AMERICAN BENEFITS COUNCIL

May 11, 2007

Filed Electronically

CC:PA:LPD:PR (Notice 2007-14)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Description of Benefits Permitted to be Provided in Qualified Defined Benefit Plans

Dear Sir or Madam:

The American Benefits Council (Council) welcomes the opportunity to respond to Notice 2007-14, which requests comments on the types of benefits that may be provided by tax-qualified defined benefit plans. 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 appreciates the public policy concern reflected in Notice 2007-14, namely that tax-qualified defined benefit plans should be used primarily to provide retirement benefits rather than severance or other non-retirement type benefits. It is important, however, that any guidance that addresses the types of benefits permitted in a defined benefit plan not cast doubt on benefits traditionally found in defined benefit pension plans. Accordingly, the Council urges the Treasury Department and the Internal Revenue Service (collectively, the Service) to exercise care in drafting new rules to ensure that the vast majority of plans are not affected or otherwise disrupted.

The Council is particularly concerned about the implications any rulemaking may have for (a) early retirement window benefits and (b) plant shutdown and other similar unpredictable contingent event benefits. The Council is not aware of any statistical data on the prevalence of these types of benefits but it is clear that early retirement window benefits and plant shutdown-type benefits are not uncommon, particularly in plans maintained in certain business sectors such as manufacturing. These types of benefits are most common in collectively-bargained plans but also appear in other plans.

Voluntary Early Retirement Benefits

Notice 2007-14 suggests that the Service is concerned with benefits that could exceed the accrued benefits otherwise payable under a plan. Benefits that exceed the otherwise payable accrued benefit are, however, an important design element in the context of voluntary early retirement window programs as well as a well-established and traditional element of defined benefit plans. It would be incredibly disruptive if new guidance cast doubt on their ongoing permissibility and the Council urges the Service to preserve flexibility in window design.

Voluntary early retirement programs have proven to be an important tool to plan sponsors as natural changes in the economy have resulted in the need for workforce reductions (such as the result of company mergers or changes in technology). Voluntary programs have benefited many thousands of union-represented employees as well as salaried employees over the years, and have helped fund retirements on more financially secure terms than would otherwise have been the case. Further, voluntary early retirement offers help both affected companies and their employees to achieve needed or desired workforce reductions without having to resort to involuntary means. Involuntary programs are generally less favorable to employees from an economic perspective (especially if delivered on an immediate taxable basis), and increase the risk of litigation between employees and their employers.

Existing rules provide reasonable flexibility for designing effective voluntary early retirement programs. A program can include a so-called social security supplement (consistent with Section 1.411(a)-7(c)(4)(ii)), provide a subsidized (or further subsidized) early retirement benefit, and/or offer enhanced benefits (such as by adding service to a service based design, additional dollars, or a formulaic amount that is service based or otherwise not discriminatory). There are currently sufficient protections against discriminatory designs, both in terms of age discrimination and in terms of nondiscrimination in favor of highly compensated employees. Moreover, there are limits on the use of serial windows so that windows are the exception rather than the norm. Taken as a whole, we see little, if any, need for reform in this area and the Council urges the Service not to disrupt reasonable early retirement window practices.

Contingent-Event Benefits

Plant shutdown and other similar unpredictable contingent event benefits are also an important part of traditional defined benefit plans. Ordinarily, these benefits are restricted to participants who both (a) satisfy certain age and/or service conditions and (b) have an involuntary termination of employment. The involuntary termination of employment typically must be by reason of a plant shutdown, division elimination, or position elimination, although it may be payable simply be reason of any involuntary termination of employment after meeting age and service conditions. Plant shutdown

and other similar benefits provide important protection against sudden loss of employment and can provide a valuable bridge to normal retirement.

Notice 2007-14 suggests that the Service is concerned about the extent to which employers exercise discretion in determining whether a participant is eligible for a contingent-event benefit, presumably raising a question under the definitely determinable requirement. As a threshold matter, we note that determining whether an employee is eligible for a contingent-event benefit is generally a fiduciary act. It is not an act governed by unfettered employer discretion. Moreover, determining whether an employee is eligible for a contingent-event benefit is not qualitatively different than any of the many discretionary determinations that must be made in administering any employee benefit plan including, for example, determining whether a participant is a member of a eligible employee class and whether an employee has had a severance from employment. The sole question under the definitely determinable requirement should be whether an employee can reasonably determine whether they are eligible for the benefit. In our experience, this standard is routinely satisfied by contingent-event benefits. For these reasons, the Council urges the Service to reject the imposition of restrictive standards for contingent event benefits, such as limiting the applicable standards to WARN Act shutdowns. Similarly, we urge the Service to preserve the use of all contingent-event benefits that are reasonably related to involuntary severance from employment.

Importance of Flexibility

Early retirement window benefits and contingent-event benefits serve strong public policy goals. Window benefits allow employers to manage the size and composition of their workforces through incentives for early, voluntary retirement. Plant shutdown and other benefits conditioned upon involuntary severance from employment are critical to transitioning employees to retirement age. One of the essential advantages to defined benefit plans relative to defined contribution plans is the flexibility to manage the workforce. The advantages of offering defined benefit plans to employees, however, have been diminished over time, in part as a result of the increased applicable legal requirements, and in part as a result of the marketplace. It is critical that any new rules preserve as much flexibility as possible if the defined benefit plan system is to enjoy ongoing vitality.

Effective Date

The Council also notes the extreme importance of any final guidance stemming from the Notice being applied prospectively and excluding from its coverage any defined benefit plan benefits that have already been approved for implementation (even if the plan amendment has not been executed). In this regard, for example, it would prove extremely disruptive to have to adjust to changes in design rules after a voluntary early retirement program has been designed and approved, and totally unworkable for

programs already in the implementation stage. Designs are often times collectively bargained. Changing the rules after bargaining has occurred will not just affect the pension design, but may implicate other bargained matters (relative to benefits, workforce practices, etc.). Further, designs are often determined and announced in advance of the event that will trigger the need for workforce reductions (such as under merger circumstances). Consequently, it would be impractical to apply restrictions that have already been approved for implementation, and would be even more unworkable for any program already implemented.

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We very much appreciate the opportunity to provide our views on these important issues and look forward to continued discussions as the regulatory process moves forward

Sincerely,

Jan M. Jacobson
Director, Retirement Policy