AMERICAN BENEFITS COUNCIL

October 27, 2015

J. Mark Iwry
Senior Advisor to the Secretary
Deputy Assistant Secretary
(Retirement & Health Policy)
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Victoria Judson
Division Counsel/Associate Chief Counsel
Tax Exempt & Government Entities
Internal Revenue Service
1111 Constitution Avenue, NW
4306 IR
Washington, DC 20224

Robert Choi
Director, Employee Plans
Internal Revenue Service
1111 Constitution Avenue, NW
NCA 614
Washington, DC 20224

Dear Mark, Vicki, and Robert:

On behalf of the American Benefits Council (the "Council"), I am writing with respect to Notice 2015-49, which addresses the use of lump sum payments to replace lifetime income being received by retirees under defined benefit plans.

The Council very much understands and supports efforts to enhance awareness of and solutions to longevity risks. We share many of the government's objectives in this regard and have been very supportive of past government efforts regarding lifetime income. But we feel compelled today to write to respectfully share our disappointment with Notice 2015-49, which represents a departure from past practices by Treasury and the Service.

This Notice sets an ill-advised precedent for this Administration and future Administrations in the following three respects.

- **Process:** The Notice in effect announces that (1) proposed regulations will be issued, subject to notice and comment, (2) comments will be received and evaluated, and (3) the final regulations will come to the conclusions already

reached in the Notice and those final regulations will be retroactive. We view this guidance as new policy and in the context of making new policy, this Notice is an inappropriate use of Treasury's authority to issue retroactive regulations under Code section 7805(b).

- **No legal basis:** In brief, the Notice prohibits acceleration of retirement benefits by relying on a statute that prohibits delayed payments of retirement benefits. We believe there is no legal basis for the Notice.

- **Not allowing individuals to make choices:** Finally, the Notice prohibits individuals from being given a choice. We are concerned that eliminating individual choice based on what seems to be fear that individuals are not equipped to make the right choice is an inappropriate step by the government. Depriving retirees of the right to make their own choices is not only inappropriate, but can also have significantly adverse financial effects on retirees in many cases.

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.

We urge you to withdraw the Notice because it takes Treasury's authority to issue retroactive regulations to an inappropriate level for policy purposes rather than for sound administrative purposes, and there is no legal basis for the Notice. If the Notice is not withdrawn, we ask you to provide deference to the Administrative Procedure Act's ("APA") regulatory process by deferring the effective date so that final decisions are made after public comment, not before.

SUMMARY OF NOTICE

The Notice is well summarized in Section I of the Notice, which states:

This notice informs taxpayers that the Treasury Department and the IRS intend to amend the required minimum distribution regulations under § 401(a)(9) of the Internal Revenue Code to address the use of lump sum payments to replace annuity payments being paid by a qualified defined benefit pension plan. The regulations, as amended, will provide that qualified defined benefit plans generally are not permitted to replace any joint and survivor, single life, or other annuity currently being paid with a lump sum payment or other accelerated form of distribution. The Treasury Department and the IRS intend that these amendments to the regulations will apply as of July 9, 2015,

except with respect to certain accelerations of annuity payments described in section IV of this notice.

PROCESS ISSUES

As noted, the Notice inappropriately stretches Treasury's authority to issue retroactive regulations under Code section 7805(b) in order to establish new policy. Congress's broad grant of rulemaking authority to Treasury, including the authority to apply regulations retroactively, is widely considered as stemming from Congress's desire to equip Treasury with the tools necessary to protect Federal revenues, bring clarity to or correct past mistaken interpretations of the tax laws, and administer the Code in an equitable manner. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983) ("Indeed as early as 1918, Congress expressly authorized the Commissioner 'to make all needful rules and regulations for the enforcement' of the tax laws. Revenue Act of 1918, ch. 18, § 1309, 40 Stat. 1057, 1143 (1919). The same provision, so essential to efficient and fair administration of the tax laws, has appeared in tax codes ever since"); *United States v. Hughes Properties, Inc.*, 476 U.S. 593, 603 (1986) ("[T]he major responsibility of the Internal Revenue Service is to protect the public fisc."); *Home Concrete & Supply, LLC v. United States, 634 F.3d 249, 259 (4th Cir. 2011) (Wilkinson, J., concurring)* ("Nor do judges harbor any desire to impair the mission of the IRS in a day of staggering budget deficits. . . . Yet it remains the case that agencies are not a law unto themselves. No less than any other organ of government, they operate in a system in which the last words in law belong to Congress and the Supreme Court.")

It is very difficult to conceive that Congress' grant of authority was also intended to enable Treasury to make new policy in a retroactive manner that bypasses the APA and that relies on a statutory provision that is entirely unrelated to the matter at hand (as discussed below).

Regulatory principles: The procedural approach taken in the Notice makes inappropriate use of Treasury's authority to issue retroactive regulations and disregards broadly applicable and well-founded APA and Executive Order requirements that the public be afforded a meaningful opportunity to comment. We are also concerned that the approach in the Notice is inconsistent with basic principles ordinarily followed by the government which have long contributed to confidence in and support for the regulatory system governing private employer-sponsored plans. In effect, the approach reflects a view that public input is not needed or important in the regulatory process and that Treasury and the Service can make new policy effective immediately.

Additional process issue: We would like to highlight one additional point about the process. Many private letter rulings were issued that reached a conclusion directly contrary to the Notice. After a period of time, the Service refused to issue additional private letter rulings *and actually returned filed requests*. There were communications at the time that the rationale for the refusal was that enough private letter rulings had

been issued to make taxpayers comfortable with the issue, and that it was inefficient for the Service to issue more private letter rulings saying the same thing. At no time was it suggested that the Service's position in the private letter rulings was being reexamined.

In this context, the position reversal reflected in the Notice is especially disconcerting. One day, the community is told that the answer is so clear that no more private letter rulings will be provided. Soon thereafter, the community is told that all of those prior answers were wrong, but that a private letter ruling would have protected a taxpayer. That juxtaposition of government positions has shaken the confidence of some of our members in the government process.

The Council's Board of Directors is sufficiently concerned about process issues -- citing this guidance as one significant example -- that is has established a task force to examine ways the Council could more effectively help agencies implement processes that ensure appropriate input from the regulated community.

Examples of effects of process: The inappropriate process has not only deprived the public of any meaningful opportunity to comment, but it has also left the community with major gaps in guidance that is currently in effect. For example, we are unsure whether, in the context of a plan termination, lump sums may be offered to retirees receiving annuity payments. Based primarily on informal comments by government personnel, the view is generally that such offers are permissible. But we need formal resolution of this issue and other technical issues in light of the fact that the rules announced by the Notice are immediately effective. This illustrates our concerns with the process. When rules are immediately effective without any public input, there are inevitably unclear and perhaps unintended consequences.

A more appropriate process that follows the APA's requirements would permit these questions to be answered through the regulatory process with a prospective effective date.

USE OF 401(A)(9)

The use of section 401(a)(9) to prohibit accelerations of defined benefit annuity payments cannot be supported. Section 401(a)(9) prohibits excessive deferral of benefit payments, not acceleration of payments.

The general prohibition in section 401(a)(9) on increasing payments makes sense. If a stream of payments is scheduled to increase over time, the payments are backloaded, which can violate the clear objectives of section 401(a)(9). But that is not what is happening here. The stream simply stops and all remaining payments are accelerated, thus paying out benefits much faster than the stream of payments that satisfies section 401(a)(9). There is no way to defend using 401(a)(9) to prohibit that.

The Notice tries to explain the prohibition by stating "if a participant has the ability to accelerate distributions at any time, then the actuarial cost associated with that acceleration right would result in smaller initial benefits, which contravenes the purpose of § 401(a)(9)." However, we believe that this explanation is not relevant as we know of no situation, including the fact pattern described in the Notice, in which a plan has (or a plan sponsor has sought to add) a provision allowing for such an ability to accelerate distributions at any time. We do not have an issue prohibiting an ongoing "lump sum anytime" provision once annuity payments have begun.

The Notice addresses the real world situation where a participant has no initial right to accelerate payments, so the level of payments is unaffected by a later-created right to accelerate. In other words, no logical argument can be made that there is any backloading of payments in the situation described in the Notice.

In this context, it is hard to imagine that a regulation implementing the Notice could withstand judicial scrutiny. Courts have found Treasury regulations invalid when the regulations conflict with the plain meaning of their corresponding Code section. *See Microsoft Corp. v. Comm'r*, 311 F.3d 1178, 1189 (9th Cir. 2002). Moreover, in *United States v. Cartwright*, the Supreme Court affirmed the invalidation of a Treasury regulation because it was an unreasonable interpretation even though it was not "technically inconsistent" with the language of the statute. 411 U.S. 546, 557 (1973). At a minimum, Treasury's expected amendment to the regulations under Code section 401(a)(9) (as described in Notice 2015-49) is an unreasonable interpretation of section 401(a)(9) because it is simply unrelated to the purpose and plain meaning of Code section 401(a)(9).

Even if Treasury disagrees with our legal analysis, it is appropriate and consistent with Treasury's customary approach to recognize that there could be differing positions and the process should take that potential into account.

ELIMINATION OF RETIREE CHOICE

The motivating factor for the Notice appears to be to eliminate individual choice in this instance. In other words, the concern appears to be that individuals receiving an annuity may be tempted to elect a lump sum, which the government considers to be ill-advised. This reflects a disappointing view of individuals' abilities.

Our members are focused on educating and empowering employees to make the right decisions for themselves. This Notice reflects a view that employees cannot do that. We respectfully disagree. The individual who has health issues and a short life expectancy should not be deprived of a lump sum offer that could make an enormous difference to his family. The individual who has other sources of guaranteed income for life and needs a nest egg for unexpected expenses should not be told by the government that she is not equipped to make that choice. In a world where circumstances vary so

dramatically, and individuals strive to make the best choices, it is not appropriate to take individual choice away because the government is concerned that individuals will make a choice that the government disagrees with. The position announced in the Notice thus not only deprives employees of a choice regarding how to take their benefits, but by taking away this choice, the Notice appears to be shortsighted in denying employees a current benefit that may later turn out to be much better for them

* * *

We thank you for your consideration of the issues addressed in this letter. We look forward to discussing these issues with you further.

Sincerely,

Lynn D. Dudley
Senior Vice President,
Global Retirement and Compensation Policy

cc:
Michael Brewer
Kyle Brown
Dominic DeMatties
William Evans
Lauson Green
Linda Marshall
Robert Neis
Neil Sandhu
Michael Spaid
Laura Warshawsky
Harlan Weller
David Ziegler
Carol Zimmerman