March 13, 2003

CC:ITA:RU (REG-209500-86)
Room 5226
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC

Dear Madam or Sir,

The National Coordinating Committee for Multiemployer Plans (the NCCMP) is pleased to present these comments on the re-proposed Treasury regulation under Internal Revenue Code section 411(b)(1)(H). The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer plans for retirement, health and other benefits. Our purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit organization, with member plans and plan sponsors in every major segment of the multiemployer plan universe.

We respectfully request the opportunity to testify on these matters at the April 10 public hearing. Our testimony will be based on the issues raised in these comments.

With one exception, these comments are addressed to the proposed rules for defined benefit plans in general, rather than the special cash balance features.[1] They point out anomalies in the application of some of the rules to multiemployer plans and their participants. We suspect that each of the perverse outcomes identified here could be abated with a technical adjustment, specific exception or other workaround. However, we believe the better approach would be to reformulate the underlying concepts, to eliminate rather than correct for the problems.

A main reason why plan sponsors and the general public deride the employee benefits rules as impenetrably complex is that they are infested with clusters of specific little fixes pasted in to correct for difficulties created by the basic principles. However welcome those targeted solutions are to the aficionados who follow the area closely enough to understand them, there is little doubt that the rules would inspire more respect as well as more compliance if they were more accessible to those they regulate, and to the people in whose interest they are regulated.

Clarity in the solutions is particularly needed here, where the ultimate regulation will govern not only for the Code and ERISA but also for the Age Discrimination in Employment Act, and will therefore be applied and interpreted by courts in actions to which the IRS is not a party. And there is a real need for adaptability in the rules to accommodate evolving plan designs. Right now pension plan sponsors are confronting

[1] To our knowledge there are at present only a few multiemployer cash balance plans, most of which were converted from defined contribution plans.

an aging workforce and significant cost pressures. Either or both could inspire benefit innovations that could be stymied by an overly technical regulation.

Ironically, the emerging evidence is that formalistic applications of age discrimination rules end up hurting workers, as illustrated by such recent court decisions as *Erie County Retirees Assn. v. County of Erie, PA*, 220 F.3d 193 (3d Cir.2000) and *Cline v. General Dynamics Land Co.,* 296 F.3d 466 (6th Cir. 2002). If the approach followed in *Erie County* were generally adopted, plan sponsors would be barred from providing health coverage for retirees below age 65 that is, in any regard and from any perspective, richer than the coverage provided for older retirees. If the *Cline* analysis gains currency, plan sponsors will not be able to provide health coverage that *favors* older retirees. In combination, these cases would, as a practical matter, outlaw almost all employer-sponsored retiree health programs now offered.

We urge you to approach the task of writing age discrimination rules for retirement plans with sensitivity, to avoid replicating such a bizarre result. To us, this means laying out the basic principles, which should be grounded in a common-sense understanding of the law and its objectives. Attempts to spell out a detailed technical blueprint that answers every question will be self-defeating, both because there are too many questions that cannot now be anticipated and because an overabundance of fine-lines would very likely overwhelm the core of common sense.

1. Rate of Benefit Accrual

Under the proposal, in determining whether benefit accrual rates decline for older participants, benefits must be cast as annuities at normal retirement age, except for "eligible cash balance plans". If any part of the benefit is defined as a dollar amount rather than a stream of payments, the same dollar amount would translate into a higher monthly annuity benefit for a younger worker, given the longer period of deferral to normal retirement age.

Some multiemployer plan benefits include fixed-dollar features. In the past, these have shown up primarily in the form of minimum benefits. For example, a plan might provide for payment of an amount equal to the employer contributions made on a participant's behalf in the event she terminates without vesting in a regular pension benefit. Or, the plan might offer a benefit equal to a stated sum times the participant's years of service, or either as a minimum or as an add-on to the basic benefit, for people whose service terminates under specified conditions.

Recently, some multiemployer plans, looking at ways to encourage senior, skilled workers to stay in the workforce, have been looking at variations of an approach originated by creative public sector plans: DROPs (Deferred Retirement Option Plans).[2]

[2] Technical ERISA problems, primarily with the backloading rules, have impeded the spread of DROPs in the private sector, but it appears they can be overcome. Since they are common in public sector plans, it appears that DROPs will need to be addressed in the ADEA rules that parallel the 411(b)(1)(H) regulations.

These assure workers that they will not lose all of the value of their early retirement benefits if they keep working, by creating a notional account for them within the plan and crediting it with amounts equal to the benefit payments they would have received. Encouraging long-service workers to continue in covered service is not only a way to meet employment needs, it can also bolster a plan's financing. Another way to achieve this is to cut off early retirement subsidies; offering incentives such as DROP is, if affordable, a preferable approach from the point of view of multiemployer plan participants and the plans' trustees.

Ad hoc retiree benefit increases in single-sum form are very common in multiemployer plans, where there is often a tradition of approving so-called 13th checks when justified by investment experience.

Doubtless, there is any number of other examples of lump-sum-type benefits provided within a multiemployer plan whose primary benefit form is a life annuity. None of these is, on its face, age-discriminatory nor are they in any way motivated by stereotypes about older employees' or retirees' needs or abilities. Indeed, some are aimed specifically at helping older employees. Yet, if they must be converted to life annuities at normal retirement age in order to test compliance with Section 411(b)(1)(H),[3] the plans that offer them will inevitably fail.

Our solution: treat these single-sum-type benefits the way the plans and participants treat them, as nondiscriminatory if on their face they do not drop off because of the participant's age, unless the use of the single-sum format is a subterfuge for age-based discrimination. At the very least, that should be the rule for defined benefit plans in which the predominant form of benefit is a life annuity.

2. Offset for Accruals After Normal Retirement Age

The newly proposed regulation prescribes an awkward and costly methodology for offsetting benefit payments, or actuarial increases in the benefits that would be paid after NRA but for the participant's continuing employment, against the additional benefits that the individual is earning on account of that additional service. The mechanism compares the increased actuarial value, for the year, against the additional accruals for that year, and requires that the participant be granted the higher of the two *for any year*. By contrast, the standard practice (which is consistent with the previously proposed regulation in this area) has been to pay the higher of the actuarially increased NRA benefit or the participant's total accrued benefit, based on all years of service. That standard practice is not difficult to explain to plan sponsors, not difficult to administer, and fair on its face. The proposed methodology shares none of those virtues.

Given the ages involved, the actuarial increase is almost always much larger than the new accruals. However, to avoid having to deal with the new procedures, plans will be driven to suspend benefits when an employee older than NRA continues in or returns to covered

[3] Few if any of them would meet the standards for "eligible cash balance plans", because they were not designed to function in that way.

service, which means they will end up with lower benefits. This is an odd result for a rule aimed at promoting the interest of older workers. We strongly recommend retention of the approach put forth in the earlier proposal.

If you decide to keep the formulation in the current proposal, plans will need to adapt their rules to match what they can afford and administer. Accordingly, we urge you to include, in the final package of regulations, a rule making clear that plans do not violate Code section 411(d)(6) by adding or tightening suspension of benefits rules.

3. Mortality Assumptions For Benefit Conversions.

This is a small point, but it should be fixed. Proposed section 1.411(b)-(2)(d)(2) allows plans to use reasonable mortality assumptions "to calculate optional forms of benefit" and the cost of a qualified pre-retirement survivor annuity. Many plans are drafted to present the qualified joint and survivor annuity as the presumptive form of benefit, with every other form as the options (some may even offer with no alternatives if the participant is married at retirement). However, even in those cases the QJSA benefit amounts are calculated using mortality assumptions. Also, very few, if any, multiemployer plans charge participants for the QPSA, which is provided automatically for administrative ease, but they do use mortality assumptions in determining the amounts payable.

Since these are not, technically, benefit "options", the text of the final regulation should be modified to accommodate them and other benefit conversions where the "optional" nature may be tenuous, such as QDROs.

4. Eligible Cash Balance Plan: "Normal Form of Benefit"

For a plan to be an eligible cash balance plan and thus entitled to be tested for age discrimination on a defined contribution basis, the proposal requires that "the normal form of benefit [be] an immediate payment of the balance in a hypothetical account (without regard to whether such an immediate payment is actually available under the plan.)"

It is not at all clear what this means.[4] Many plans do not identify a "normal form". Some identify it as the presumptive form in which the benefit will be paid (e.g., a QJSA), even though they define the way benefits accrue a little differently. Some cash balance plans say that the accrued benefit is the notional account and that benefits will be paid in that form, unless the participant and spouse fail to waive the QJSA. Others say it is the annuity-equivalent of the notional account. The particular text depends on the preferences of the drafter, the forms used as models, and the point in the development of doctrine on cash balance plans at which the plan was set up.

[4] Describing the concept as involving immediate payment even if the plan does not authorize immediate payment is particularly confusing.

If the final regulation retains this concept, we urge that plans be given a reasonable period of time to adopt a revised definition of "normal form", including 411(d)(6) relief, in order to become eligible cash balance plans.

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Thank you for your consideration. We will be happy to provide any additional information that would be helpful to your review of these comments.

Sincerely,

Randy G. DeFrehn
Executive Director