included in the adjusted value of plan assets and the adjusted funding target, the unpredictable

contingent event benefits permitted to be paid for unpredictable contingent events that occurred during the current plan year that were taken into account for the current plan year (including any associated section 436 contributions), the plan amendments that took effect in the current plan year that were taken into account for the current plan year (including any associated section 436 contributions), any benefit accruals that were restored for the plan year (including any section 436 contributions), and any other relevant factors. The actuarial assumptions and funding methods used in the calculation for the certification must be the actuarial assumptions and funding methods used for the plan for purposes of determining the minimum required contributions under section 430 for the plan year.

(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 include in plan assets contributions that have not been made to the plan by the certification date. Thus, 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 paragraphs (h)(4)(iii) and (v) 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 a plan year that the plan's adjusted funding target attainment percentage for that plan year either is less than 60 percent, 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 end of that plan year, then 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.

(B) Effect of range certification before certification of specific percentage. If a plan's enrolled actuary issues a range certification pursuant to this paragraph (h)(4)(ii), then, for purposes of this section (including application of the limitations of sections 436(b) and (c), contributions described in sections 436(b)(2), 436(c)(2), and 436(e)(2), and the mandatory reduction of the prefunding and funding standard carryover 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 until a certification of the plan's specific adjusted funding target attainment percentage for the plan year has been issued under paragraph (h)(4)(i) of this section. However, if the plan's enrolled actuary has issued a range certification for the plan year but does not issue a certification of the specific adjusted funding target attainment percentage for the plan by the last day of that plan year, the adjusted funding target attainment percentage for the plan is retroactively deemed to be less than 60 percent as of the first day of the 10th month of the plan year.

(C) Effect of range certification 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, the 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 are 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 on or before the last day 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, then, except to the extent provided in paragraph (h)(4)(iv)(B) of this section, that later percentage must be applied for the portion of the plan year beginning on the date of the earlier certification. The subsequent determination could be the correction of a prior incorrect certification or it could be an update of a prior correct certification to take into account subsequent facts under the rules of paragraph (h)(4)(v) of this section. The implications of such a change depend on whether the change is a material change or an immaterial change. See paragraph (h)(4)(iv) of this section.

(B) Material change. A change in a plan's certified adjusted funding target attainment percentage constitutes a material change for a plan year 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. A change in a plan's adjusted funding target attainment percentage for a plan year can be a material change even if the only impact of the change occurs in the following plan year under the rules for determining the presumed adjusted funding target attainment percentage in that following year.

(C) Immaterial change. In general, an immaterial change is any change in an adjusted funding target attainment percentage for a plan year that is not a material change. In addition, subject to the requirement to recertify the adjusted funding target attainment percentage in paragraph (h)(4)(v)(B) of this section, a change in adjusted funding target attainment percentage is deemed to be an immaterial change if it merely reflects a change in the funding target for the plan year or the value of the adjusted plan assets after the date of the enrolled actuary's certification resulting from--

(1) Additional contributions for the preceding year that are made by the plan sponsor;

(2) The plan sponsor's election to reduce the prefunding balance or funding standard carryover balance;

(3) The plan sponsor's election to apply the prefunding balance or funding standard carryover balance to offset the prior plan year's minimum required contribution;

(4) A change in funding method or actuarial assumptions, where such change required actual approval of the Commissioner (rather than deemed approval);

(5) Unpredictable contingent event benefits which are permitted to be paid because the employer makes the section 436 contribution described in paragraph (f)(2)(iii)(A) of this section;

(6) Unpredictable contingent event benefits which are permitted to be paid because the plan's enrolled actuary determines that the increase in the funding target attributable to the occurrence of the unpredictable contingent event would not cause the plan's adjusted funding target attainment percentage to fall below 60 percent;

(7) A plan amendment which takes effect because the employer makes the section 436 contribution described in paragraph (f)(2)(iv)(A) of this section, the liability for which was not taken into account in the certification of the adjusted funding target attainment percentage; or

(8) A plan amendment which takes effect because the plan's enrolled actuary determines that the increase in the funding target attributable to the plan amendment would not cause the plan's adjusted funding target attainment percentage to fall below 80 percent, the liability for which was not taken into account in the certification of the adjusted funding target attainment percentage.

(iv) Effect of change in percentage--(A) Material change. In the case of a material change, if the plan's prior operations were in accordance with the prior certification of the adjusted funding target attainment percentage for the plan year (rather than the actual adjusted funding target attainment percentage for the plan year), then the plan will not have satisfied the requirements of section 401(a)(29) and section

436. Even if the plan's prior operations were in accordance with the subsequent certification of the adjusted funding target attainment percentage, the plan will not have satisfied the qualification requirements of section 401(a) because the plan will not have been operated in accordance with its terms during the period of time the prior certification applied. 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.

(B) Immaterial change. An immaterial change in the adjusted funding target attainment percentage applies prospectively only and 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.

(v) Rules relating to updated certification--(A) In general. This paragraph (h)(4)(v) sets forth rules relating to updates of an actuary's certification of the plan's adjusted funding target attainment percentage for a plan year. Paragraphs (h)(4)(v)(B) and (D) of this section require that an updated adjusted funding target attainment percentage be certified in certain situations. Even if the updated adjusted funding target attainment percentage is not required to be certified, plan administrators may request that the actuary prepare an updated certification of the adjusted funding target attainment percentage, as described in paragraphs (h)(4)(v)(C) and (E) of this section. Any updated adjusted funding target attainment percentage determined under this paragraph (h)(4)(v) will apply beginning as of the date of the event that gave rise to the need for the update which is a section 436 measurement date. Thus, pursuant to this paragraph (h)(4)(v), the updated funding target attainment percentage applies thereafter for all purposes of section 436, including application with respect to unpredictable contingent events occurring on or after the measurement date (but not for unpredictable contingent events that occurred before such measurement date or for benefits with annuity starting dates before that measurement date). The updated adjusted funding target attainment percentage will continue to apply for the remainder of the plan year and will be used for the presumed adjusted funding target attainment percentage for the next plan year, unless there is a later updated certification of adjusted funding target attainment percentage for the plan year.

(B) <u>Requirement to recertify AFTAP if plan sponsor contributes to threshold</u>. If, during the plan year, unpredictable contingent event benefits are permitted to be paid, a plan amendment takes effect, or benefits are permitted to accrue because the plan sponsor makes a contribution described in paragraph (f)(2)(iii)(B), (f)(2)(iv)(B), or (f)(2)(v) of this section, then, in accordance with paragraph (f)(2)(ii)(C) of this section, the plan's enrolled actuary must issue an updated certification of the adjusted funding target attainment percentage that takes into account such contribution as well as the liability for unpredictable contingent event benefits that are permitted to be paid, plan amendments that take effect during the plan year, and restored benefits.

(C) <u>Optional recertification of AFTAP after other unpredictable contingent event or plan amendment</u>. Except as provided in paragraph (h)(4)(v)(D) of this section, if, during a plan year, unpredictable contingent event benefits are permitted to be paid, or a plan amendment takes effect, because either the plan sponsor makes a contribution described in paragraph (f)(2)(iii)(A) or (f)(2)(iv)(A) of this section, or the plan's enrolled actuary determines that the increase in the funding target attributable to the occurrence of the unpredictable contingent event or the plan amendment would not cause the plan's adjusted funding target attainment percentage to fall below the applicable 60 percent or 80 percent threshold (taking into account the occurrence of all previous unpredictable contingent event benefits and plan amendments to the extent not already reflected in the certified adjusted funding target attainment percentage for the plan year (or update)), then the plan administrator may request that the plan actuary issue an updated certification of the adjusted funding target attainment percentage that takes into account the unpredictable contingent event benefits or plan amendments and any associated section 436 contribution.

(D) Requirement to recertify AFTAP after deemed immaterial change. If a change in the adjusted funding target attainment percentage as a result of one of the items listed in paragraph (h)(4)(iii)(C) of this section would be a material change, then the change is treated as an immaterial change only if the plan's enrolled actuary recertifies the adjusted funding target attainment percentage for the plan year as soon as practicable after the event that gives rise to the change.

(E) Optional recertification after other immaterial change. If a change in the adjusted funding target attainment percentage is immaterial, then the plan administrator may request that the plan actuary issue an updated certification of the adjusted funding target attainment percentage that takes into account the unpredictable contingent event benefits or plan amendments and any associated section 436 contribution.

(5) Examples of rules of paragraphs (h)(1), (h)(2), and (h)(3) of this section. The following examples illustrate the rules 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 (h)(5). 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 plan year is subject to section 436 in 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. The examples read as follows:

Example 1. (i) On July 15, 2010, the adjusted funding target attainment percentage (“AFTAP”) for Plan T for 2010 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 prohibited payments 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 prohibited payments 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, when it is certified to be 66%.

(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 prohibited payments in paragraph (d)(3) of this section continues to apply.

(iii) Pursuant to paragraph (h)(2)(iv) of this section, beginning April 1, 2011, the AFTAP for 2011 is presumed to be 55% (10 percentage points less than the AFTAP for 2010). Plan T is subject to the restriction on prohibited payments under paragraph (d)(1) of this section for annuity starting dates on or after April 1, 2011. In addition, Plan T is subject to the restriction on unpredictable contingent event benefits under paragraph (b) of this section for unpredictable contingent events occurring on or after April 1, 2011 and benefits are required to be frozen on and after April 1, 2011 under paragraph (e) of this section.

(iv) Once the enrolled actuary for the plan certifies that the AFTAP for 2011 for Plan T is 66%, 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. Plan T must resume paying prohibited payments, 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. In addition, Plan T must provide benefits for any unpredictable contingent event occurring on or after January 1, 2011, to the extent permitted under paragraph (b) of this section. 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 June 1, 2011, unless Plan T provides otherwise.

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 restrictions in paragraphs (b), (d)(1), and (e) of this section commencing on 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 September 30, 2011, the certification does not constitute a new section 436 measurement date, and Plan T continues to be subject to the restrictions on unpredictable contingent event benefits, prohibited payments, and benefit accruals under paragraphs (b), (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 prohibited payments under paragraph (d)(1) of this section, and Plan T must provide benefits for any unpredictable contingent event occurring on or after January 1, 2012, to the extent permitted under paragraph (b) of this section and must resume paying prohibited payments, 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 restrictions on unpredictable contingent event benefits under paragraph (b) of this section, prohibited payments under paragraph (d)(1) of this section, and 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 prohibited payments under paragraph (d)(1) of this section no longer applies; however, the partial restriction on prohibited payments under paragraph (d)(3) of this section applies beginning on February 1, 2012. Therefore, Plan T must pay a portion of the prohibited payments elected by participants with annuity starting dates on or after February 1, 2012. Furthermore, based on the presumed AFTAP of 65%, the restriction on unpredictable contingent event benefits under paragraph (b) of this section ceases to apply for events occurring on or after February 1, 2012, to the extent permitted under paragraph (b) of this section and the restriction on benefit accruals under paragraph (e) of this section no longer applies so that, 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 restrictions on unpredictable contingent event benefits under paragraph (b) of this section, on prohibited payments under paragraph (d)(1) of this section, and 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 restrictions on unpredictable contingent event benefits under paragraph (b) of this section, on prohibited payments under paragraph (d)(1) of this section, and on benefit accruals under paragraph (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)(iv) 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 (b), (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 the prohibited payments 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 prohibited payments 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 the prohibited payments 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 restrictions on unpredictable contingent event benefits under paragraph (b) of this section, on the payment of accelerated benefit distributions under paragraph (d)(1) of this section, and on benefit accruals under paragraph (e) of this section apply. Accordingly, Plan V cannot pay any unpredictable contingent event benefits for events occurring on or after April 1, 2011, or prohibited payments to participants with an annuity starting date on or after April 1, 2011, and benefit accruals cease as of April 1, 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 unpredictable contingent event benefits, prohibited payments, and benefit accruals in paragraphs (b), (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 unpredictable contingent event benefits for events occurring on or after January 1, 2011, to the extent permitted under paragraph (b) of this section and a portion of the prohibited payments elected by participants with an annuity starting date on or after June 1, 2011. 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)(B) 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)(B) 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.

(6) Examples of rules of paragraph (h)(4) of this section. The following examples illustrate the rules 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 is not a material change under paragraph (h)(4)(iii)(C)(1) of this section because the AFTAP 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) Adjusted funding target attainment percentage--(i) In general. Except as otherwise provided in this paragraph (j)(1), the adjusted funding target attainment percentage for a plan year is the fraction (expressed as a percentage)--

(A) The numerator of which is the adjusted plan assets for the plan year described in paragraph (j)(1)(ii) of this section; and

(B) The denominator of which is the adjusted funding target for the plan year described in paragraph (j)(1)(iii) of this section.

(ii) Adjusted plan assets--(A) General rule. The adjusted plan assets for a plan year is generally determined by--

(1) Subtracting the plan's funding standard carryover balance and prefunding balance as of the valuation date from the value of plan assets for the plan year under section 430(g) (but treating the resulting value as zero if it is below zero); and

(2) Increasing the resulting value by the aggregate amount of purchases of annuities for participants and beneficiaries (other than participants who, at the time of

the purchase, were highly compensated employees as defined in section 414(q), which definition includes highly compensated former employees under §1.414(q)-1T, Q&A-4) which were made by the plan during the preceding 2 plan years, to the extent not included in plan assets for purposes of section 430.

(B) Special rule for plans that are fully funded without regard to subtraction of funding balances from plan assets. If for a plan year the value of plan assets determined without subtracting the funding standard carryover balance and the prefunding balance is not less than 100 percent of the plan's funding target determined under section 430 without regard to section 430(i), then the adjusted value of plan assets used in the calculation of the adjusted funding target attainment percentage for the plan year is determined without subtracting the plan's funding standard carryover balance and prefunding balance from the value of plan assets for the plan year.

(C) Special rule for plans with section 436 contributions. If an employer makes a contribution described in paragraph (f)(2) of this section after the valuation date in order to avoid or terminate limitations under section 436, then the present value of that contribution (determined using the effective interest rate under section 430(h)(2)(A) for the plan year) is permitted to be added to the plan assets as of the valuation date for purposes of determining or redetermining the adjusted funding target attainment percentage for a plan year, but only if the liability for the benefits, amendment, or accruals that would have been limited (but for the contribution) is included in determining the adjusted funding target for the plan year.

(D) Transition rule. Paragraph (j)(1)(ii)(B) 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

(E) Limitation on transition rule. Paragraph (j)(1)(ii)(D) of this section does not apply with respect to the current plan year unless, for each plan year beginning after December 31, 2007, and before the current plan year, the value of plan assets determined without subtracting the funding standard carryover balance and the prefunding balance is not less than the product of--

(1) The applicable percentage determined under paragraph (j)(1)(ii)(D) of this section for that plan year; and

(2) The funding target (determined without regard to the at-risk rules of section 430(i)) for that plan year.

(iii) Adjusted funding target--(A) In general. Except as otherwise provided in this paragraph (j)(1)(iii), the adjusted funding target equals the funding target for the plan year, determined in accordance with the rules set forth in §1.430(d)-1, but without regard to the at-risk rules under section 430(i), increased by the aggregate amount of purchases of annuities that were added to assets for purposes of determining the plan's adjusted plan assets under paragraph (j)(1)(ii)(A)(2) of this section. The definition of adjusted funding target for a plan maintained by a commercial airline for which the plan sponsor has made the election described in section 402(a)(1) of Pension Protection Act of 2006 (PPA '06), Public Law 109-280 (120 Stat. 780), is the same as if it did not make such an election.

(B) <u>Adjusted funding target after updated certification</u>. After the plan's enrolled actuary prepares an updated certification of the adjusted funding target attainment percentage under paragraph (h)(4)(v) of this section, the adjusted funding target will also be updated to reflect unpredictable contingent event benefits and plan amendments not already taken into account.

(iv) <u>Plans with zero adjusted funding target</u>. If the adjusted funding target for the plan year is zero, then the adjusted funding target attainment percentage for the plan year is 100 percent.

(v) <u>Plans with end of year valuation dates</u>. [Reserved]

(vi) <u>Special rule for plans that are the result of a merger</u>. [Reserved]

(vii) <u>Special rule for plans that are involved in a spinoff</u>. [Reserved]

(2) <u>Annuity starting date</u>--(i) <u>General rule</u>. The term <u>annuity starting date</u> 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 annuity starting date is the annuity starting date for the qualified joint and survivor annuity that is payable under the plan at the same time as the benefit that is not payable as an annuity;

(C) In the case of an amount payable under a retroactive annuity starting date, the benefit commencement date (instead of the date determined under paragraphs (j)(2)(i)(A) and (B) of this section);

(D) The date of the purchase of an irrevocable commitment from an insurer to pay benefits under the plan; and

(E) The date of any transfer to another plan described in paragraph (j)(6)(i)(C) of this section.

(ii) Special rule for beneficiaries. If a participant commences benefits at an annuity starting date (as defined in paragraph (j)(2)(i) of this section) and, after the death of the participant, payments continue to a beneficiary, the annuity starting date for the payments to the participant constitutes the annuity starting date for payments to the beneficiary, except that a new annuity starting date occurs (determined by applying paragraph (j)(2)(i)(A), (B), and (C) of this section to the payments to the beneficiary) if the amounts payable to all beneficiaries of the participant in the aggregate at any future date can exceed the monthly amount that would have been paid to the participant had he or she not died.

(3) First effective plan year. The first effective plan year for a plan is the first plan year to which section 436 applies to the plan under paragraph (k)(1) or (k)(2) of this section.

(4) Funding target. In general, the funding target means the funding target under §1.430(d)-1, without regard to the at-risk rules under section 430(i) and §1.430(i)-1. However, solely for purposes of sections 436(b)(2)(A) and (c)(2)(A), the funding target means the funding target under §1.430(i)-1 if the plan is in at-risk status for the plan year.

(5) Prior plan year adjusted funding target attainment percentage--(i) In general. Except as otherwise provided in this paragraph (j)(5), the prior plan year adjusted funding target attainment percentage is the adjusted funding target attainment

percentage determined under paragraph (j)(1) of this section for the immediately preceding plan year.

(ii) Special rules--(A) Special rule for new plans. In the case of a plan established during the plan year that was not the result of a merger or spinoff, the adjusted funding target attainment percentage is equal to 100 percent for plan years before the plan was established. Except as otherwise provided in paragraph (j)(5)(ii)(B) of this section, a plan that has a predecessor plan in accordance with §1.415(f)-1(c) is not a plan established during the plan year under this paragraph (j)(5)(ii)(A). Instead, if the plan has a predecessor plan, the adjusted funding target attainment percentage for the prior plan year is the adjusted funding target attainment percentage for the prior plan year for the predecessor plan (and that predecessor plan's adjusted funding target attainment percentage is treated as equal to 100 percent on any date on which it is terminated, other than in a distress termination).

(B) Special rules for plans that are the result of a merger. [Reserved]

(C) Special rules for plans that are involved in a spinoff. [Reserved]

(iii) Special rules for 2007 plan year--(A) General determination of 2007 adjusted funding target attainment percentage. In the case of the first plan year beginning in 2008, except as otherwise provided in this paragraph (j)(5), the adjusted funding target attainment percentage for the immediately preceding plan year (the 2007 plan year) is determined as the fraction (expressed as a percentage)--

(1) The numerator of which is the value of plan assets determined under paragraph (j)(5)(iii)(B) of this section increased by the aggregate amount of purchases of annuities for participants and beneficiaries (other than participants who, at the time of

the purchase, were highly compensated employees as defined in section 414(q), which definition includes highly compensated former employees under §1.414(q)-1T, Q&A-4) which were made by the plan during the preceding 2 plan years, to the extent not included in plan assets under section 412(c)(2) (as in effect prior to amendment by PPA ’06); and

(2) The denominator of which is the plan’s current liability determined pursuant to section 412(l)(7) (as in effect prior to amendment by PPA ’06) on the valuation date for the 2007 plan year increased by the aggregate amount of purchases of annuities that were added to the plan assets under the rules of paragraph (j)(5)(iii)(A)(1) of this section.

(B) General determination of value of plan assets--(1) In general. The value of plan assets for purposes of this paragraph (j)(5)(iii) is determined under section 412(c)(2) as in effect for the 2007 plan year, except that the value of plan assets prior to subtracting the plan’s funding standard account credit balance described in paragraph (j)(5)(iii)(B)(2) of this section must be adjusted so that the value of plan assets is neither 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 2007 plan year, that balance is subtracted from the value of plan assets described in paragraph (j)(5)(iii)(B)(1) of this section as of that valuation date. However, the subtraction does not apply if the value of plan assets prior to adjustment under paragraph (j)(5)(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 2007 plan year.

(3) Effect of funding standard carryover balance reduction for 2007 plan year. Notwithstanding paragraph (j)(5)(iii)(B)(2) of this section, if, for the first plan year beginning in 2008, 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 2007 plan year using the valuation interest rate for that 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)(5)(iii)(B)(2) of this section.

(C) Plan with end-of-year valuation date. With respect to the first plan year beginning in 2008, if the plan had a valuation date under section 412 that was the last day of the plan year for each of the plan years beginning in 2006 and 2007, the adjusted funding target attainment percentage for the 2007 plan year may be determined as the fraction (expressed as a percentage)--

(1) The numerator of which is the value of plan assets determined under paragraph (j)(5)(iii)(D) of this section increased by the aggregate amount of purchases of annuities for participants and beneficiaries (other than participants who, at the time of the purchase, were highly compensated employees as defined in section 414(q), which definition includes highly compensated former employees under §1.414(q)-1T, Q&A-4) which were made by the plan during the preceding 2 plan years, to the extent not included in plan assets under section 412(c)(2) (as in effect prior to amendment by PPA '06); and

(2) The denominator of which is the plan's current liability determined pursuant to section 412(l)(7) (as in effect prior to amendment by PPA '06) on the valuation date for

the second plan year that begins before 2008 (the 2006 plan year), including the increase in current liability for the 2006 plan year, increased by the aggregate amount of purchases of annuities that were added to the plan assets under the rules of paragraph (j)(5)(iii)(C)(1) of this section.

(D) Special asset determinations for 2006 adjusted funding target attainment percentage--(1) General rule. If the adjusted funding target attainment percentage for the 2007 plan year is determined under the rules of paragraph (j)(5)(iii)(C) of this section, then the value of plan assets is determined as the value of plan assets under section 412(c)(2) as in effect for the 2006 plan year, adjusted as provided in this paragraph (j)(5)(iii)(D).

(2) Inclusion of contributions for 2006. Contributions made for the 2006 plan year are taken into account in determining the value of plan assets, regardless of whether those contributions are made during the plan year or after the end of the plan year and within the period specified under section 412(c)(10) (as in effect prior to amendment by PPA ’06).

(3) Restriction to 90-110 percent corridor. The value of plan assets taking into account the amount of contributions made for the 2006 plan year is increased or decreased, as necessary, so that it is neither 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 the 2006 plan year (taking into account assets attributable to contributions for the 2006 plan year).

(4) Subtraction of credit balance. The plan’s funding standard account credit balance as of the end of the 2006 plan year is generally subtracted from the value of

plan assets determined after application of paragraph (j)(5)(iii)(D)(3) of this section. However, this subtraction does not apply if 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) (as in effect prior to amendment by PPA '06) on the valuation date for the 2006 plan year.

(E) Special rules for mergers and spinoffs. Rules similar to the rules of paragraph (j)(5)(ii) of this section apply for purposes of determining the adjusted funding target attainment percentage for the 2007 plan year in the case of a newly established plan, a plan that is the result of a merger of two plans, or a plan that is in involved in a spinoff.

(6) Prohibited payment--(i) General rule. 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 paragraph (d) of this section is in effect;

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

(C) Any transfer of assets and liabilities to another plan maintained by the same employer (or by any member of the employer's controlled group) that is made in order to avoid or terminate the application of section 436 benefit limitations; and

(D) Any other amount 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) relating to objectives and standards for publishing regulations, revenue rulings and revenue procedures in the

Internal Revenue Bulletin).

(ii) Special rule for beneficiaries. In the case of a beneficiary that is not an individual, the amount that is a prohibited payment is determined by substituting for the amount in paragraph (j)(1)(i)(A) of this section the monthly amount payable in installments over 240 months that is actuarially equivalent to the benefit payable to the beneficiary.

(7) Section 436 contributions. Section 436 contributions are the contributions described in paragraph (f)(2) of this section that are made in order to avoid the application of section 436 limitations under a plan for a plan year.

(8) Section 436 measurement date. A section 436 measurement date is the date that is used to determine when the limitations of sections 436(d) and 436(e) apply or cease to apply, and is also used for calculations with respect to applying the limitations of paragraphs (b) and (c) of this section. See paragraphs (h)(1)(i), (h)(2)(iii)(B), (h)(2)(iv)(B), and (h)(3)(i) of this section regarding section 436 measurement dates that result from application of the presumptions under paragraph (h) of this section.

(9) Unpredictable contingent event. 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 (including the absence 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. 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 (including the absence) 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, that benefit is an unpredictable contingent event benefit.

(10) Examples. The following examples illustrate the rules 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. Plan S is not in at-risk status for 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, and 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 adjusted funding target attainment percentage (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. Section 436 applies to Plan R for 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. No annuities were purchased using plan assets during 2005 or 2006.

(ii) Pursuant to paragraph (j)(5)(iii)(B)(1) of this section, the asset value used to determine the AFTAP 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)(5)(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 AFTAP for the 2007 plan year. However, pursuant to paragraph (j)(5)(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 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).

Example 4. (i) Plan T is a non-collectively bargained defined benefit plan that was established prior to 2007. Plan T 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 met the conditions of paragraph (j)(1)(ii)(E) of this section for 2008. As of January 1, 2009, Plan T has a value of plan assets (equal to the market value of assets) of $3,000,000, a funding standard carryover balance of $150,000, and a prefunding balance of $50,000. During 2007 and 2008, assets from Plan T were used to purchase a total of $400,000 in annuities for employees other than highly compensated employees. The funding target for Plan T (without regard to the at-risk rules of section 430(i)) is $3,200,000 as of January 1, 2009.

(ii) The plan's funding status is calculated in accordance with paragraph (j)(1)(ii)(B) of this section to determine whether the special rule for fully-funded plans applies to Plan T. Accordingly, the value of plan assets determined without subtracting the funding standard carryover balance and the prefunding balance is 93.75% of the plan's funding target ($3,000,000 ÷ $3,200,000). The applicable transitional percentage in paragraph (j)(1)(ii)(D) of this section is 94% for 2009. Because the percentage calculated above is less than 94%, the transition rule does not apply to Plan T.

(iii) Accordingly, the January 1, 2009, AFTAP for Plan T is calculated without reflecting the special rule in paragraph (j)(1)(ii)(B) of this section. The AFTAP as of January 1, 2009, is calculated by dividing the adjusted assets by the adjusted funding target. For this purpose, the value of assets is increased by the annuities purchased for nonhighly compensated employees during 2007 and 2008, and decreased by the funding standard carryover balance and the prefunding balance as of January 1, 2009, resulting in an adjusted asset value of $3,200,000 (that is, $3,000,000 + $400,000 - $150,000 - $50,000). The funding target is increased by the annuities purchased for nonhighly compensated employees during 2007 and 2008, resulting in an adjusted funding target of $3,600,000 (that is, $3,200,000 + $400,000). The AFTAP for Plan T for 2009 is therefore $3,200,000 ÷ $3,600,000, or 88.89%.

(k) Effective/applicability dates--(1) Statutory effective date. Section 436 generally applies to plan years beginning on or after January 1, 2008. The applicability of section 436 for purposes of determining the minimum required contribution is delayed for certain plans in accordance with sections 104 through 106 of PPA '06.

(2) Collectively bargained plan 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, section 436 does not apply to plan years beginning before the earlier of--

(A) January 1, 2010; or

(B) The later of--

(1) The date on which the last such collective bargaining agreement relating to the plan terminates (determined without regard to any extension thereof agreed to after August 17, 2006); or

(2) The first day of the first plan year to which section 436 would (but for this paragraph (k)(2)) apply.

(ii) Treatment of certain plan amendments. For purposes of this paragraph (k)(2), 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.

(iii) 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)(2) if it is considered a collectively bargained plan under the rules of paragraph (a)(5)(ii)(B) of this section.

(3) Effective date/applicability date of regulations. This section applies to plan

years beginning on or after January 1, 2010. For plan years beginning before January 1, 2010, plans are permitted to rely on the provisions set forth in this section for purposes of satisfying the requirements of section 436.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 9. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 10. In §602.101, paragraph (b) is amended by adding entries for §§1.430(f)-1, 1.430(g)-1, 1.430(h)(2)-1, and 1.436-1 to the table to read as follows:

§602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.430(f)-1	1545-2095
1.430(g)-1	1545-2095
1.430(h)(2)-1	1545-2095
1.436-1	1545-2095
* * * * *	

/s/ Steven Miller

Acting Deputy Commissioner for Services and Enforcement.

Approved: September 24, 2009.

/s/ Michael Mundaca

Acting Assistant Secretary of the Treasury (Tax Policy).