

# United States Senate

WASHINGTON, DC 20510

October 2, 2019

The Honorable Charles Rettig  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue Northwest  
Washington, DC 20224

The Honorable Steven Mnuchin  
Secretary  
Department of the Treasury  
1500 Pennsylvania Ave Northwest  
Washington, DC 20220

Dear Commissioner Rettig and Secretary Mnuchin:

We write regarding the Internal Revenue Service's (IRS) recent action to extend temporary nondiscrimination relief for closed defined benefit plans (Notice 2019-49). While we appreciate and support the IRS's action to provide partial relief through 2020, we ask you to work to the greatest extent possible to provide additional relief for plans not fully relieved under this action.

As you know, over the past several years, many companies have transitioned from traditional defined benefit plans to other retirement plan models, such as defined contribution plans. In doing so, a large number of these companies have elected to grandfather existing employees by closing their traditional defined benefit plans; other companies have hard frozen their traditional defined benefit plans but assisted existing employees in other ways. When a plan closes, some participants continue to earn benefits under the traditional defined benefit plan. When a plan is hard frozen, employees earn no new benefits under the plan.

The result of this trend is that over time, existing employees in the closed plan typically build seniority and become more highly compensated than younger, newer employees, who are more likely to have greater job turnover. This widens the income gap between the employees in the closed plan and the new employees. Because the grandfathered group in the closed plan generally becomes more highly compensated, closed plans almost always end up inadvertently violating the IRS nondiscrimination testing rules. This clearly is not the intended effect of the nondiscrimination rules, which were written to strengthen retirement security, rather than to force many older employees into different types of plans that may not provide enough time to accumulate sufficient benefits before retirement.

This is exactly the reason the IRS took recent action in Notice 2019-49 to extend existing relief for plans facing this situation. However, there are many variations of the closed plan problem that are not addressed by the partial relief, especially for small employers. Additionally, the relief does not address certain plan features in a closed plan that also cause grandfathered plans to fail the outdated nondiscrimination rules. And it does not address defined benefit replacement issues that arise when a defined benefit plans has already frozen, and the plan sponsors attempt to make existing employees whole for the loss of future pension benefits.

Earlier this year, we reintroduced the Retirement Security Preservation Act (S. 2352) to provide clarification and provides comprehensive and permanent relief. RSPA addresses this problem by

amending and updating the nondiscrimination rules to protect older workers in plans that have been closed or frozen. The bill addresses not just the closed plan issue, but also the closed feature issue, the defined benefit replacement plan issue, and minimum participation issues—all of which can force plan sponsors to freeze benefits if Washington does not provide common sense relief. The bill also contains anti-abuse rules related to closed and frozen plans.


Recently, the American Benefits Council commissioned two global employee benefits consulting firms to determine the impacts to participants in closed pension plans if no action is taken imminently. The consulting firms estimated that over 450,000 employees in total could lose future retirement benefits if this relief does not materialize.

We in Congress are pushing for passage of S. 2352 and similar legislation, the Setting Every Community Up for Retirement Enhancement Act (SECURE Act), which includes S. 2352 as a provision, as soon as possible. However, plans have to run discrimination testing and make decisions now. It is our hope that while Congress negotiates a path forward on RSPA and SECURE with an intent to enact into law this year, the IRS can identify and provide additional certainty and relief beyond Notice 2019-49 to plans facing these hard decisions now.

The IRS clearly has the authority to do this with respect to the closed plan issue, the closed feature issue, and the defined benefit replacement issue, as evidenced by the issuance of proposed regulations reforming those three areas. It is our understanding that there is a question about whether the IRS has the authority to provide relief regarding the minimum participation issue. We certainly interpret the law to authorize the provision of such relief, and urge the IRS to examine this issue closely.

Thank you very much for working to protect longer-serving employees counting on their hard-earned pension benefits.

Sincerely,

  
Benjamin L. Cardin  
United States Senator

  
Rob Portman  
United States Senator