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## United States Senate

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COMMITTEES:  
AGRICULTURE  
APPROPRIATIONS

HEALTH, EDUCATION,  
LABOR, AND PENSIONS

SMALL BUSINESS

ERISA Industry Committee  
1400 L Street, NW Suite 350  
Washington, DC 20005

Dear Friends:

We are at a critical point in the debate over cash balance plan structures and conversions. I am appealing to a diverse group of interested people with a variety of viewpoints for specific ideas and information so that we might seize this moment together.

### **We've come a long way**

A month ago, the Treasury Department took a long-awaited positive step regarding cash balance plans. It put something constructive on the table regarding the ways companies can transition to cash balance plan designs while assuring a fair transition for older workers. In his proposal, the Treasury Secretary acknowledged that American workers cannot accept a general OK for companies' pension changes, with only a hope that fair transition rules might be included. Workers must see both parts of the deal – the general rules regarding plan changes and the specific protections for older workers – handled in a comprehensive, credible, trustworthy way.

### **But there is work to do**

With Treasury refraining from a regulation-only, "end run" approach, we now have a chance to live up to that trust. Conventional wisdom says not much happens in an election year. This can be an exception. I believe there is too much at stake for us to miss the opportunity presented by Treasury's good starting point.

### **We need new rules for the future, but must address the past, too**

The plans most at risk are those that have already converted. Many such companies invested in what they thought were genuine transition protections. They now are unsure those protections are sufficient. Employees who were given important choices to make are now unsure about the effect of those choices. Legal cases and regulatory changes appear regularly in the news. Still other companies have cash balance plans that originated decades ago, long before concerns were raised in the last few years. While their workers never experienced any conversion to a cash balance plan, the companies must worry about possible legal risks and whether to freeze benefits in order to protect the company from increased exposure.

### **Court cases should spur us to act, not keep us from acting**

Let's set aside for now those relatively few cases which are already actively in litigation. There are still over a thousand other cash balance plans with millions of workers and

retirees waiting for some sense of security. We need to help clarify what they should expect.

**I'm willing to suggest some next steps for our collaborative examination**

**1. Can we have flexibility *and* fairness?**

Treasury has suggested several ways that plans might transition to a cash balance design and stay within the law. I am open to discussing other ways transitions can be accomplished. I also am open to exploring whether Treasury might be given some discretion to determine whether transitions are fairly designed. Flexibility may be reasonable, as long as participant rights are protected.

**2. If conversions can be acceptable in the future, then past conversions can be acceptable, too.**

I am open to saying that plans that have already converted need legal certainty, too. Plans that have converted in ways that satisfy the prospective requirements should certainly be okay. Other conversions may have been accomplished in satisfactory ways, as well.

**To Employers:**

I understand that you need workable rules. I understand your concern that 5-year "no change" rules might be a poor precedent. But after years of frustration, surprises in court, legislative and regulatory maneuvering, just saying "no" to Treasury's proposal is not a credible, responsible or productive position. It is time to come to the table.

**To Employees:**

We need sensible policy requirements for plans that changed and established transition protections - with no regulatory disapproval, only regulatory OK signs. Failure to address these makes it more likely that plans will fear legal penalties and feel forced to consider freezing plans or changing to yet other plans, such as 401(k) plans. The same is true of cash balance plans which have been around for years, even decades. They were not the product of conversions and have not experienced transitional changes. Yet they are caught up now in the same legal jeopardy that worries so many other companies.

You have spent money and time to travel and tell your story. You have opened the doors of regulators. You have changed the law so that it now requires greater advance disclosure and explanation of proposed changes to pension plans. Any progress we've made is due to your hard work.

**To legal scholars and analysts:**

This is a policy debate, not a mathematical exercise. This is about what makes sense, what is fair, what gets the right result - greater retirement fairness, security and plan continuation. Help us create logical, workable, successful rules.

**To Treasury and IRS:**

You have not addressed how early retirement subsidies should be handled in transitions to cash balance plans. If you have no preferred recommendation, then submit four alternatives, along with the pro's and con's of each approach..

We need you to make real and trustworthy rules. Some have asked how rules can prevent companies from simply freezing their plans for some period of time, then adopting other plans that are free of transition obligations. Perhaps you should use authority similar to PBGC's ability to act in cases where companies try to "evade or avoid" PBGC requirements. If there is no single proposal you recommend, give us some options.

**To all regulators involved in the cash balance issue:**

Let us hear any outstanding questions you feel unable to address without legislative clarification. Congress and workers will not appreciate hearing later that you have uncovered an issue that needs separate attention.

**To all involved federal agencies:**

Never again should 15 years go by while companies take action to move in new directions, practitioners attend conferences to learn about those actions, industry trends are noted and written about, yet regulators watch and wait. Nor should workers have to go door-to-door asking whose job it is to hear their concerns. IRS has an Office of the National Taxpayer Advocate who reports to Congress every year on issues that cause the most unrest. Pension regulators should create the same ability – a policy coordination office that can detect emerging issues or problems and advocate for the rights of participants before a crisis arises.

Thank you for your time and attention to these questions. I look forward to hearing from you.

Sincerely,



Tom Harkin  
United States Senator

CC: Department of the Treasury  
Department of Labor  
Equal Employment Opportunity Commission  
American Academy of Actuaries  
ERISA Industry Committee  
American Benefits Council  
AFL-CIO  
AARP  
Pension Rights Center