



AMERICAN BENEFITS
COUNCIL

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Dear Ms. Weiser, Ms. Judson and Commissioner Horton:

On behalf of the American Benefits Council (“Council”), I am writing with respect to the Fourth Quarter Update to the Department of the Treasury’s (“Treasury’s”) 2017-2018 Priority Guidance Plan, which indicates that the Treasury’s regulatory project on lump sum windows for defined benefit plan participants has been closed without publication. The Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions (“Unified Regulatory Agenda”), however, indicates that the Treasury aims to release proposed regulations on lump sum windows in March 2019. We are writing to ask the Unified Regulatory Agenda be modified to conform to the Priority Guidance Plan, and that Notice 2015-49 be withdrawn.

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 sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans. The Council has members that are directly affected by Notice 2015-49.

The Council applauds the decision to close this project without publication, as reflected in the Priority Guidance Plan. As we described in more detail in our October 27, 2015, letter, this regulatory project did not have a legal basis and would have curtailed retirees' ability to make informed choices about their retirement. Today, we write to ask that the Unified Regulatory Agenda be modified to reflect the closure of the project, as described in the Priority Guidance Plan. More importantly, we also write to ask that Notice 2015-49 ("the Notice") be withdrawn in light of the decision to discontinue the project. Unless the Notice is withdrawn, we are concerned that the Notice could be interpreted to impose a de facto rule that prohibits plan sponsors from offering lump sum windows to participants who have already begun receiving benefits, despite a lack of procedural, legal, or policy justifications.

- **Lack of procedural transparency:** The Notice announced that the Treasury would issue retroactively effective regulations and that no private letter rulings ("PLRs") or determination letters expressing opinions on plans that provide for a lump sum program would be issued. In effect, the Notice announced a new policy and prevented plan sponsors from offering lump sum windows to participants already receiving pension benefits. Then, three years later, the Treasury closed the regulatory project. However, the Unified Regulatory Agenda does not reflect the discontinuation of the project, and the Treasury and Internal Revenue Service ("IRS") have not yet withdrawn the Notice. This lack of transparency creates significant confusion for plan sponsors.

Moreover, unless the Notice is withdrawn, this sets forth a precedent whereby a Notice can be issued and rules applied without ever having notice and comment and a formal regulatory process.

- **No legal basis:** As we pointed out in our previous letter, the Notice's prohibition on the accelerated payment of retirement benefits rests on an unsound legal basis.
- **Eliminates retiree choice:** We reiterate our previous view that the policy set forth in the Notice prohibits individuals from being given a choice with respect to their retirement benefits, which is not only ill-advised but could also have adverse financial consequences for many retirees.

Because the regulatory project upon which the Notice was predicated has been closed without further action, we once again urge you to withdraw the Notice.

SUMMARY OF NOTICE 2015-49

Notice 2015-49 announced that the Treasury and IRS planned to amend the required minimum distribution regulations under Code section 401(a)(9) to provide that qualified defined benefit plans generally would not be permitted to replace annuities currently being paid with a lump sum payment or other accelerated forms of distributions. The Notice indicated that the amendments to the regulations would apply retroactively as of the date the Notice was issued. Furthermore, the Notice explained that “*in light of the pending guidance, any private letter ruling or determination letter issued by the IRS or the IRS Office of Chief Counsel involving a plan that provides for a lump sum risk-transferring program will generally include a caveat expressing no opinion*” as to the lump sum program.

The Notice was drafted to discourage plan sponsors from offering lump sum windows and, in practice, it prohibited plan sponsors from doing so even in the absence of formalized regulations. The anticipated regulatory guidance project, however, was recently closed without publication. In this context, the Unified Regulatory Agenda should be amended to reflect this decision, and the Notice should be revoked.

PROCEDURAL ISSUES

In our prior letter, we expressed our concern that the Notice was an inappropriate use of the Treasury’s authority to issue retroactive regulations under Code section 7805(b). Moreover, if the Notice is not withdrawn, plan sponsors still will not be able to submit PLR requests with respect to lump sum programs, despite the lack of pending guidance. In essence, if the Notice is not withdrawn, plan sponsors will be discouraged from offering lump sum windows by reason of a “rule” established without notice and comment.

Moreover, unless and until the Unified Regulatory Agenda is amended and the Treasury and IRS withdraw the Notice, the agencies have put plan sponsors in an uncertain position, unsure of whether they can comfortably offer lump sum cash-outs to participants in payout status. Will the IRS recommence issuing PLRs to plan sponsors offering lump sum programs? Will the Treasury issue other guidance relating to lump sum windows (e.g., on whether lump sums may be offered to retirees receiving annuity payments in the context of plan terminations)? Because of the lack of procedural transparency with respect to the closed lump sum windows project, these questions remain unresolved.

LACK OF LEGAL JUSTIFICATION

Code section 401(a)(9) was designed as a shield to prevent plan payments from being backloaded over time, thus protecting against excessive deferrals of benefits. Notice 2015-49, however, repurposes Code section 401(a)(9) as a means to cut off opportunities to accelerate benefits. As we emphasized in our previous letter, there is no legal basis that supports using Code section 401(a)(9) to prohibit accelerating a defined benefit annuity payment. This interpretation contravenes the plain meaning of Code section 401(a)(9).

As explained in the Notice, the Treasury and IRS interpreted Code section 401(a)(9) as prohibiting defined benefit payments from being *sped up*. Frankly, this rationale does not make sense; the purpose of Code section 401(a)(9) is to prevent benefit payments from being improperly *postponed*. Although the Notice explains that actuarial costs associated with accelerating benefit payments would result in smaller initial benefits, we still do not believe that this explanation is relevant. Plan sponsors were not allowing participants to accelerate distributions at any time. Instead, plan sponsors were allowing participants to accelerate distributions only within a circumscribed period of time that did not exist when benefit amounts were determined. While we have no objections to a policy prohibiting an ongoing “lump sum anytime” provision once annuity payments have begun, the Notice goes far beyond this fact pattern and prohibits arrangements that clearly do not involve smaller initial benefits.

We are encouraged to see that the Treasury has abandoned the lump sum windows project without issuing any guidance; any corresponding regulations issued under Code section 401(a)(9) would have lacked legal justification. But we are concerned that the current Unified Regulatory Agenda does not reflect the decision to discontinue this guidance project. This is why we ask that the Unified Regulatory Agenda be modified to conform to the Priority Guidance Plan, and encourage the Treasury and IRS to withdraw Notice 2015-49, which sets out this flawed interpretation of the Code.

RESTRICTING RETIREE CHOICE

Last, we reiterate that Notice 2015-49 inappropriately suppresses retirees’ freedom of choice with respect to their defined benefit payments. The Notice reflects a negative view of employees’ decision-making abilities and takes a one-size-fits-all approach to retirees’ wide-ranging financial circumstances. While it might be unsuitable for certain individuals to accelerate their defined benefit payments by taking a lump sum payment after their pension benefit payments have begun, it might be a prudent decision for others.

We continue to believe that it is inappropriate to limit individuals’ choices simply because the government is concerned that individuals will make a choice the

government disagrees with. Accordingly, the Unified Regulatory Agenda should be amended. We urge the Treasury and IRS to withdraw the Notice.

Thank you for considering the issues addressed in this letter. We look forward to discussing these issues with you further.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council