November 28, 2007

CC:PAD:LPD: PR (Notice 2007-69)
Room 5203
Internal Revenue Service
POB 7604
Ben Franklin Station
Washington, D.C. 20044

Dear Sir or Madam:

I am writing on behalf of the American Benefits Council (the "Council") with respect to Internal Revenue Service Notice 2007-69. 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 understands that the definition of normal retirement age in a qualified retirement plan is very important and has significant implications. We understand and appreciate your concerns and desire to develop rules around the definition of normal retirement age. Nevertheless, the Council has the following concerns with respect to the Notice:

- From both a substantive and a process perspective, we are very concerned about the statement in Section V of the Notice regarding plans under which the normal retirement age is defined as the earlier of a specified age or a specified number of years of service.
- We have continuing concerns about the ability of plans to interpret and apply the regulatory rule regarding permissible normal retirement ages.

Normal Retirement Ages with a Service-Based Component.

We have member companies that have defined the normal retirement age under their plans as the earlier of a specified age or a specified number of years of service.

These plans have been given determination letters and have been operated in the strongly held belief that there has never been any question regarding the permissibility of such an arrangement. This belief has been supported not only by their determination letters, but also by a number of other factors.

First, taken on its face, we believe Code section 411(a)(8) contemplates that factors other than age can be used to determine a plan's normal retirement age. Second, there is case law support for the type of normal retirement age that we are discussing. *See Fry v. Exelon Corp. Cash Balance Pension Fund*, No. 06 C 3723, 2007 WL 2608524, 41 E.B.C. (BNA) 2114 (N.D. Ill. Aug. 31, 2007) (for purposes of ERISA corollary to Code section 411(a)(8), holding that normal retirement age may be measured by a period of service versus the attainment of a specific age); *Ryan v. Asbestos Workers Union Local 42 Pension Fund*, 27 F. App'x 100 (3rd Cir. 2002) (same) (citing *Nichols v. Board of Trustees of Asbestos Workers Local 24 Pension Plan*, 1 E.B.C. (BNA) 1868 (D.D.C. Feb. 23, 1979) (holding that a plan provision providing for an unreduced pension with 25 years of service at any age means that 25 years of service constitutes the "normal retirement" age for purposes of ERISA)); *Bance v. Alaska Carpenters Retirement Plan*, 829 F.2d 820 (9th Cir. 1987) (holding that a plan's definition of normal retirement age based on the participant's attainment of age 62 and 10 years of service constitutes a valid normal retirement age for purposes of ERISA); but *see Laurent v. PriceWaterhouseCoopers LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006) (for purposes of ERISA corollary to Code section 411(a)(8), holding that a normal retirement age below age 65 cannot be defined in reference to length of service) (citing *Duchow v. New York State Teamsters Conference Pension & Retirement Fund*, 691 F.2d 74 (2d Cir. 1982) (stating in dictum that "the language, history and purposes of ERISA point forcefully to the conclusion that the first clause of [ERISA] § 203(a) imposes a vesting requirement that is independent of the service-period vesting standards imposed in [ERISA] § 203(a)(2)").

Third, the regulations under Code section 401(a)(4) specifically approve the use of a normal retirement age that is based in part on the attainment of a specified number of years of service. See Regulation § 1.401(a)(4)-12, paragraph (3)(ii) of the definition of "uniform normal retirement age". Although the type of normal retirement age approved in the regulations is different from the type we are discussing, they involve the same analytic issues.

As the discussion above reflects, plan sponsors have long felt very comfortable using such normal retirement ages. Plan sponsors view the elimination of that ability as a unilateral withdrawal of an important element of how employers and employees think about normal retirement age. Notice 2007-69 states:

> The Service and Treasury expect that a plan under which a participant's normal retirement age changes to an earlier date upon completion of a stated number of years of service

typically will not satisfy the vesting or accrual rules of § 411. See, e.g., § 1.411(b)-1(b)(2)(ii)(F). [emphasis added]

We have serious concerns about this statement in a number of respects. First, we do not believe that an unprecedented substantive position should be established in this way. If Treasury and the IRS have concerns about service-based normal retirement ages, those concerns should be addressed through the rulemaking process with the opportunity for public comment and a full explanation of the issues.

Second, we do not understand how the regulatory provision cited relates to service-based normal retirement ages. The regulatory provision cited prohibits the use of a benefit formula that on its face is more generous in later years of participation. That prohibition does not relate to service-based normal retirement ages. This illustrates the need for formal rulemaking so as to further explain and discuss the issues related to service-based normal retirement ages.

Third, the regulatory provision cited does not relate to vesting, so we do not know what vesting problem could arise by reason of the use of a service-based normal retirement age.

Fourth, what does it mean for the Service and Treasury to "expect" a service-based normal retirement age to "typically" violate the law? We have not seen this type of language used before in government guidance.

We believe the sentence quoted above from the Notice should be withdrawn. If the Service and Treasury want to address the issues related to a service-based normal retirement age, a formal rulemaking process should be opened.

Inadministrability of the Underlying Regulatory Rule.

We continue to have fundamental concerns about the administrability of the underlying regulatory rule to which the Notice relates. The regulatory rule is:

> The normal retirement age under a plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

Our members tell us that they do not know how to interpret or administer this rule. All rules have some "grey" areas in them, but this rule uses undefined terms unusually susceptible to very substantial variations in interpretation and there is no guiding principle that can be used in interpreting these terms.

For example, what is a "retirement"? If an employee terminates after two years of employment, is that a retirement? Does it make a difference whether the employee is age 28 or 38 or 48 or 58 or 68? What if the employee has 10 years of service when he or she terminates employment? What if the employee leaves to join a competitor? There is no guidance on any of these questions, forcing companies to develop their own answers.

The Notice suggests that "retirements" may be terminations of "career employees, i.e., employees whose principal career has been in the employment of the plan sponsor". What is a "principal career"? Does it require a comparison of the number of years of service at one company compared to the number with any other single company? Or should the comparison be to the total number of years of adulthood (e.g., for those who have spent time out of the workforce)? Does it matter how old the employee is at his or her termination of employment? Assume that an employee works at one company for 20 years, then moves to a higher paying job with a second company for 15 years? Is the first job "principal" because it is longer in duration? Or is the second job "principal" because it is later and higher paying? Or could there be two principal careers? Finally, companies may well not have comprehensive data on all of their employees' work histories, which this analysis would apparently require.

After we have determined a definition of "retirement", we need to develop a definition of "typical" retirement age. Assume a very simplistic example: a company determines that 10% of the retirees in the applicable industry retire at age 56, 10% at age 57, 10% at age 58, etc., through age 65. What is the typical retirement age for this industry? Does the industry not have a typical retirement age because no single age is typical? Or is it the age by which over 50% of the retires have retired, i.e., age 61 in this case? Or does "typical" require a higher percentage than 50%? Or would a lower percentage be appropriate? Again, companies need to develop their own answers without any guidance.

Assume that we have answers regarding the meaning of "retirement" and of "typical". What does the "reasonably representative" requirement add to this?

We also have to determine "the industry in which the covered workforce is employed." Many companies have operations in different industries and cover all employees in one plan. What industry should be used in that case? What if a plan covers only hourly workers? Logically, only typical retirement ages among hourly workers would be relevant, but the regulation is silent on this point. And what is an industry? In the absence of any guidance, again companies are forced to create their own definitions of "industry".

And let us assume that answers to all of the above can be determined. How does any one company access the needed data with respect to an entire industry? This data is not available. And this would need to be done on annual basis to ensure the ongoing validity of the normal retirement age.

In short, the sentence quoted above from the Notice should be withdrawn. In addition, we do not believe that this regulation can be administered for the reasons discussed above. We strongly urge you to withdraw it.

We thank you for your consideration of our comments.

Sincerely,

Jan Jacobson
Retirement Policy Legal Counsel
American Benefits Council