



THE ERISA INDUSTRY COMMITTEE

*Representing the Employee Benefits Interests
of America's Largest Employers*

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By Hand

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U.S. Department of the Treasury
Room 1000
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Re: Postponement of Effective Date of
Relative Value Regulations

Dear Bill:

We are writing to urge the Treasury Department to postpone the effective date of the relative value regulations until the later of April 1, 2005, or after the effective date of the amendments to the regulations under IRC § 411(d)(6). We also renew the request we made in December for the Treasury to postpone the effective date of the retroactive annuity starting date ("RASD") regulations; a copy of our December submission is enclosed.

The relative value regulations were published in the Federal Register on December 17, 2003, and apply, in general, to qualified joint and survivor annuity ("QJSA") and qualified preretirement survivor annuity ("QPSA") explanations furnished on or after July 1, 2004.

ERIC supports the general objective of the relative value regulations: to give plan participants a meaningful comparison of the relative economic values of the plan's optional forms of benefit. However, the period that the Treasury has given to employers and plan administrators to comply with the regulations is so brief that there is a grave risk that participants will not receive the informative and readily understandable disclosure that the Treasury seeks. As a result, the regulations' accelerated effective date is likely to undermine the regulations' basic objective of providing participants with meaningful and readily understandable information.

The relative value regulations require employers to evaluate and make decisions and changes regarding a number of significant and complex matters affecting plan recordkeeping, participant communications, and plan design. For the reasons set forth below, we urge the Treasury to announce, as soon as possible, a relatively short delay in the effective date of the regulations. Such a delay will allow employers to implement the regulations effectively and accurately and in a fashion that is useful, reliable, and positive for plan participants.

1. The relative value regulations require employers to make a number of significant decisions about how they will comply with the regulations, including:

- Whether to furnish detailed numerical information for (a) **all** optional forms of benefit or (b) only **generally available** optional forms of benefit (and, if the latter, the employer must identify the optional forms that are “generally available” and determine how participants will obtain information regarding optional forms that are **not** generally available);
- Whether to describe the relative value of each optional form (a) on an **individualized** basis, using participant-specific information, or (b) **generically**, using examples to illustrate relative values (and, if the latter, the employer must decide how it will respond, as required, to participant requests for individualized information); and
- Whether to furnish (a) **separate notices** to married and unmarried participants or (b) the **same notice** to all participants regardless of marital status (and, if the latter, the employer must decide whether comparisons will be based on the single life annuity or the joint and survivor annuity).

We do not mention these choices because we object to them: they reflect desirable flexibility that is built into the regulations. However, the availability of these choices requires employers to take the time needed to make appropriate choices for their plans and their participants. These decisions cannot be made without considerable study, thought, and planning.

2. The defined benefit plans sponsored by major employers are complex. Major employers’ plans typically include:

- **Numerous optional forms of benefit:** For example, one of ERIC’s members maintains a plan with over 40 benefit options. Others maintain plans with countless joint and survivor annuity options: each participant is permitted to designate the percentage of the participant’s annuity that will be payable to the survivor annuitant (in increments of 1%). Similarly, some plans offer life annuity benefits with a wide array of term certain options that give the participant broad discretion to select the period for which payment of the annuity is guaranteed. Other plans offer Social Security leveling options under which the participant can choose the age at which the participant’s Social Security benefit is deemed to commence.
- **Numerous sets of actuarial assumptions:** Plans must use GATT assumptions for lump-sum, installment, and decreasing annuity options, but they generally use different assumptions for other benefit options and often use alternative sets of assumptions for many options (applying whichever set of assumptions yields the greatest benefit for the participant).

- **Grandfathered benefit options and benefit options based on grandfathered mortality and interest rate assumptions:** Many plans include grandfathered benefit options and grandfathered mortality and interest rate assumptions -- often as a result of mergers and acquisitions and plan amendments that occurred in the past. Because of the anti-cutback rule in § 411(d)(6), and because regulatory relief from § 411(d)(6) has not yet been granted, it has been extremely difficult, if not impossible, for plans to eliminate these features.
- **Bifurcated benefit options:** Under some plans, one portion of a participant's accrued benefit (for example, the benefit accrued before a specified date) is subject to one array of benefit options, while another portion of the participant's accrued benefit (the portion accrued on or after the specified date) is subject to a different array of options. In the absence of § 411(d)(6) relief, it has not been possible for plans to eliminate optional forms of benefit that apply to benefits accrued in the past.
- **Combined benefit options:** Some plans allow participants to combine alternative benefit options. For example, some plans allow a participant to elect a joint and survivor option either with or without a term certain or Social Security leveling feature. Other plans allow a participant to receive only part of the participant's benefit in a lump sum and require the remainder to be received as an annuity.
- **Complex options:** Some plans offer joint and survivor annuities either with or without a "pop-up" feature (under which the benefit amount "pops up" if the survivor annuitant predeceases the participant). Some plans offer early retirement supplements that, in some cases, affect the optional forms of distribution that are available under the plan.

The complexity of these options and other features will make it extremely difficult for major employers' plans to comply with the relative value regulations by July 1.

3. The pension plans sponsored by major employers cover many thousands of participants. Major employers sponsor defined benefit plans covering tens of thousands, and in some cases, hundreds of thousands, of participants. At a time when many baby boomers are beginning to retire, and many employees are retiring pursuant to voluntary and involuntary retirement programs, the task of revamping and communicating retirement plans' QJSA and QPSA notices is a major undertaking.

4. Many major employers sponsor multiple defined benefit plans. The challenge posed by the relative value regulations is compounded by the fact that many major employers sponsor a number of different defined benefit plans -- for different business units, for different employee groups (union and nonunion, for example), and for different geographic locations. These plans generally differ, not only in their benefit formulas, but also in their benefit options and actuarial assumptions. In many cases, each plan is administered separately, with its own data base, its own administrative systems, and its own

method and style of communications. In these circumstances, it takes considerable time to overhaul plan communications materials that must be tailored to the specific provisions and the participants in each plan.

5. The relative value regulations require defined benefit plans to communicate technical information that is (a) accurate, (b) tailored to the specific plan, (c) tailored (or available to be tailored) to the individual participant, and (d) difficult to communicate in terms that are easily understood by the average participant. The relative value regulations require major plans to communicate, in an understandable way, detailed mathematical information to thousands of plan participants. Given the size and complexity of major defined benefit plans, this cannot be done overnight, and it cannot be done effectively and appropriately without considerable thought and effort. For example, some employers try out alternative forms of communications on a series of employee “focus groups” before settling on the form of communication that is most appropriate for their employees.

6. The Treasury’s objective -- to assure that participants who are making benefit elections have information they need to compare alternative benefit forms -- is laudable. However, the scheduled accelerated effective date could thwart, rather than advance, the achievement of that objective. Unless employers are given sufficient time to analyze the regulations and the choices they offer, to make thoughtful decisions regarding those choices, to organize and prepare the data and the communications material that the regulations require, and to arrange for the distribution of that material, there is a grave risk that participants will not receive useful information that they can easily understand.

Given the size and complexity of the plans and the large number of benefit options available under many of them, the brief period between the issuance of the regulations and the scheduled effective date does not give plan sponsors and administrators the time they need to assemble, organize, and communicate the information required by the regulations in the most effective and appropriate way.

7. The relative value regulations leave unanswered many important questions that the Treasury must answer before employers will have the guidance they need to comply with the regulations. For example:

- What is a “generally available” benefit option?
- How are the 30-day and 90-day deadlines affected, if at all, when a participant requests individualized information regarding the relative values of the plan’s benefit options?
- How are disclosures made in accordance with the relative value regulations to be reconciled with the requirement in § 1.401(a)-20, Q&A-

16, that the QJSA for married participants be at least as valuable as any other optional form of benefit under the plan?¹

- If a plan allows a participant to select a joint and survivor annuity percentage in any designated percentage (up to 100%), how can the plan, in a practical way, disclose the financial effect of each optional form of benefit that is presently available to the participant?
- If a QJSA explanation includes a chart showing a series of examples in accordance with paragraph (d)(2) of the regulations, does the requirement that there be disclosure of the actual benefit refer to the “hypothetical participant’s” actual benefit or the actual participant’s actual benefit? If the latter, can the participant’s benefit be calculated using reasonable estimates in accordance with paragraph (c)(3) of the regulations?
- Why will an employer not be exposed to potential liability for breach of fiduciary responsibility if it elects (as the regulations permit) to use GATT assumptions to communicate the value of optional forms that are subject to Code § 417(e) and different assumptions to value optional forms that are not subject to § 417(e)?

8. The Government should not schedule the effective dates of required changes in benefit notices in a scattershot manner. Together with the Department of Labor, the Treasury has issued a variety of regulations affecting benefit notices:

- The Treasury’s RASD regulations (applicable to plan years beginning on or after **January 1, 2004**);
- The Treasury’s relative value regulations (generally applicable to explanations furnished on or after **July 1, 2004**);
- The Treasury’s § 411(d)(6) regulations (proposed on March 23, 2004, but not scheduled to be effective until final regulations are published in the Federal Register -- presumably **well after the public hearing on June 24, 2004**); and
- The Labor Department’s automatic rollover regulation (proposed to be effective **six months after publication** of the final regulation in the Federal Register).

Together, these regulatory developments are likely to require many employers to revise their plans, plan procedures, and disclosure materials on numerous occasions: once

¹ The comment in the preamble, that there is no requirement, or implication, that the assumptions used for purposes of disclosing relative value be the same as those used for purposes of compliance with the “at least as valuable” requirement, is hardly authoritative guidance. 68 Fed. Reg. 70,143 (Dec. 17, 2003).

for the RASD regulations, a second time for the relative value regulations, a third time for the automatic rollover regulation, and perhaps a fourth time for the anti-cutback regulations. The staggered effective dates of these regulations significantly increase the cost and difficulty of compliance and prevent employers from complying with the regulations in a coordinated and systematic way. The staggered effective dates are likely to bewilder employees who will be confused by the constantly changing plan provisions.

9. When it issues the final amendments to the § 411(d)(6) regulations, the Treasury should grant relief to employers that wish to update the assumptions and factors that their plans use to determine actuarial equivalence. In order to reflect recent and anticipated mortality experience and current economic conditions, many employers wish to update the mortality and interest assumptions that their plans use to determine the plans' actuarially equivalent benefits. Because such changes raise § 411(d)(6) issues, it would be very helpful if the Treasury granted relief to such plans under § 411(d)(6). This issue should be addressed **before** rather than **after** the relative value regulations become effective. If the issue is resolved **after** the relative value regulations are issued, the Treasury will put many employers in a position in which they must, as a practical matter, comply with the relative value regulations twice: once under the old assumptions and a second time under the new assumptions.

10. The Treasury should delay the effective date of the relative value regulations until the later of April 1, 2005, or after the effective date of the amendments to the § 411(d)(6) regulations. For the reasons we have presented, the task of complying with the relative value regulations could be significantly simplified if the Treasury issues final regulations granting appropriate relief from the anti-cutback provisions of § 411(d)(6). Accordingly, the relative value regulations should not become effective until after the amendments to the § 411(d)(6) regulations become effective.

At the very least, the effective date of the relative value regulations should be postponed until April 1, 2005, so that, consistent with the objective of the regulations, employers will have sufficient time to prepare accurate, readily understandable, and timely information to participants. An earlier effective date puts the achievement of this important objective in grave jeopardy.

We very much appreciate your consideration of our request. If it would be helpful, we will be pleased to meet with you and your colleagues to discuss our concerns in greater detail.

Respectfully submitted,

Mark J. Ugoretz
President

Enclosure
cc: Carol D. Gold