



March 29, 2017

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Internal Revenue Service
CC:PA:LPD:PR (REG-112324-15)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Improper Exemption of Regulatory Action Regarding Mortality Tables from the Requirements of Executive Orders 12866 (RIN 1545-BM71) and 13771

Dear Sir or Madam:

The ERISA Industry Committee (“ERIC”) and the American Benefits Council (“the Council”) appreciate the opportunity to comment on the rules proposed by the Department of the Treasury (“Treasury”) and the Internal Revenue Service (the “Service”) with respect to the mortality tables that the Secretary is required to prescribe and periodically revise under Internal Revenue Code (“Code”) section 430(h)(3).¹ The Council and ERIC are submitting comments on the substance of the proposed rulemaking in separate letters. The purpose of this letter is to express our joint concern that the proposed regulation was determined to be exempt from the regulatory review requirements as set forth in Executive Order 12866 (“E.O. 12866”) and Executive Order 13771 (E.O. 13771).

ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels. ERIC’s members provide comprehensive retirement benefits to tens of millions of active and retired workers and their families.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

¹ 81 Fed. Reg. 95,911 (Dec. 29, 2016).

NEED FOR AN ECONOMIC IMPACT ANALYSIS OF PROPOSED REGULATION IN LIGHT OF EXECUTIVE ORDERS 12866 AND 13771

As proposed, the mortality table regulations would create a large new burden on businesses that maintain defined benefit plans. The billions of dollars of new costs that these rules will impose will materially affect businesses' ability to increase productivity, create jobs, and pursue opportunities. Both organizations have written to Treasury and the Service several times over the years expressing concerns about such possible effects if, as is now the case, the proposed regulations follow too closely reports that overstate life expectancy.

The adverse effects that the mortality table regulations will have on several of the Administration's priorities serve to emphasize the importance of ensuring that a thorough review is conducted of the proposed rules. The processes and mechanisms for ensuring such a review are provided for under the longstanding E.O. 12866 as well as the new Executive Order issued by the President to reduce and control regulatory costs, E.O. 13771. The determination in the preamble to the proposed regulations that the mortality table regulations are not subject to E.O. 12866 prevents those important processes and mechanisms from being applied, with the following implications:

- The regulation will not be subject to review by the Office of Management and Budget ("OMB");
- The regulation will not be subject to a thorough economic analysis;
- The regulation will not be subject to the new "2-for-1" requirements of E.O. 13771; and
- The regulation will not be subject to the new requirement under E.O. 13771 that new regulations in Fiscal Year 2017 have a net incremental cost of zero.

As discussed below, it appears that the basis for the determination that the mortality table regulation is not subject to E.O. 12866 is the view that the regulation is not "significant" and/or is not "legislative." As also discussed below, we believe that the regulation is both significant and legislative. The importance of these labels is ensuring that the proposed regulation is appropriately reviewed and vetted under E.O. 12866, especially in this case because the regulation's adverse effects on business do not accord with the President's priorities. By ensuring that the regulation is determined to be subject to the requirements of E.O. 12866, the critical review processes outlined above would be required to occur.

Also, as discussed below, this regulation fits within the scope of E.O. 13771, triggering the need to repeal two rules and ensure that there is a net incremental cost of zero. In this regard, we believe that the economic benefits of the two repealed rules should flow to defined benefit plan sponsors. If regulatory burdens on a segment of the economy can cause economic harm, that harm is not relieved by providing relief to another segment of the economy. To alleviate economic harm, the relief needs to be targeted at the segment bearing the burden.

Although we realize that the rulemaking effort at issue was largely prompted by the statutory requirement that the Service update the mortality tables under Code section 430(h)(3) at least every

10 years, we would note that nothing in the Code requires the updated regulations to impose the burden that the proposed regulations would entail. We believe that the mortality tables could very appropriately be revised, as required, at a significantly lower cost to employers.

1. The Mortality Table Regulations Should Be Subject to OMB Review Under E.O. 12866

E.O. 12866 sets forth a process for the centralized review of certain agency regulations by OMB's Office of Information and Regulatory Affairs ("OIRA") to ensure that regulatory actions are consistent with applicable law, the President's priorities, and the principles stated in the Order. In this regard, E.O. 12866 seeks to ensure that the federal regulatory system "improves the performance of the economy without imposing unacceptable or unreasonable costs on society," while also recognizing that "the private sector and private markets are the best engine for economic growth."

As provided under E.O. 12866, only regulatory actions that are determined to be "significant regulatory action[s]" are subject to review by OIRA. However, we understand that, under a longstanding agreement between Treasury and OMB, Internal Revenue Service regulations are exempt from the regulatory review requirements of E.O. 12866 unless a regulation is determined to be *both* a "significant regulatory action" as defined in the Order and a legislative rule under the Administrative Procedure Act ("APA").

For the reasons described below, we would maintain that the proposed mortality table rule is both a significant regulatory action and a legislative rule, and thus the proposal should be subject to the critical and important review requirements for regulatory actions of such nature under E.O. 12866. In this regard, we find the statement by Treasury and the Service that the rule is exempt from the requirements of E.O. 12866 to be incorrect.²

A. The Mortality Table Regulations Are Very Clearly an Economically Significant Regulatory Action

E.O. 12866 defines a "significant regulatory action" as "any regulatory action that is likely to result in a rule that may: (1) ***Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities***; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order" (emphasis added).

A regulatory action that is determined to be "significant" because it may have an annual economic effect on the economy of \$100 million or more is commonly referred to as an

² *Id.* at 95,918.

“economically significant” rule. Economically significant rules are subject to additional review requirements under E.O. 12866, including a more rigorous economic analysis.

Our estimates of the impact of the proposed mortality table rule demonstrate that the rule is economically significant. We anticipate that the proposal’s impact is likely to increase defined benefit plans’ funding obligations by *billions* of dollars, and could very well impact some larger plans alone by over \$100 million.

The significance of the economic impact of the proposed regulation is without question. However, as described in a recent Government Accountability Office report, we understand that Treasury and the Service in almost all cases determine that tax regulations are not economically significant because, in their view, the economic impact of a tax regulation generally comes from the underlying Code provisions rather than the regulation.³ As such, Treasury and the Service state that they have little “discretion to control” the economic effects of tax regulations.⁴

Although Treasury and the Service may indeed have little “discretion to control” the economic impact of regulations that implement Code provisions imposing a specific tax rate, in this case it is apparent that Treasury and the Service have a very high degree of discretion in implementing Code section 430(h)(3). Section 430(h)(3) provides the Secretary with substantial leeway in determining how to develop mortality tables, including the discretion to determine at what rate to set mortality improvement projections – projections that are inherently speculative. In addition, although there is only one study to “take into account,” nothing requires that study to be relied on as 100% accurate. Treasury and the Service can take that study into account and adjust it as appropriate, another source of significant discretion. Thus, because the extent of the economic cost inflicted by the mortality table regulations is almost entirely determined by Treasury and the Service (and not by the Code), the proposed mortality table regulation should clearly be treated as an economically significant regulatory action for purposes of E.O. 12866.

Please note that in this regard, the proposed mortality regulations are distinctly different from other tax regulations where Treasury and the Service are interpreting substantive Code provisions. Our position on the application of the Executive Orders to the proposed mortality regulations is limited to these regulations, and we express no view on the treatment of other tax regulations.

B. The Mortality Table Regulations Are a Legislative Rule

Under the APA, rules that are exempt from the statute’s requirements for notice and comment rulemaking are referred to as interpretative rules,⁵ whereas rules that are not exempt from the notice and comment requirements are often referred to as legislative rules. Although the APA does not clearly distinguish between what constitutes an interpretative rule versus a legislative rule, the D.C. Circuit has set forth a test under which a rule is a legislative rule if “in the absence of the rule there

³ U.S. GOV’T ACCOUNTABILITY OFFICE, REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS OF TAX REGULATIONS AND GUIDANCE 24, GAO-16-720 (2016), *available at* <https://www.gao.gov/assets/680/679518.pdf>.

⁴ *Id.*

⁵ 5 U.S.C. § 553(b)(3)(A).

would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties.”⁶

In our view, the proposed mortality table regulations are legislative rules because they are wholly creating the basis for enforcement or any other action by the Service under Code section 430(h)(3). The Code leaves the development of mortality tables nearly completely up to the Secretary, providing only general direction with respect to some factors that should be considered. In fact, the Code provides no direction at all with respect to the setting of the projected mortality improvement rate, which is one of the most important factors in determining the economic impact of the mortality tables.

2. The Mortality Table Regulations Should be Subject to the Executive Order on Reducing Regulations and Controlling Regulatory Costs

On January 30, 2017, the President issued E.O. 13771⁷ in an effort to reduce regulations and control regulatory costs. To that end, section 2 of E.O. 13771 generally requires agencies that propose for notice and comment or otherwise promulgate a new regulation to, at the time of proposal or promulgation, identify at least two existing regulations for repeal. In addition, with respect to Fiscal Year 2017, E.O. 13771 generally requires that “the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero.”

On February 2, 2017, Dominic J. Mancini, OIRA’s Acting Administrator, published a memorandum providing interim guidance with respect to the implementation of section 2 of E.O. 13771. That memorandum clarifies that the Order’s requirements for Fiscal Year 2017 “apply only to those *significant* regulatory actions, as defined in Section 3(f) of Executive Order 12866, an agency issues between noon on January 20 and September 30, 2017. This includes significant final regulations for which agencies issued a Notice of Proposed Rulemaking before noon on January 20, 2017” (emphasis added). The memorandum further clarifies that agencies “may proceed with significant regulatory actions that need to be finalized in order to comply with an imminent statutory deadline,” but that in all cases “agencies should identify additional regulatory actions to be repealed in order to offset the cost of the new significant regulatory action, even if such action is required by law.”

As discussed above, because the proposed mortality table regulation is properly characterized as a significant regulatory action, it follows that the regulation would be subject to the requirements of section 2 of E.O. 13771 if finalized prior to October 1, 2017.⁸ That is, in conjunction with finalizing the mortality table rules, the Service would be required to identify at least two regulations to be repealed, and the incremental cost of the mortality regulation should be taken into account with respect to the requirement that the total incremental cost of all new regulations shall be no greater than zero.

⁶ Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).

⁷ 82 Fed. Reg. 9,339 (Feb. 3, 2017).

⁸ If the mortality table rule is finalized after September 30, 2017, the rule presumably would be subject to section 3 of E.O. 13771.

Regulations imposing a burden of this magnitude on U.S. businesses are clearly within the scope of the Executive Order, which is intended to ensure that government regulations not stand in the way of business, productivity, and economic growth. The mortality table regulation would have that effect on those businesses that continue to maintain defined benefit plans, directing too many resources unnecessarily away from those companies' new investments, job growth, and other economic activities. Therefore, because the economic cost of the mortality table regulations would be borne solely by plan sponsors of defined benefit plans, we believe that the right way to implement E.O. 13771 with respect to the mortality table regulations is to ensure that Treasury and Service identify offsetting regulations for repeal that would specifically ease the burdens on businesses with defined benefit plans.

Respectfully submitted,

ERISA Industry Committee

American Benefits Council