



April 16, 2007

Via Electronic Filing

Courier's Desk

Internal Revenue Service

Attn: CC:PA:LPD:DRU (Notice 2007-8)

1111 Constitution Avenue, NW

Washington, DC 20044

Re: Comment on Issues Presented by Section 401(a)(36) of the Internal Revenue Code, as Added by the Pension Protection Act of 2006; Notice 2007-8.

Dear Sir or Madam:

The American Benefits Council (Council) and the HR Policy Association (HR Policy) appreciate the opportunity to comment under Notice 2007-8 on the issues presented by Section 401(a)(36), as added by the Pension Protection Act (PPA), which permits in-service distributions to be made by a defined benefit plan to an employee who has attained at least age 62. 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. HR Policy Association is a public policy advocacy organization representing the chief human resource officers of over 250 leading employers doing business in the United States. Representing nearly every major industry sector, HR Policy members have a combined U.S. market capitalization of more than \$7.5 trillion and employ more than 18 million employees world wide.

In-Service Distributions of Subsidized Early Retirement Benefits

In Notice 2007-8, the Treasury Department (Treasury) and the Internal Revenue Service (Service) pose several questions for comment. First and foremost are questions relating to whether subsidized early retirement benefits can be paid to a participant who has attained age 62 but not yet terminated employment and, if so, how those payments should be characterized.

The Council and HR Policy strongly urge that any guidance under 401(a)(36) should allow, but not require, employers to pay early retirement subsidies, thus treating them as if the participant had actually terminated employment. To do otherwise would negate the potential attractiveness of the new distribution option for any defined benefit plan that contains early retirement subsidies.

The PPA contains very little detail regarding how the in-service distributions should work, and no clarification is available from legislative history. However, it can be gleaned simply from the passage of the provision that Congress clearly intended that in-service distributions from defined benefit plans after attaining age 62 would be attractive to both employers (who would add the distribution option to their plans) and employees (who would be interested in electing the distribution option).

Many defined benefit plans provide subsidized early retirement benefits, and failure to allow distribution of the subsidy would greatly diminish the value of the PPA provision. Congress clearly intended to allow in-service distributions after attaining age 62. If the in-service distribution does not include the early retirement subsidy, many employees will fully retire so they can receive the subsidy. Whether the “retired” employee simply quits working or goes to work for another employer, the result would negate the apparent intent of Congress to encourage participants to continue working for their original employer by allowing in-service distributions.

Characterization of in-service distributions as subsidized early retirement benefits is also important to create parity between the distributions during employment and distributions that could be made if the participant fully retired. Under current law, subsidized early retirement benefits are not characterized as age discriminatory and do not become a part of the participant’s accrued benefit (which is instead defined as the participant’s benefit at normal retirement age unless the payments at the early retirement age are greater than those at normal retirement). Both issues are important to employers.

Any in-service distributions under 401(a)(36) that include subsidies should be treated as early retirement subsidies for purposes of determining whether the plan is age discriminatory. Otherwise, employers sponsoring plans that contain early retirement subsidies will likely not offer the distribution option even though they may be very interested in establishing a phased retirement program. Early retirement subsidies generally have age and service requirements such as attainment of age 62 with 10 or 15 years of service. Employers interested in offering the in-service distributions will likely apply the same age and service requirements that would be applied to full retirement. The value of the subsidy typically decreases with age and failure to treat the in-service distribution option

as an early retirement subsidy would subject adopting employers to potential age discrimination lawsuits.

In addition, the Council and HR Policy believe that transition benefits designed to mimic early retirement benefits when a traditional defined benefit plan is converted to a hybrid plan should receive the same treatment as early retirement subsidies for purposes of the age discrimination rules (for the same reasons as outlined above for early retirement subsidies).

While the Council and HR Policy recognize that Treasury's and the Service's treatment of these subsidized in-service distributions as early retirement subsidies would not preclude different treatment by other government agencies such as the Department of Labor and the Equal Employment Opportunity Commission, we believe that such treatment under the Internal Revenue Code would encourage other agencies to see these distributions in a similar light. We strongly urge you to consider these ramifications when drafting guidance.

Distributions of Non-Periodic Payments

Another issue that the Council requests guidance on is whether Section 401(a)(36) permits distributions to be made to participants in the form of non-periodic payments. For example, may a participant who has attained age 62 receive an in-service single sum distribution rather than a distribution in the form of an annuity or periodic payments? Also, if such a distribution were permitted, would additional in-service distributions be permitted to be made to the participant in later years?

Regulations Should Be Significantly Changed and Reproposed

Notice 2007-8 also asks whether the phased retirement regulations, proposed in November 2004 and subject to a hearing in March 2005, should be finalized. As you know, the Council submitted comments and testified during the hearing that the regulations, as originally proposed, would not likely be utilized by employers interested in implementing phased retirement programs. Our primary issues include the regulatory reduction-in-hours requirement matched to the percentage of benefits permitted to be distributed from the plan (plus an annual audit of hours and recalculation of benefits) as well as the age 59-1/2 minimum age requirement. The Council and HR Policy believe these proposed regulations should not be finalized.

Nevertheless, Council and HR Policy members *are* interested in implementing phased retirement programs that begin prior to age 62 (and prior to age 59-1/2 as

discussed in our earlier comment letter). For that reason, the Council and HR Policy encourage Treasury and the Service to issue new simpler proposed regulations that do not contain the administrative complexity found in the original proposal. To facilitate phased retirement programs, the simpler rules should allow in-service distributions to be offered under the terms of the plan for a specified, limited period of time so that employers trying out phased retirement programs are not concerned about being locked into the program. Please see the Council's comment letter dated February 4, 2005, for details of other suggested changes.

Regardless of whether the regulations are finalized or repropounded, the Council and HR Policy are especially troubled by the language contained in the original proposal potentially restricting the definition of normal retirement age for plans. The Council's concerns about this issue are also contained in our earlier comment letter. If Treasury and the Service are concerned about plans setting the normal retirement age too low, this issue should be addressed in a separate regulatory project under, for example, the benefit accrual rules of Code Section 411(a)(8) instead of phased retirement regulations.

Again, we appreciate the opportunity to comment on issues regarding new Internal Revenue Code Section 401(a)(36) distributions. We hope that these comments are helpful and we would be happy to discuss these comments in further detail should you have any questions. Jan Jacobson can be reached at 202-289-6700 and Tim Bartl at 202-789-8670.

Sincerely,



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Director, Retirement Policy
American Benefits Council



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