ERIC The ERISA Industry Committee

The Only National Association Advocating Solely for the Employee Benefit and Compensation Interests of America's Largest Employers

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RE: Notice 2015-49, Use of Lump Sum Payments to Replace Lifetime Income Being Received By Retirees Under Defined Benefit Pension Plans

Dear Messrs. Iwry, Neis, Choi and Ms. Judson:

We are writing on behalf of The ERISA Industry Committee ("ERIC") to ask the Department of Treasury and the Internal Revenue Service (the "Agencies") to provide clarification concerning Notice 2015-49, "Use of Lump Sum Payments to Replace Lifetime Income Being Received By Retirees Under Defined Benefit Pension Plans" (the "Notice"). The Notice was issued on July 9, 2015.

ERIC is the only national trade association advocating solely for the employee benefit and compensation interests of the country's largest employers. ERIC supports the ability of its large employer members to tailor health, retirement, and compensation benefits for millions of employees, retirees, and their families. ERIC's members provide comprehensive retirement benefits to tens of millions of active and retired workers and their families. ERIC has a strong interest in proposals that would affect its members' ability to provide secure pension benefits in a cost-effective manner, such as the Notice.

The Notice describes the Agencies' intent to amend the required minimum distribution regulations under Section 401(a)(9) of the Internal Revenue Code of 1986, as amended (the "Code") in a manner that generally would prohibit lump sum offers pursuant to a plan amendment made to defined benefit plan participants and their beneficiaries in pay status during a limited window period ("retiree lump-sum window offerings"). As provided in the Notice, Treasury Regulation Sections 1.401(a)(9)-6, Q&A-13 and A-14(a)(4) will be amended to exclude retiree lump-sum window offerings from the list of exceptions to the general prohibition against increasing a retiree's or their beneficiary's annuity payments.

ERIC seeks clarification that the amendments contemplated in the Notice apply only to retiree lump-sum window offerings that, absent the change in the regulation, would be considered to be an increase in annuity benefits to pay increased benefits that result from a plan amendment under Treasury Regulation Section 1.401(a)(9)-6, Q&A-14(a)(4). Specifically, ERIC requests that the Agencies make clear that the anticipated change in the regulations would not prohibit the payment of lump sums that are permitted in other contexts, including, for example:

- in connection with a plan termination, Treas. Reg. § 1.401(a)(9)-6, Q&A-13(b)(1);
- at the time that the participant retires, *Id.*;
- upon the participant's death, Treas. Reg. § 1.401(a)(9)-6, A-14(a)(5); and
- after restrictions on a plan's ability to offer lump-sum distributions cease to apply under either the funding-based restrictions under Section 436 of the Code or the so-called "high-25" restrictions under Section 401(a)(4), Treas. Reg. §§ 1.436-1(a)(4)(ii) (funding-based restrictions), 1.401(a)(4)-5(b) ("high-25" restrictions).

Lump sum offers in these other contexts are permitted under long-standing rules and are justified by policy considerations that do not implicate the concerns reflected in the Notice. Many of the circumstances discussed in this letter are incorporated in plan documents and plan administration. Furthermore, a plan should be permitted to offer a new election as part of a correction when the amount of a benefit was inadvertently calculated incorrectly. For example, if a participant's benefit is miscalculated and the participant elects an annuity based on significantly incorrect information, the plan should be permitted to offer the participant a new election based on correct information.

Additionally, ERIC requests that the Agencies permit retiree lump-sum window offerings for participants and beneficiaries with small benefits. Administration can be disproportionately expensive for small benefits, and permitting settlement of these benefits could enable a plan to more efficiently continue to provide larger benefits. Small benefits could be defined as those with a present value of $5,000 or less. This would be consistent with Section 411(a)(11) of the Code, which generally permits plans to cash out benefits based on this threshold without the consent of participants and their spouses.

Finally, ERIC is concerned that future final rules contemplated in the Notice will be made effective as of the date of the Notice, essentially resulting in a retroactive effective date for such final rules. By taking this approach to rulemaking, it appears that the eventual outcome of the regulation has been determined before comments have been provided. An immediate effective date was not justified; the Notice merely reverses positions expressed by the Internal Revenue Service in several private letter rulings spanning several years, and it is not likely that an approach previously approved by the Service would be considered egregiously harmful. Furthermore, the Notice does not offer employers time to adjust to a reversal of a regulatory position, particularly if the employer does not fall within the criteria for grandfathering. However, because the Notice is effective immediately, ERIC requests that, to minimize disruption, the Agencies quickly issue the clarifications requested in this letter.

Thank you for your consideration of these comments. If the Agencies have any questions, or if we can be of further assistance, please contact us at (202) 789-1400.

Respectfully,

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