No. 15-638

IN THE
Supreme Court of the United States

PRICEWATERHOUSECOOPERS LLP,
THE RETIREMENT BENEFIT ACCUMULATION PLAN
FOR EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP,
AND THE ADMINISTRATIVE COMMITTEE TO THE
RETIREMENT BENEFIT ACCUMULATION PLAN FOR
EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP,

Petitioners,

v.

TIMOTHY D. LAURENT and SMEETA SHARON,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JULIA PENNY CLARK
Counsel of Record
Bredhoff & Kaiser, PLLC
805 Fifteenth Street, NW
Washington, DC 20005
(202) 842-2600
jpclark@bredhoff.com

ELI GOTTESDIENER
Gottesdiener Law Firm, PLLC
498 7th Street
Brooklyn, New York 11215
(718) 788-1500
eli@gottesdienerlaw.com

Counsel for Respondents

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

QUESTION PRESENTED

As the decision below explains, this lawsuit, which concerns the operation of a pension plan during the years 2000-2006, is a "throwback[] to an earlier era of ERISA litigation." Pet. App. 9a.

The Second Circuit's ruling interprets the meaning of "normal retirement age" under ERISA standards that were in effect before 2007. In 2007, the Treasury Department promulgated a notice-and-comment regulation that, by petitioner PwC's own telling, "dramatically changed" those standards effective May 22, 2007. PwC Supp. Br., 2d Cir. Dkt. 123-1 at 4. The 2007 regulation, which has been in force for more than eight years, set forth new definitive guidelines that now undisputedly govern the meaning of "normal retirement age" in ERISA plans nationwide. 72 Fed. Reg. 28,604 (May 22, 2007); Pet. App. 192a-193a.

Thus, contrary to the impression the petition attempts to convey, the question that this case presents is an exclusively backward-looking one that has no bearing on any other ERISA plan and never will: Whether, under pre-2007 standards that are now obsolete, "5 years of service" was a lawful "normal retirement age" under the ERISA pension plan maintained by petitioner PwC for its workforce of accountants and support staff between 2000 and 2006.

TABLE OF CONTENTS

Page

STATEMENT 1

REASONS FOR DENYING THE WRIT 11

I. THE QUESTION PRESENTED IS OF NO ONGOING SIGNIFICANCE BECAUSE OF SUPERSEDING CHANGES IN THE LAW 14

A. A 2007 Notice-and-Comment Treasury Regulation Renders The Question Presented Obsolete............................... 14

B. A 2006 Statutory Amendment Also Forecloses Future Claims Like The One Here 21

C. In 2014, Congress Enacted A Statutory "Clarification Of The Normal Retirement Age" 24

II. THE SECOND CIRCUIT'S INTERPRETATION OF ERISA IS CORRECT AND IDENTICAL TO THE TREASURY DEPARTMENT'S EXPERT CONSTRUCTION.................................... 25

III. THE SECOND CIRCUIT'S INTERLOCUTORY RULING IS A POOR VEHICLE FOR REVIEW 31

CONCLUSION... 34

TABLE OF APPENDIX

Page

APPENDIX A: 1999 Letter from PricewaterhouseCoopers LLP to U.S. Treasury Department, 1999 TNT 222-20 (Nov. 18, 1999) (Dist. Ct. Dkt. 133-1) 1a

TABLE OF AUTHORITIES

CASES Page

Alessi v. Raybestos-Manhattan, Inc.,
451 U.S. 504 (1981) 4, 9

American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co., 148 U.S. 372 (1893)....... 31

Beck v. PACE Intern. Union,
551 U.S. 96 (2007) 26

Berger v. Xerox Corp. Ret. Income Guar. Plan, 338 F.3d 755 (7th Cir. 2003) .. 5, 21, 30

Bowen v. Georgetown U. Hosp.,
488 U.S. 204 (1988) 27

Central Laborers' Pension Fund v. Heinz,
541 U.S. 739 (2004) 15, 19, 27

Clark v. Uebersee Finanz-Korporation, A.G.,
332 U.S. 480 (1947) 31

Esden v. Bank of Boston,
229 F.3d 154 (2d Cir. 2000)...................... 4, 7, 21, 30

Frommert v. Conkright,
738 F.3d 522 (2d Cir. 2013)........................... 7

Fry v. Exelon Corp. Cash Bal. Pens. Plan,
571 F.3d 644 (7th Cir. 2009) 12, 25

Haig v. Agee, 453 U.S. 280 (1981)................... 20

Jones v. UOP, 16 F.3d 141 (7th Cir. 1994)...... 9

Laurent v. PricewaterhouseCoopers LLP,
448 F. Supp. 2d 537 (S.D.N.Y. 2006)........... 8

Laurent v. PricewaterhouseCoopers LLP,
963 F. Supp. 2d 310 (S.D.N.Y. 2013)........... 10

TABLE OF AUTHORITIES—Continued

Page

Lyons v. Georgia-Pacific Corp., 221 F.3d 1235 (11th Cir. 2000) 5

Mayo Found. for Med. Educ. & Research v. United States, 131 S.Ct. 704 (2011)........ 18, 19

McCorkle v. Bank of America Corp., 688 F.3d 164 (4th Cir. 2012) 25

Mead Corp. v. Tilley, 490 U.S. 714 (1989)...... 26

Morales v. TWA, 504 U.S. 374 (1992).............. 30

Nat'l Cable & Telecom. Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005)....... 19

Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) 20

Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996) 27

United States v. Correll, 389 U.S. 299 (1967).. 18

United States v. Virginia, 518 U.S. 515 (1996) 32

Virginia Military Inst. v. United States, 508 U.S. 946 (1993) 31

Walling v. Helmerich & Payne, Inc., 323 U.S. 37 (1944) 31

West v. AK Steel Corp., 484 F.3d 395 (6th Cir. 2007) 4, 30

White v. Sun Life Assur. Co. of Canada, 488 F.3d 240 (4th Cir. 2007) 29

TABLE OF AUTHORITIES—Continued

Page

STATUTES

29 U.S.C. §1002(24) (ERISA §3(24)).......... *passim*

29 U.S.C. §1022 (ERISA §102).............. 7, 8, 10, 33

29 U.S.C. §1053 (ERISA §203).......................... 22

29 U.S.C. §1054 (ERISA §204).............. 20, 21, 24, 33

Internal Revenue Code §7805.......................... 18

Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113–235, 128 Stat. 2130 (Dec. 16, 2014)... 20, 24, 25

Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (Aug. 17, 2006)... 22, 23

REGULATIONS

26 C.F.R. §1.401(a)-1................... 1, 8, 15, 17, 26, 29

26 C.F.R. §1.411(b)-1.. 9, 33

29 C.F.R. §2520.102-3....................................... 5, 7, 33

43 Fed.Reg. 47,713 (Oct. 17, 1978)................... 18

69 Fed.Reg. 65,108 (Nov. 10, 2004)................... 19

72 Fed.Reg. 28,604 (May 22, 2007)................... 1, 3, 8, 15, 18, 19, 26

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

IRS Notice 96-8, 1996 WL 17901
(Feb. 5, 1996)... 5, 30

IRS Notice 2007-69, 2007 WL 2285348
(Aug. 27, 2007) 8, 9, 15

U.S. Congress Joint Committee on Taxation,
JCS-1-15 (March 2015) (2d Cir. Dkt. 122-5). 13, 20

U.S. Congress Joint Committee on Taxation,
JCX-77-14 (June 25, 2014)
(2d Cir. Dkt. 122-6) 20

U.S. Congress Joint Committee on Taxation,
JCS-9-90 at 62-63 (Mar. 22, 1990).................. 29

STATEMENT

Plan participants filed this action in March 2006 claiming that PricewaterhouseCoopers LLP ("PwC") violated the then-operative provisions of ERISA by paying lump-sum benefit distributions that were worth less than participants' accrued retirement annuities. In September 2006, then-Judge Michael Mukasey denied PwC's motion to dismiss the claim. Seven years later, Judge J. Paul Oetken denied PwC's renewed motion to dismiss. In a unanimous decision, the Second Circuit affirmed the denial of PwC's motion, leaving the question of liability and any appropriate relief for the district court. Pet. App. 1a-38a.

Contrary to PwC's contention, the Second Circuit's decision does not throw the federal standards regarding an ERISA plan's "normal retirement age" into "disarray." Pet. 3, 12-13. The Second Circuit disagreed with the Seventh and Fourth Circuits regarding the meaning of the ambiguous phrase "normal retirement age" under the law in effect before 2007. In May 2007, the Treasury Department published a notice-and-comment regulation that mooted that disagreement for all periods after May 22, 2007. The regulation, titled "Distributions From a Pension Plan Upon Attainment of Normal Retirement Age," sets forth clear, definitive standards that now undisputedly govern normal retirement age in all ERISA plans nationwide. 26 C.F.R. § 1.401(a)-1(b)(2), 72 Fed. Reg. 28,604 (May 22, 2007).

PwC is thus mistaken: This Court's intervention is not "necessary" to provide "certainty and uniformity to this important area of federal law," Pet. 12. The

reality is that, as a result of the 2007 regulation, plus two amendments to the ERISA statute enacted by Congress in 2006 and 2014 (discussed below), the question presented by PwC's petition—whether "5 years of service" was a valid "normal retirement age" for PwC's workforce between March 23, 2000 and August 17, 2006—is purely academic to all but the litigants in this case. Indeed, PwC admitted this in the briefing below, explaining that changes in the law after 2006 "eliminat[ed] any need for a plan sponsor, such as PwC, to link normal retirement age to [5 years of service]," thereby allowing "plans such as PwC's [to] voluntarily shift[] to a higher normal retirement age, without the threat of adverse consequences." PwC Supp. Br., 2d Cir. Dkt. 123-1 at 4-5.[1] Consistent with this concession, PwC voluntarily changed its plan's retirement age to "age 62" effective May 22, 2007; and "age 62" remains the plan's normal retirement age today. *See* PwC Ans. to Pls. Second Amended Compl., Dist. Ct. Dkt. 153 ¶76.

PwC's admission that its voluntary shift to age 62 had no "adverse consequences" disproves its assertion that the Second Circuit's construction of the statute interferes with PwC's, or any other company's, discretion to decide "what benefits (if any) to offer," Pet. 2. It does not. First, as noted, the Second Circuit's ruling has no ongoing significance under now-governing law. Second, as PwC itself acknowledges, "ERISA does not dictate what benefits (if

---

[1] "2d Cir. Dkt." refers to the docket of the Second Circuit Court of Appeals, Docket No. 14–1179. "Dist. Ct. Dkt" refers to the docket of the Southern District of New York, Case No. 06-2280 (JPO).

any) employers must offer, but simply establishes uniform rules governing the administration of benefits employers elect to provide." Pet. 12; *see also id.* at 26 (same).

As the Treasury Department explained in its 2007 regulation, "[t]he definition of normal retirement age is important in applying" many of these administrative rules, including the pre-2007 minimum rate-of-accrual and benefit vesting standards that PwC admits it was attempting to "foil." 72 Fed. Reg. 28,604; Cert. Opp. App. 3a, 12a-16a; Pet. 5. The Second Circuit concluded correctly that the statute's command requiring a plan's stated "normal retirement age" to in fact be a *normal retirement age* is a critical element of the statutory scheme that the court was compelled to enforce, not disregard. Pet. App. 4a-6a, 22a-23a, 30a-32a; *accord* 72 Fed. Reg. 28,604-28,605.

Respondents show below that nothing decided by the Court of Appeals or asserted in the petition warrants this Court's review. The Second Circuit's decision (1) has no significance to any other pension plan sponsor or participant, and never will, because it construes and applies a statutory and regulatory scheme that is no longer in effect; (2) is correct, reflecting an understanding of the governing ERISA provisions that is identical to the Treasury Department's expert construction now set forth in a controlling notice-and-comment regulation; and (3) is in any event a poor vehicle for review because (i) it is an interlocutory ruling, merely affirming the district court's denial of PwC's motion to dismiss a claim that PwC says it expects to ultimately defeat on the merits, (ii) it involves an extreme fact pattern—a pur-

ported "normal retirement age" for accounting-firm employees after a mere 5 years on the job—that would fail any conceivable retirement-age standard the Court might devise, and (iii) reversal would not be dispositive but would just return the case to the Second Circuit to consider the district court's two alternative reasons for finding PwC's retirement age unlawful.

The petition should be denied.

STATEMENT OF THE CASE

1. The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.*, protects retirement benefits that have accrued over the course of an employee's tenure with his or her employer.

> Congress through ERISA wanted to ensure that 'if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit— . . . he actually receives it.' For this reason, the concepts of vested rights and nonforfeitable rights are critical to the ERISA scheme.

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981) (internal citations omitted).

Under pre-August 2006 law, ERISA required that a lump-sum distribution from a pension plan not be less than the full actuarial present value of the annuity benefit a participant would have received at retirement age had she "not elected to take her benefit in the form of a lump sum." *Esden v. Bank of Boston*, 229 F.3d 154, 163-64 (2d Cir. 2000). *Accord West v. AK Steel Corp.*, 484

F.3d 395 (6th Cir. 2007); *Lyons v. Georgia-Pacific Corp.*, 221 F.3d 1235 (11th Cir. 2000); IRS Notice 96-8, Section III, 1996 WL 17901 (Feb. 5, 1996). This lump-sum "full-value" requirement was designed to protect participants in defined-benefit pension plans from unwittingly "sell[ing] their pension entitlement back to the company cheap." *Berger v. Xerox Corp. Ret. Inc. Guar. Plan*, 338 F.3d 755, 762 (7th Cir. 2003) (Posner, J.).

2. PwC admits that during the 2000-2006 period at issue in this case, it used a counterfactual definition of "normal retirement age" to attempt to circumvent this full-value requirement. PwC Appeal Reply Brief (2d Cir. Dkt. 80) at 24; 2014 WL 7003970 at *24. During the relevant period, PwC's pension plan contained a formula that purported to identify the "normal retirement age under the plan" within the meaning of ERISA § 3(24)(A), 29 U.S.C. § 1002(24)(A), as "the earlier of the date a Participant attains age 65 or completes five (5) Years of Service." Pet. App. 37a n.19. Under this formula, employees hired before age 60 ostensibly attained "normal retirement age" after 5 years on the job. For example, according to PwC, an accountant it hired at age 22 attained "normal retirement age" at age 27.

Notwithstanding ERISA's requirement that plan summaries must "include a statement describing the plan's normal retirement age, as that term is defined in section 3(24) of the Act," 29 C.F.R. § 2520.102-3(j)(1), PwC did not tell employees that their normal retirement age was the date each worker completed 5 years on the job. Pet. App. 118a & n.11 (finding PwC "made the highly unusual choice to depart from clear regulations and industry practice" "to disguise the unconventional and potentially controversial nature

of the [plan's stated normal retirement age]"). Indeed, what PwC did publish for its employees suggested a different definition. The Plan website contained a glossary of terms that defined "Normal Retirement Age" as: "The age, as established by the plan, at which retirement normally occurs." Dist. Ct. Dkt. 133, at 32 n.7. PwC admits that its employees do not normally retire after working a mere 5 years regardless of their age at hire. *See* PwC 2009 IRS Form 5500, Sch. SB, Part V, line 22 (reporting average retirement age as age 64), available at www.efast.dol.gov/portal/app/disseminate?execution=e1s2# (EIN: 134008324, Plan No. 002) ("PwC 2009 IRS filing").

In 1999, PwC sent the Treasury Department a letter after press reports exposed the firm's attempt to "foil" the statute's full-value requirement through the use of a contrived normal retirement age. PwC explained that use of an ersatz normal retirement age "well below th[e] actual typical retirement age" was the firm's "opposite and equal reaction" to "poor rulemaking." PwC 1999 letter, Cert. Opp. App. 3a, 12a-16a. PwC asserted that an artificial retirement age not only "foiled" ERISA's full-value requirement, but also allowed pension plan sponsors to "exploit" a purported "Law Flaw" in the statute's anti-backloading standards and "manipulate" ERISA "in previously unimagined ways." *Id.*[2]

---

[2] Backpedaling, PwC now suggests that it adopted an artificially low normal retirement age for the altruistic purpose of giving "participants the valuable right to access their accrued benefits long before they left the workforce—making their investments portable as they transition to a new job." Pet. 24; *see also id.* at 8 ("The PwC plan structure thus made a participant's vested lump-sum benefit portable when that person left

3. Respondents, former PwC employees who received lump-sum pension distributions, brought this action in March 2006. The complaint alleged that PwC attempted to do via its 5-years-of-service "normal retirement age" what ERISA then prohibited: pay lump-sum benefits that were less than the full value of the retirement benefit a participant would have received had she "not elected to take her benefit in the form of a lump sum," *Esden*, 229 F.3d at 157.

Respondents argued that PwC's attempt to outwit the statute's full-value requirement failed because "5 years of service" was not a lawful normal retirement age for PwC's workforce of accountants and support staff, for two independent reasons. First, 5 years of service bore no relationship to the "time a plan participant attains normal retirement age" at PwC, as required by ERISA § 3(24), 29 U.S.C. § 1002(24), and indeed was not even an "age." Second, 5 years of service could not be used to calculate participants' pension benefits because PwC had concealed the definition from participants, in violation of ERISA's employee notice requirements, ERISA § 102, 29 U.S.C. § 1022, as implemented by 29 C.F.R. § 2520.102-3(j)(1). *See Frommert v. Conkright*, 738 F.3d 522, 532 (2d Cir. 2013).

PwC"). The suggestion is false: whatever definition of normal retirement age PwC used, participants who left the firm after working 5 or more years could have taken their benefits with them. *See* Pet. App. 142a-143a (Plan § 6.3(b)); Dist. Ct. Dkt. 169-1 (Plan § 5.4(b), permitting a "single lump sum cash payment to the Participant upon his or her termination of employment," independent of the authorization under § 5.4(a) for distributions upon attainment of normal retirement age).

4. In September 2006, the district court, then-Judge Michael Mukasey, denied PwC's motion to dismiss these claims, agreeing with respondents that the Plan's definition of normal retirement age violated ERISA § 3(24), 29 U.S.C. § 1002(24), and had also been concealed from participants in violation of ERISA § 102, 29 U.S.C. § 1022. *Laurent v. PricewaterhouseCoopers LLP*, 448 F.Supp.2d 537, 545-47 (S.D.N.Y. 2006) ("*Laurent I*"); Pet. App. 39a-72a.

5. In May 2007, the Treasury Department published a notice-and-comment regulation to supplement existing regulations implementing ERISA's normal retirement age requirements. The 2007 regulation, which was effective immediately and remains the governing standard today, sets forth definitive guidelines regarding a plan sponsor's identification of normal retirement age. Sponsors are given the choice of a bright-line safe harbor—age 62 or older (age 50 or older for public safety workers)—or discretion to select any earlier age that is no lower than the earliest age that is "reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." 26 C.F.R. § 1.401(a)-1(b)(2), 72 Fed. Reg. 28,604 (May 22, 2007); Pet. App. 192a-193a.[3] Deference is given to a good faith determination of a retirement age of 55 or older, and a plan sponsor wishing to use an earlier age can request an agency certification of compliance. 72 Fed. Reg. 28,605; IRS Notice 2007-69, *Relief Related to Plan*

[3] The final regulation was published more than two years after publication of the Notice of Proposed Rulemaking, receipt of written comments, and a public hearing. *See* 72 Fed. Reg. at 28,605.

Amendment of Definition of Normal Retirement Age, 2007 WL 2285348 (Aug. 27, 2007), Sec. IV; IRS Pub. 4962 at 10, available at www.irs.gov/pub/irs-pdf/p4962.pdf.

Neither PwC nor any other plan sponsor has ever challenged the 2007 regulation as beyond the scope of the Treasury Department's interpretative authority. To the contrary, effective May 22, 2007 PwC voluntarily changed the normal retirement age under its plan from "5 years of service" to "age 62" to take advantage of the regulation's new safe harbor. *See* PwC Ans. to Pls. Second Amended Compl., Dist. Ct. Dkt. 153 ¶ 76; PwC 2009 IRS filing at pdf p. 59, *supra* p. 6.

6. In 2012, respondents filed a Second Amended Complaint to add a third independent basis why PwC's pre-2007 "5 years of service" retirement definition was unlawful under pre-2007 law: it violated ERISA's anti-backloading standards, which prohibit plans from changing an employee's retirement age from 65 to an earlier "normal retirement age that is based on completion of a stated number of years of service." IRS Notice 2007-69, 2007 WL 2285348, Sec.V (implementing 26 C.F.R. § 1.411(b)-1(b)(2)(ii)(F)).[4]

[4] The "purpose of [the anti-backloading rules] is to prevent the employer from defeating the vesting section . . . by . . . making benefits accrue very slowly until the employee is near retirement age." *Jones v. UOP*, 16 F.3d 141, 143 (7th Cir. 1994); *see also Alessi*, 451 U.S. at 512 n.9. As noted above, PwC admitted that use of a normal retirement age younger than the "actual typical retirement age" for a company's employees was a means of "exploit[ing]" the anti-backloading standards in a manner that PwC acknowledged Congress could not have intended. Cert. Opp. App. 3a, 14a-16a.

PwC again moved to dismiss. The district court, now Judge J. Paul Oetken, agreed to conduct an "independent examination" of all three of respondents' alternative arguments challenging the validity of PwC's "5 years of service" normal retirement age. After doing so, Judge Oetken concluded that each of respondents' three arguments was convincing. He agreed with Judge Mukasey that PwC's definition violated ERISA § 3(24), 29 U.S.C. § 1002(24), and had been unlawfully concealed from participants in violation of 29 U.S.C. § 1022. In addition, Judge Oetken agreed with respondents' new argument that "5 years of service" was not a lawful normal retirement age for the independent reason that it violated ERISA's anti-backloading standards. *Laurent v. PricewaterhouseCoopers LLP*, 963 F.Supp.2d 310 (S.D.N.Y. 2013) ("*Laurent IV*"); Pet. App. 80a-130a.

7. In a unanimous decision, the Second Circuit affirmed. Pet. App. 1a-38a. The court agreed with the district court, respondents, the Treasury Department, and PwC that "the statute confers considerable discretion on retirement plan creators to determine normal retirement age" and that "[e]mployers of firefighters, ballerinas, or professional athletes, for example, could quite reasonably select a much younger normal retirement age than the statutory default." *Id.* at 19a. But the court disagreed with PwC's contention that a plan sponsor's discretion is boundless. "ERISA does not define normal retirement age as . . . simply 'the time set by the plan,' nor 'whatever age or date the plan provides,' language that Congress could easily have adopted had that been its intended meaning." *Id.* at 20a. Instead, "the statute's text is clear that the time a participant attains normal retirement age under the plan must be just that: a *normal retirement* age." *Id.* at 29a (emphasis in original).

"Five years on the job at an accounting firm is not a normal retirement age." *Id.* at 27a.

The Court of Appeals emphasized that its interpretation left "plan sponsors with a great deal of discretion, to which courts must defer. Close scrutiny of a decision to set normal retirement age for purposes of a plan such as [PwC's] at 58 or 60 or 62 would be inappropriate." *Id.* But, by PwC's own admission, the date its employees complete 5 years of service regardless of their age at hire "bears no relationship at all" to the time when accounting-firm employees normally retire, placing "5 years of service" beyond the outermost periphery of any conceivable definition of "normal retirement age" for PwC's workforce. *Id.* at 27a n.15.

Having concluded that Judges Mukasey and Oetken had correctly found that 5 years of service was not a conceivable normal retirement age for PwC's workforce under ERISA § 3(24), 29 U.S.C. § 1002(24), the Court of Appeals determined that it was not necessary to reach the two alternative independent bases for the district courts' denials of PwC's motions to dismiss. *Id.* at 4a, 38a.

REASONS FOR DENYING THE WRIT

Contrary to PwC's contention that "[t]he question presented concerns an important issue of federal employee-benefits law that governs plans nationwide," Pet. 33, this case actually has no bearing whatsoever on the law that presently "*governs*"—present tense—pension plans. As the Court of Appeals explained, this lawsuit is a "throwback[] to an earlier era of ERISA litigation" involving a set of pension plan standards that are no longer in force. Pet. App.

9a. Multiple changes in the law following the 2000-2006 period that is at issue in this case—including a statutory "Clarification Of The Normal Retirement Age" enacted in 2014 (*infra*, pp. 24-25)—have mooted the relevance of the Second Circuit's ruling to anyone other than the parties.

Equally mistaken is PwC's assertion that "[i]f allowed to stand, the decision below will foment . . . broa[d] uncertainty and confusion," Pet. 19, and that this Court's intervention is necessary to provide "clarity and uniformity" regarding the standards for identifying an ERISA plan's normal retirement age. *Id.* at 3 (asserting that "[f]ederal law that Congress sought to make uniform is now in disarray. A plan, potentially subject to the law of multiple circuits, may face conflicting obligations to its thousands of participants"). To the contrary. As described above, a notice-and-comment Treasury Department regulation published in 2007 sets forth clear, definitive standards that now undisputedly govern the identification of normal retirement age in pension plans nationwide.

Simply put, the issue PwC wants the Court to decide is purely academic to all but the litigants in this case, and hence there is no reason for the Court to grant review. Respondents are not alone in this view. Six years ago, after the plaintiffs in *Fry v. Exelon Corp. Cash Balance Pension Plan*, 571 F.3d 644 (7th Cir. 2009)—the case on which PwC nearly exclusively relies in asserting a circuit split—filed a petition seeking certiorari, the Exelon Corporation explained that there was no reason for this Court's intervention in a case involving the identical pre-2007 ERISA standards, noting that:

> Petitioner's claim does not warrant this Court's review [because] the petition presents an issue of no ongoing significance. In 2006, ERISA was amended to . . . foreclos[e] claims like petitioner's in the future. And a Treasury regulation effective as of May 2007 prospectively changed the administrative interpretation of the statute and imposed new restrictions on plans' definitions of normal retirement age that will govern future cases. * * * Because the Seventh Circuit's opinion [applying pre-2007 standards] will not govern future claims under ERISA, it does not warrant this Court's review.

Fry v. Exelon Corp. Cash Balance Pension Plan, Case No. 09-532, Respondent Exelon Corp. Cash Balance Pension Plan's Brief in Opposition, 2010 WL 146463, at *8-9 (Jan. 12, 2010). The Court denied the petition. 559 U.S. 936 (2010).

Another reason why this Court's intervention is not warranted is that the Second Circuit's ruling was correct, based on a straightforward interpretation of the governing ERISA provisions that is identical to the Treasury Department's expert construction underlying the 2007 regulation. The Second Circuit is the only court of appeals that has interpreted ERISA's normal retirement age provisions after the Treasury Department's publication of the 2007 regulation and Congress's subsequent 2014 statutory "Clarification Of The Normal Retirement Age" that acknowledged and accepted the regulation as "present law," U.S. Congress Joint Committee on Taxation, JCS-1-15 (March 2015) at 111. No other court has ruled that 5 years of service was or is a lawful normal retirement age under the clarified statute. There is no circuit

split regarding the meaning of "normal retirement age" under current law.

An independent reason for denying the petition is that the interlocutory nature of the Second Circuit's ruling—denial of a motion to dismiss—renders it a poor vehicle for review. PwC has indicated that it will argue on remand that, even if its 5-years-of-service "normal retirement age" was unlawful, respondents nevertheless are not entitled to relief. The Court should decline PwC's invitation to expend valuable resources reviewing an interlocutory ruling that PwC asserts ultimately will be meaningless even in this case.

Because the decision below will not govern future claims under ERISA (or impact any other pending case), was correctly decided, and presents a poor vehicle for review, it does not warrant this Court's attention.

I. THE QUESTION PRESENTED IS OF NO ONGOING SIGNIFICANCE BECAUSE OF SUPERSEDING CHANGES IN THE LAW

Changes in the law following the 2000-2006 period at issue in this lawsuit have mooted the relevance of the Second Circuit's ruling to anyone other than the parties in this action.

A. A 2007 Notice-and-Comment Treasury Regulation Renders The Question Presented Obsolete

PwC's contention that the Court's intervention is necessary to provide "clarity and uniformity" regarding the standards for identifying an ERISA plan's normal retirement age, Pet. 3, ignores that the Treasury

Department has already done precisely that, in a notice-and-comment regulation post-dating this action that now clearly defines "normal retirement age" under present law for all plans nationwide.

1. "Speaking in its most authoritative voice," *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 748 (2004), the Treasury Department in 2007 published a final regulation after notice and comment that sets forth clear, definitive standards governing a plan's identification of normal retirement age. The regulation offers plan sponsors the choice of a bright-line safe harbor—age 62 or older (age 50 or older for public safety workers)—or discretion to select any earlier age that is not lower than the earliest age that is "reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." 26 C.F.R. § 1.401(a)-1(b)(2), 72 Fed. Reg. 28,604 (May 22, 2007); Pet. App. 192a-193a. Deference is given to a sponsor's good faith selection of a normal retirement age of at least age 55. 72 Fed. Reg. 28,605. A sponsor can request a private ruling certifying an even lower age. *See* IRS Notice 2007-69, 2007 WL 2285348, Sec. IV; IRS Pub. 4962, *supra* p. 9.

The 2007 regulation refutes PwC's contention that "[t]his Court's intervention is necessary to . . . restore certainty and uniformity to this important area of federal law," Pet. 12, while at the same time "preserving employer discretion" in designing benefit plans, *id.* at 13. Whatever disagreement may have existed between the Second and Seventh Circuits about the standards governing a plan's normal retirement age before 2007 was resolved by the regu-

lation, which now sets forth the applicable standards for all plans nationwide.

The regulation provides the "[c]lear, definitive guidance" to which PwC asserts "[e]mployers designing plans, administrators implementing them, and employees making long-term decisions are entitled," *id.* at 13. And the regulation provides this guidance in a manner that preserves a company's flexibility to set a normal retirement age appropriate to the company's workforce, with broad deference given to the company's good faith selection. The regulation has now been in operation without a hitch for more than 8 years: respondents are not aware of a single case involving a disagreement between an employee (or the government) and a plan sponsor regarding the sponsor's selection of a normal retirement age pursuant to the 2007 regulation.

2. Neither PwC nor any other plan sponsor has ever challenged the 2007 regulation as beyond the scope of the Treasury Department's interpretative authority. Having failed to challenge the validity of the regulation in this case—to the point that the necessity of such challenge is not even acknowledged or hinted at in PwC's petition to this Court—the issue should be deemed waived. In fact, far from disputing the regulation's validity, PwC took advantage of the regulation's new safe harbor provisions by voluntarily revising the normal retirement age under its plan from "5 years of service" to "age 62" effective May 22, 2007. *See* PwC 2009 IRS filing, *supra* p. 6. The change is irrevocable: even if the Court were to grant the petition and reverse the Court of Appeals, PwC's normal retirement age would remain age 62.

See Pet. App. 115a-116a (district court's finding that a cash-balance plan's normal retirement age cannot be reduced because it would constitute an unlawful forfeiture of accrued benefits).

The truth is that PwC has things exactly backwards. If the Court were to grant the petition and reverse the Court of Appeals, turmoil would ensue. A ruling that accepted PwC's radical view that the statute gives a plan sponsor boundless discretion to label "age 12" or any other date or time of the sponsor's choosing as the plan's "normal retirement age" would invalidate the Treasury Department's 2007 regulation, nullifying the hundreds of administrative rulings issued by the Internal Revenue Service certifying plans' tax-qualified status based on the regulation. *See* IRS Pub. 4962, *supra* p. 9 ("the final [2007 normal retirement age] regulations will be taken into account in the Service's review of plans submitted for determination letters filed in [2009] and later"); *id.*, Form 8401 at 3, line 2047A ("Please submit a demonstration to show that the plan's definition of normal retirement age satisfies Reg. section 1.401(a)-1(b)(2), or amend section of the plan to provide a definition of normal retirement age that satisfies the regulation").[5]

---

[5] PwC concedes that the Treasury Department's interpretation of "normal retirement age" reflected in the 2007 regulation is "materially identical to the Second Circuit's definition." Pet. 32 & n. 5. Any suggestion by PwC in its reply that the Court could, as a result, use this case as a vehicle to review the validity of the regulation should be rejected. No court, including the Second Circuit in the decision below, has assessed the 2007 regulation under *Chevron*—because, tellingly, no sponsor has ever challenged the regulation. The validity of the regulation is thus not an issue that is ripe for this Court's review, and this

Rejecting the Treasury Department's expert construction of the statute set forth in a notice-and-comment regulation would be a significant departure from *Mayo Found. for Med. Educ. & Research v. United States*, 131 S.Ct. 704 (2011), in which the Court held unanimously that "[t]he principles underlying our decision in *Chevron* apply with full force in the tax context." *Id.* at 713. *Accord U.S. v. Correll*, 389 U.S. 299, 307 (1967) ("Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code") (quoting IRC § 7805); Reorg. Plan 4 of 1978, 43 Fed. Reg. 47,713 (1978), § 101(c) (transferring authority to interpret ERISA § 3(24), 29 U.S.C. § 1002(24), to the Treasury Department).

The Treasury Department's construction of ERISA reflected in its 2007 regulation has all the hallmarks of an interpretation warranting deference. First, the regulation was issued "pursuant to the explicit authorization to 'prescribe all needful rules and regulations for the enforcement' of the Internal Revenue Code." *Mayo*, 131 S.Ct. at 714. Second, "[t]he Department issued the [normal retirement age] rule only after notice-and-comment procedures, again a consideration identified in our precedents as a 'significant' sign that a rule merits *Chevron* deference." *Id.* (internal citation omitted). Finally, "[t]he [normal retirement age] rule easily satisfies the second step of *Chevron*, which asks whether the Department's rule

---

case certainly is not an appropriate vehicle for addressing that question in the first instance.

is a 'reasonable interpretation' of the enacted text," *id. See* 72 Fed. Reg. 28,604-05 (May 22, 2007) and 69 Fed. Reg. 65,108, 65,110-12 (Nov. 10, 2004) (explaining the basis for the Department's interpretation, which is echoed by the Second Circuit in its independent analysis reflected in the decision below, Pet. App. 1a-38a).[6]

3. Judicial invalidation of the interpretation reflected in the Treasury Department regulation would be particularly inappropriate in light of Congress's tacit 2014 endorsement of the core concept of the

---

[6] PwC's *ipse dixit* assertion that in 1974 Congress "rejected" the proposition that normal retirement age should bear some relationship to a company's "normal retirement" patterns, Pet. 31-32, is refuted by the statute's command that a sponsor identify the time employees attain *normal retirement* age, not any time "set by the plan." Pet. App. 20a; *accord* 72 Fed. Reg. 28,604. PwC's objection that the specific standards set forth in the 2007 normal retirement age regulation are not stated explicitly in the statute is similarly misguided: "Filling gaps in the Internal Revenue Code plainly requires the Treasury Department to make interpretive choices . . . . Regulation, like legislation, often requires drawing lines." *Mayo*, 131 S.Ct. at 713. And, contrary to PwC's contention, the 1978 revenue ruling it cites, Pet. 6, 32, has no bearing on the validity of the 2007 final regulation published after notice and comment, even accepting PwC's misreading of the ruling. *Heinz*, 541 U.S. at 748 (ERISA case; "allegedly longstanding agency practice can[not] trump a formal regulation with the procedural history necessary to take on the force of law"); Pet. App. 34a-35a. Neither the Seventh nor Fourth Circuits held that the statute unambiguously permits a plan to define normal retirement age as 5 years on the job, leaving the Treasury Department room to reach a different conclusion. *National Cable & Telecom. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005).

2007 regulation when it enacted a "Clarification Of The Normal Retirement Age" in the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113–235, 128 Stat. 2130, 2827 (2014), codified at ERISA § 204(k), 29 U.S.C. § 1054(k). Committee reports show that Congress was informed that "[u]nder final Treasury regulations issued in 2007, 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." *See* General Explanation of Tax Legislation Enacted in the 113th Congress, Staff of Joint Comm. on Taxation, 113th Cong., JCS-1-15 (March 2015) at 111; Description of the Chairman's Modification to the "Preserving America's Transit and Highways Act of 2014," Staff of Joint Comm. on Taxation, 113th Cong., JCX-77-14 (June 25, 2014) at 13.

Congress's subsequent amendment of the ERISA statute's normal retirement age provisions to "clarify" their meaning in a manner coherent with the 2007 regulation, while leaving the regulation fully intact, was a strong indication that Congress agrees that the regulation correctly interprets the statute. *See Haig v. Agee*, 453 U.S. 280, 301 & n.50 (1981) (statutory amendment coherent with a regulation expressly communicated to lawmakers is "weighty evidence of congressional approval of the Secretary's interpretation"); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381-82 (1969) (endorsing the "venerable principle that the construction of a statute by those charged with its execution should be followed . . . especially when . . . Congress has not just kept its silence by

refusing to overturn the administrative construction, but has ratified it with positive legislation").

B. A 2006 Statutory Amendment Also Forecloses Future Claims Like The One Here

PwC admits that the sole reason it defined normal retirement age as 5 years on the job was to attempt to "circumvent" the pre-August 2006 full-value rule that was intended to protect participants from unwittingly "sell[ing] their pension entitlement back to the company cheap," *Berger*, 338 F.3d at 762. PwC Appeal Reply Brief (2d Cir. Dkt. 80) at 24, 2014 WL 7003970 at *24 (conceding that the 5-year "retirement age" served no purpose other than to attempt to thwart ERISA's full-value requirement); PwC 1999 letter, Cert. Opp. App. 3a, 12a-16a.[7]

In 2006, Congress amended ERISA to re-affirm the principle that a lump-sum benefit distribution must be the actuarially-equivalent "present value" of a participant's accrued-to-date pension; but Congress prospectively changed the method for measuring actuarial equivalence in the case of cash-balance style

[7] "ERISA requires that any lump-sum substitute for an accrued pension benefit be the actuarial equivalent of that benefit." *Berger*, 338 F.3d at 759 (citing 29 U.S.C. § 1054(c)(3)). "This rule that regardless of any option as to timing or form of distribution, a vested participant in a defined benefit plan must receive a benefit that is the actuarial equivalent of her normal retirement benefit (that is, the accrued benefit expressed as an annuity beginning at normal retirement age) has been repeatedly recognized by courts." *Esden*, 229 F.3d at 163 (collecting cases).

pension plans like PwC's that describe benefits in terms of a hypothetical account balance. Specifically, the Pension Protection Act of 2006 amended ERISA to provide that plans like PwC's could, for benefits paid after August 17, 2006, deem the value of a participant's accrued-to-date retirement benefit as "equal to the amount expressed as the balance in the hypothetical account" at the time of distribution—rather than the actuarial present value of participant's accrued retirement annuity payable at "normal retirement age." Pub. L. 109-280, § 701(a)(2), 120 Stat. 780, 984, codified as relevant at 29 U.S.C. § 1053(f); Pet. App. 150a; *see also id.* 9a-12a.

The 2006 statutory amendment means that the full-value "whipsaw" claim that is the basis of the complaint—*i.e.*, that PwC paid lump sums from its cash-balance plan that were less than the present value of participants' accrued benefits *payable at normal retirement age*—can no longer be brought under the current ERISA statutory scheme. As PwC concedes, "Congress amended ERISA in 2006 to eliminate claims to 'whipsaw' payments prospectively." Pet. 9 n.2. The Second Circuit concurred, explaining that "plaintiffs' claim . . . depends on principles of actuarial equivalence that were in effect at the time they took their distributions but have since been abrogated by Congress." Pet. App. 12a n.7; *see also id.* 9a (stating that respondents' claim is necessarily limited to lump sums that "predate the passage of the Pension Protection Act").

The upshot is that the 2006 enactment of the Pension Protection Act means that a cash balance plan's "normal retirement age" is no longer relevant to the calculation of lump-sum benefit distributions. Thus,

there is no longer a reason for a pension sponsor such as PwC to attempt to avoid the full-value "whipsaw" requirement by specifying a counterfactual normal retirement age. As explained above, PwC concedes that the *sole* reason it wanted to define normal retirement age as 5 years on the job was to attempt to "foil" the full-value requirement. PwC Appeal Reply Brief (2d Cir. Dkt. 80) at 24, 2014 WL 7003970 at *24; PwC 1999 letter, Cert. Opp. App. 3a, 12a-16a. Now that the pre-2007 version of the requirement has "been abrogated by Congress" for lump sums paid after August 17, 2006, Pet. App. 12a n.7, there is simply no reason why PwC or any other plan sponsor would want to define normal retirement age as a mere 5 years on the job.

That explains why PwC had no problem changing its normal retirement age to "age 62" shortly after the 2006 law change "abrogat[ing]" the whipsaw requirement. *See* PwC 2009 IRS filing, *supra* p. 6. As PwC admitted to the Court of Appeals, the 2006 Pension Protection Act "eliminat[ed] any need for a plan sponsor, such as PwC, to link normal retirement age to [5 years of service]," thereby allowing "plans such as PwC's [to] voluntarily shift[] to a higher normal retirement age, without the threat of adverse consequences." PwC Supp. Br., 2d Cir. Dkt. 123-1 at 4-5. This is another way of saying that a retirement age defined as "5 years of service" is a relic of the past with no continuing utility to plan sponsors.

The 2006 Act's prospective elimination of the whipsaw requirement is what the Court of Appeals was referring to when it explained that this case is a "throwback[] to an earlier era of ERISA litigation." Pet. App. 9a. There will never be another case that involves the interaction of the pre-2007 lump-sum

whipsaw requirement and "normal retirement age"—because the whipsaw requirement was prospectively repealed effective August 17, 2006.

C. In 2014, Congress Enacted A Statutory "Clarification Of The Normal Retirement Age"

PwC's argument that the Second Circuit's decision created a circuit split with ongoing significance for plan sponsors, is further undermined by an amendment to ERISA that was enacted in late 2014. The Second Circuit is the only court of appeals that has interpreted ERISA's "normal retirement age" provisions following Congress's "Clarification Of The Normal Retirement Age" in the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113–235, 128 Stat. 2130, 2827 (2014), codified at ERISA § 204(k), 29 U.S.C. § 1054(k) (the "2015 Act").

The new ERISA provision added by the 2015 Act states that a pension plan may permissibly define normal retirement age as the earlier of (i) an 'age otherwise permitted under section 3(24)' or (ii) 30 (or more) years of service." 2015 Act, Sec. 2; new § 204(k). Clause (i)'s reference to an age "otherwise permitted" under section 3(24) refutes PwC's extreme view that *any* "age" or "time" automatically passes muster as a "normal retirement age." And as the Second Circuit noted, it is "instructive that [in clause (ii)] Congress permitted a years-of-service normal retirement age that is sufficiently long [*i.e.*, 30 years] that it bears a close relationship to what we ordinarily view as a time period after which it would be 'normal' to retire." Pet. App. 36a-37a.

Because the *Fry* and *McCorkle* courts did not have the benefit of this Congressional "clarification" when asked to rule on the validity of normal retirement ages similar to PwC's, their interpretation of the statute before its clarification does not squarely conflict with the Second Circuit's post-clarification ruling, and certainly not in a manner that has any ongoing significance. Simply put, the Seventh and Fourth Circuits interpreted a statute that was different from the one applied by the Second Circuit, and their understanding of what ERISA *used to* mean, before the 2015 Act's "Clarification Of The Normal Retirement Age," is moot.[8]

II. THE SECOND CIRCUIT'S INTERPRETATION OF ERISA IS CORRECT AND IDENTICAL TO THE TREASURY DEPARTMENT'S EXPERT CONSTRUCTION

This Court has observed that to attempt to address "complicated and important issues pertaining to the private pensions of millions of workers" "without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voy-

---

[8] PwC's suggestion that the Second Circuit's ruling—and by implication, the Treasury Department's interpretation reflected in the 2007 regulation—"calls into doubt other circuits' decisions that approved definitions of 'normal retirement age' tied to employees' years of service without undertaking anything resembling the analysis of 'typical retirement age,' " Pet. 19, ignores that the minimum retirement ages in those decisions were age 62 for carpenters and 25 years on the job for asbestos workers.

age without a compass.' " *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989); *accord Beck v. PACE Intern. Union*, 551 U.S. 96, 104 (2007) (same). As discussed above, the Treasury Department, after more than two years of careful consideration following notice and comment from the ERISA community, published final regulations that interpret the statute to require a pension plan's "normal retirement age" to be no lower than the earliest age that is "reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." 26 C.F.R. § 1.401(a)-1(b)(2), 72 Fed. Reg. 28,604 (May 22, 2007); Pet. App. 192a.

The Second Circuit's independent examination of the ERISA statute in the decision below led the court to the identical determination. The court held that "[c]onstruing the statute consistently with the ordinary meaning of its terms and as a coherent whole, 'the time a plan participant attains normal retirement age under the plan' must bear some reasonable relation to a time when the plan's participants would, under normal circumstances, retire." Pet. App. 26a. "[T]he statute's text is clear that the time a participant attains normal retirement age under the plan must be just that: a *normal retirement* age." *Id.* at 29a (emphasis in original).[9]

---

[9] The Second Circuit made clear that its construction of the statute was based on its independent analysis, not deference to the Treasury Department's interpretation. Pet. App. 33a-35a. At the same time, the Court of Appeals heeded this Court's instruction that "[w]here . . . a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be absurd to ignore the agency's current author-

A. The Second Circuit's and Treasury Department's identical interpretation of "normal retirement age" is the only one that follows from a faithful application of this Court's precedents regarding statutory interpretation. Analyzing ERISA's text, the Court of Appeals agreed with the consensus among respondents, PwC, and the district court that:

> the structure of the statute . . . signals Congress's intent to give employers wide latitude in deciding whether it is reasonable for workers to retire at a given age—whether that is 62 or 65 for most office workers, 50 or 55 for law enforcement officers, and 35 or 40 for shortstops. These are discretionary calls for the plan sponsor to make, to which courts should defer.

Id. at 19a.

But the Second Circuit, like the Treasury Department, disagreed with PwC's contention that a plan sponsor's discretion is utterly unfettered. The statute "does not confer boundless discretion to select *any* point in or measure of time" and pronounce that it is the "normal retirement age" under the plan merely because the sponsor declares that to be so.

---

itative pronouncement of what the statute means," *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 n.3 (1996) (distinguishing *Bowen v. Georgetown U. Hosp.*, 488 U.S. 204 (1988)). *See* Pet. App. 35a (Second Circuit noting that the Treasury Department's construction of the statute "reinforces our conclusion that ERISA does not permit a plan to pick any age as its normal retirement age, regardless of whether it bears any resemblance to normal retirement"); *Heinz*, 541 U.S. at 746 ("Our conclusion is confirmed by a regulation of the Internal Revenue Service (IRS) that adopts just this reading").

Id. at 20a (emphasis in original). "ERISA does not define normal retirement age as . . . simply 'the time set by the plan,' nor 'whatever age or date the plan provides,' language that Congress could easily have adopted had that been its intended meaning." *Id*. "Instead, the statute defines 'normal retirement age' [in terms of] 'the time a plan participant attains normal retirement age under the plan.' " *Id*.

The court explained that this "is no mere tautology [but] suggests that 'the time' that a plan establishes as its normal retirement age must have some reasonable relationship to the age at which participants would normally retire." *Id*. The Second Circuit pointed out the obvious flaw in PwC's (and now its amici's) argument that ERISA § 3(24)(B)(ii)'s reference to a "5th anniversary" supposedly shows that a plan's retirement age need not be normal: "That subsection only applies if the fifth anniversary is *later* than age 65—further evidence that the ages included in the statutory definition cannot be divorced from what we ordinarily think of as normal retirement." *Id*. at 24a-25a (emphasis in original).[10]

The Court of Appeals said that its interpretation of normal retirement age was bolstered by the recognition that:

---

[10] Section 3(24)(B) carves out a narrow exception that permits pension plans to postpone normal retirement age for employees hired after age 60 to their 5th anniversary of plan participation rather than age 65. The fact that the statute permits plans, in this limited circumstance, to *defer* an employee's retirement age past 65 is hardly an indication that Congress thought it was giving pension plans the authority to define normal retirement age as the date an employee works 5 years regardless of his or her age at hire.

> Treating any literal calendar age as sufficient to meet ERISA's requirements . . . produces results wholly inconsistent with the statutory scheme. If any age will do, why can't PwC set 35 as its normal retirement age? Or 25? Or 12? Setting a normal retirement age at any of these calendar ages is no more consistent with the statute than defining normal retirement age as five years of service.

Id. at 22a. "Reading the statute to permit plans to use any arbitrary age that suits the employer as a 'normal retirement age' would read that very phrase out of § 3(24)(A)." *Id.*[11]

The Second Circuit's analysis is compelling. "Plan drafters enjoy broad latitude, but they cannot write over the constraints established by federal law." *White v. Sun Life Assur. Co. of Canada*, 488 F.3d 240, 247 (4th Cir. 2007). As the Second Circuit explained in an earlier case involving another pension plan sponsor's attempt to outfox ERISA's full-value benefit payment requirement:

---

[11] Contrary to PwC's and its amici's misleading contention, a low "normal retirement age" does not favor employees. As demonstrated by the facts of this case, and as PwC admitted in its 1999 letter, what it does is thwart ERISA minimum standards that Congress imposed as a condition of the tax-exempt status afforded private pension plans that agree to provide broad-based "retirement" benefits—not mere severance benefits after 5 years on the job—because bona fide *retirement* plans "reduce pressure on the social security system." U.S. Congress Joint Committee on Taxation, JCS-9-90 at 62-63 (Mar. 22, 1990). *See also* 26 C.F.R. § 1.401(a)-1(b)(1)(i) (pension plans must be maintained primarily to provide benefits "after retirement"); 72 Fed. Reg. 28,604-28,605; Pet. App. 4a-6a.

> Employers do not have to provide pension plans, but when they do, those plans must comply with Title I of ERISA. Further, if a plan seeks the tax benefits afforded a qualified pension plan, it must comply with the requirements imposed by [Internal Revenue Code] section 401 et seq. A defined benefit pension plan, including one adopting a cash balance format, need not offer a lump-sum distribution . . ., but when it does so provide, that distribution must be the actuarial equivalent of the accrued benefit valued according to the statutory methodology. The Plan is correct that a pension benefit is defined according to the terms of the plan; but ERISA is quite explicit that those terms are circumscribed by statutory requirements and restrictions. The Plan cannot contract around the statute.

Esden, 229 F.3d at 172-73 (internal citations omitted). *Accord Berger*, 338 F.3d at 763; *AK Steel*, 484 F.3d at 410; IRS Notice 96-8, Sec. III.C, 1996 WL 17901 ("The requirements referred to in this notice apply even in the case of a cash balance plan that [purports to] defin[e] an employee's accrued benefit as an amount equal to the employee's hypothetical account balance").

B. PwC's contrary position—that Congress built an escape hatch into a definitional provision ("normal retirement age") that permits plan sponsors to opt-out of ERISA's benefit accrual and vesting standards with the mere stroke of a pen, *see* PwC 1999 letter, Cert. Opp. App. 12a-16a—is implausible. *See Morales v. TWA*, 504 U.S. 374, 386 (1992) (rejecting argument that statute contains an "utterly irrational loophole"). Statutory defini-

tions "are to be harmonized" with the substantive provisions that use the definitions. "To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-89 (1947). *See also Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42 (1944) (employer barred from defining contract terms "in a wholly unrealistic and artificial manner so as to negate the statutory purposes").

At the end of the day, it is impossible to find fault with the Court of Appeals' conclusion that "[f]ive years on the job at an accounting firm is not a normal retirement age." Pet. App. 27a.

III. THE SECOND CIRCUIT'S INTERLOCUTORY RULING IS A POOR VEHICLE FOR REVIEW

The Second Circuit's ruling is a poor vehicle for review for several reasons.

First, for sound reasons, the Court's general practice is to "await final judgment in the lower courts." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari). There is no reason to depart from that practice here. Granting review of the Second Circuit's interlocutory ruling would expend this Court's resources addressing a question that, by PwC's own account, might "become quite unimportant by reason of the final result." *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). PwC recently told the district court that invalidity of its normal retirement age does not estab-

lish that participants are entitled to recoup the benefits they claim were underpaid. According to PwC:

> Even if [normal retirement age] is age 65, the Court must still determine whether the lump sum distributions to plaintiffs understated the value of their future hypothetical interest credits. Plaintiffs have not proven, and the Court has not ruled, that the projection rate in the Plan understates the value of participants' right to earn interest credits [through age 65].

Dist. Ct. Dkt. 168 at 3.

If PwC's position were to prevail at summary judgment or trial, the Second Circuit's interlocutory ruling would become moot. Granting review at this juncture thus risks wasting this Court's resources on a question that could turn out to be irrelevant. If a final judgment does later present the same question, PwC can seek certiorari at that point. *United States v. Virginia*, 518 U.S. 515, 526 (1996) (granting review of final judgment following denial of an earlier interlocutory petition).

A second reason this case is a poor vehicle for review is that the operative facts are so extreme—a purported "normal retirement age" for accounting-firm employees after a mere 5 years on the job, regardless of age at hire—they would fail any conceivable retirement age standard the Court might devise. The only "standard" that PwC's ostensible normal retirement age would satisfy is one that says "normal retirement age" means anything the plan labels as such—in other words, the absence of any standard at all. For the reasons catalogued by the Second Cir-

cuit, and by the Treasury Department in its 2007 regulation, that interpretation of ERISA is untenable.[12]

A third reason why this case is a poor vehicle for review is that a grant and reversal of the decision below would merely result in remand to the Court of Appeals so that it could consider the two alternative bases relied upon by the district court to deny PwC's motion to dismiss. The district court held that even if 5 years on the job could be considered a "normal retirement age" under ERISA § 3(24), 29 U.S.C. § 1002(24), PwC's particular formulation—the "earlier of" age 65 or "5 years of service"—was invalid under both (i) ERISA's anti-backloading standards set forth in 29 U.S.C. § 1054(b) and 26 C.F.R. § 1.411(b)-1(b)(2)(ii)(F), and (ii) ERISA's participant notice requirements set forth in 29 U.S.C. § 1022 and 29 C.F.R. § 2520.102-3(j)(1). Pet. App. 100a-129a. PwC's failure to explain why it is likely to convince the Court of Appeals to reverse Judge Mukasey's and

---

[12] Amici's contention that the Treasury Department's interpretation is "just as inconsistent with the text and structure of the statute as the Second Circuit's standard," Amicus Br. 18, further confirms that this case is not an appropriate vehicle to address the meaning of normal retirement age. The Second Circuit's ruling does not address amici's dissatisfaction with the now-governing 2007 regulation, because PwC has never challenged the regulation's validity. Amici's speculation that there might still be litigation about the meaning of normal retirement age under pre-2007 law is belied by the fact that neither PwC nor its amici have identified a single active case involving either the pre-2007 standards or the 2007 regulations that have now been in force for more than 8 years. The applicable statute of limitations in the Second Circuit is 6 years. *See* Dist. Ct. Dkt. 23 at 30.

Judge Oetken's alternative grounds for finding the plan's "normal retirement age" invalid provides an independent basis for denying the petition.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Julia Penny Clark
Counsel of Record
Bredhoff & Kaiser, PLLC
805 Fifteenth Street, NW
Washington, DC 20005
(202) 842-2600
jpclark@bredhoff.com

Eli Gottesdiener
Gottesdiener Law Firm, PLLC
498 7th Street
Brooklyn, New York 11215
(718) 788-1500
eli@gottesdienerlaw.com

Counsel for Respondents

APPENDIX A

LEXSTAT 1999 TNT 222-20

Copyright © 1999 Tax Analysts
Tax Notes Today

NOVEMBER 18, 1999 THURSDAY

DEPARTMENT: Official Announcements, Notices, and News Releases; Treasury Tax Correspondence

CITE: *1999 TNT 222-20*

LENGTH: 3843 words

HEADLINE: 1999 TNT 222-20 BLAME FOR CASH BALANCE PLAN CONTROVERSY BELONGS WITH IRS GUIDANCE, PricewaterhouseCOOPERS SAYS. (Section 411—Minimum Vesting;) (Release Date: SEPTEMBER 30, 1999) (Doc 1999-36542 (8 original pages))

CODE: *Section 411*—Minimum Vesting;
Section 414(j)—Defined Benefit Plans

ABSTRACT: Ira Cohen of PricewaterhouseCoopers LLP, Teaneck, N.J., has placed the blame for the controversy over cash balance plans on pension guidance issued by the IRS and Treasury.

SUMMARY: Ira Cohen of PricewaterhouseCoopers LLP, Teaneck, N.J., has placed the blame for the controversy over cash balance plans on pension guidance issued by the IRS and Treasury. Cohen argues that IRS guidance has created a "whipsaw effect" that "perversely" causes cash balance participants to receive earnings credits below market rates. To avoid that effect, cash balance plans use a retirement age

that is below the actual typical retirement age to determine plan benefits. If the IRS and Treasury want to eliminate the controversy over cash balance plans, he says, they should eliminate the "whipsaw effect."

AUTHOR: Cohen, Ira
PricewaterhouseCoopers LLP

GEOGRAPHIC: United States

INDEX: pension plans, vesting standards, minimum; pension plans, benefits, defined

REFERENCES: Subject Area:
Individual income taxation;
Benefits and pensions
Cross Reference:
For a summary of IR-1999-79, see Tax Notes, Oct. 25, 1999, p. 449; for the full text, see *1999 TNT 202-17*, Doc 1999-33676 (1 original page), or H&D, Oct. 20, 1999, p. 707.

TEXT:

Release Date: SEPTEMBER 30, 1999

September 30, 1999

Mr. Charles O. Rossotti
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.,
Room 3000
Washington, D.C. 20224

Mr. Jonathan Talisman
Deputy Assistant Secretary for Tax Policy
U.S. Department of The Treasury
Main Treasury, Office of the Assistant Secretary
for Tax Policy
1500 Pennsylvania Avenue, N.W.
Room 1334
Washington, D.C. 20020

Dear Commissioner Rossotti and Mr. Talisman:

[1] I am writing to you to explain why one element of the current controversy over cash balance plans—a low normal retirement age in a qualified defined benefit plan,—has been a necessary result of poor rulemaking by the Treasury Department and is not a devious attempt by taxpayers to circumvent reasonable rules. (By a low normal retirement age, I mean a retirement age that is defined in the plan document that is well below that actual typical retirement age—the low retirement age might be as low as the age at five years of participation in the plan.) I urge you to consider the merits of the low normal retirement age in this context—as a hero

rather than a villain. If the IRS eliminates the use of the low normal retirement age, the IRS should also revise Notice 96-8 to correct the pension policy disaster fostered by that Notice.

I. The Whipsaw Effect

[2] The policy problem created by the Treasury Department and IRS regulations has to do with the dreaded "whipsaw effect" and rules requiring payment of minimum lump sums from qualified defined benefit plans that offer the lump sum form of distribution. Review of the minimum lump sum rules under *section 417(e) of the Internal Revenue Code* of 1986, as amended (the "Code") and the guidance relating to the "whipsaw effect" will be helpful in fully understanding the problem.

A. IRS Rules Regarding Minimum Lump Sums

[3] Let's briefly review the economic conditions prevailing when the minimum lump sum rules were first created. In the late 1970's and early 1980's, interest rates were at an all time high, often as high as 15%. In this time of high interest rates, employers frequently terminated qualified defined benefit plans with surplus assets to gain access to the surplus. The high interest rates had the effect of inflating the amount available for reversion, because pension liabilities are generally calculated as if the liability were due when the plan participants retire—some time in the future. If a plan terminates today, the present value of that future liability in a high interest rate environment is relatively small. Therefore, when plans terminate in a high interest rate environment, plan assets required to satisfy liabilities to plan partici-

pants are relatively smaller, increasing the plan assets available for reversion.

[4] On plan termination, benefits may be settled either by purchasing an annuity contract or paying a lump sum. In the era of abnormally high interest rates, like 15% per annum, the surplus reverting to the employer upon plan termination was significantly larger if lump sums were paid than if annuities were purchased. (This resulted because the price of annuity contracts reflected the fact that annuity payments commence some time in the future, so the present value discounting required when lump sums were paid would not occur or would be performed over a shorter period of time.) Indeed, some oversight committee testimony in that era showed that some companies wanted to maximize their surplus badly enough to provide their executives with an additional bonus depending on the percentage of the executives' subordinate employees who could be induced to take a lump sum on plan termination. Plan participants, like most small investors, were typically unable to obtain those high interest rates in savings accounts or purchases of debt instruments. Consequently, participants electing lump sums received less long-term economic value than those electing annuities.

[5] Congress sought to change this result by defining minimum lump sums in terms of a maximum interest rate, so that the effect of present valuing the pension due at retirement age would be regulated by adding *Section 417(e) of the Code*. *Section 417(e)* was modified several times. At present, *Section 417(e)* states:

. . . . "(3) Determination of present value.

(A) In general.

(i) Present Value. Except as provided in subparagraph, for purposes of paragraphs (1) and (2), the present value shall not be less than the present value calculated by using the applicable mortality table and the applicable interest rate.

(ii) Definitions. For purposes of clause (i)—

(I) Applicable mortality table. The term "applicable mortality table" means the table prescribed by the Secretary. Such table shall be based on the prevailing commissioners' standard table (described in *section 807(d)(5)(A)*) used to determine reserves for group annuity contracts issued on the date as of which present value is being determined (without regard to any other subparagraph of *section 807(d)(5)*).

(II) Applicable interest rate. The term "applicable interest rate" means the annual rate of interest on 30 year Treasury securities for the month before the date of distribution or such other time as the Secretary may by regulations prescribe."

[6] The Treasury Regulations (the "Regulations") implementing the minimum lump sum legislation state that that lump sum may never be less than the present value of the annuity payable at a participant's normal retirement date at a mandated interest rate. *Section 1.417(e)-1(d)(I) of the Regulations* states:

. . . . "The present value of any optional form of benefit cannot be less than the present value of the

normal retirement benefit determined in accordance with the preceding sentence". . . .

[7] This regulatory requirement is neither mandated nor suggested by the law or the legislative history. In fact, it ignores a key element of the problem the rule was designed to address. Participants in terminating plans are allowed to take annuities or lump sums IMMEDIATELY UPON PLAN TERMINATION, even if they are still employed (if the plan design allows). The rule does, however, represent a vital regulatory step hurling cash balance plans into the jaws of the dreaded "whipsaw effect." As we will see, absent this requirement, the "whipsaw effect" would be eliminated because a plan could define the lump sum as the present value of the immediate annuity—a more accurate reflection of the design options available to plan sponsors in terminating and ongoing plans.

D. Cash Balance Plans and the "Whipsaw Effect"

[8] In simple economic terms, a cash balance plan provides a benefit in the form of an account. This notional account is credited with pay credits each year and is adjusted periodically according to an earnings index. This earnings rate is usually a predetermined independent index (such as 5-year Treasury bills or the S&P 500), or the earnings rate may be a fixed interest rate such as 5%; in some designs, participants may choose among different earnings indices which mimic actual investments such as those available in the plan sponsor's 401(k) plan. Cash balance plans generally offer a lump sum and an immediate annuity upon termination of employ-

ment, and our experience with cash balance plans suggests that nearly all participants will take the lump sum form of distribution.

[9] Because the fundamental benefit is an account balance, these plans—unlike traditional defined benefit plans—should not save the employer money (at times of higher interest rates) when the employee takes a lump sum. After all, the account should be the account regardless of the interest rate. However, that elegant equation—the account equals the account—is not in the IRS's current mathematical repertoire.

[10] The IRS has created the "whipsaw problem," on the basis of its regulations relating to minimum lump sums. Because these regulations mandate that the minimum lump sum relates to the benefit at normal retirement age, the IRS required cash balance plans [to] develop a normal retirement age annuity benefit by projecting the account balance to normal retirement age using an interest rate reflective of the investment adjustments (the "Projection Rate"), then converting that amount to an annuity. Then, in order to comply with the minimum lump sum rules, that benefit at normal retirement age needs to be discounted to the benefit commencement date. If the projection rate is greater than the discount rate, the plan could be "whipsawed" into paying a lump sum that is greater than a participant's account. Although seemingly reasonable when viewed separately, the minimum lump sum rate and the Projection Rate therefore combine to create the "Whipsaw Effect." This phenomenon was described in Notice 96-8.

[11] However, under that Notice, the Projection Rate to be used is not defined, nor is it defined elsewhere in any applicable IRS authority. Reasonable people can differ as to what Projection Rate is appropriate—particularly for those that are adjusted according to an equity-based index, such as the Dow Jones Industrial Average. The example below illustrates the Whipsaw Effect. Consider two participants A and B, both age 40, whose accounts earn 4%, a submarket rate, and 8%, a market rate, respectively. Also assume that the discount rate for minimum lump sums under *section 417(e)* is 6%. Assume A and B each have $ 1,000 in their accounts.

	A	B
1) Account Balance—Beginning of year	$ 1,000	$ 1,000
2) Investment Credit	4%	8%
3) Account Balance—End of Year	$ 1,040	$ 1,080
4) Years to age 65	24	24
5) Line 3 projected to age 65	$ 2,666	$ 6,848
6) Present Value of (5) at	$ 658	$ 1,691
7) Lump sum Greater of (3/or/6)	$ 1,040	$ 1,691

C. Impact of the Whipsaw Effect

[12] In the above example, the employer would like to provide the account balance as improved for earnings ($ 1,040 for A and $ 1,080 for B). Because the employer had the audacity to provide B with an earnings

rate that better reflected the market, the minimum lump sum increased from $ 1,080, which was all that was promised, to $ 1,691 (a 57% increase). Consequently, employers, unwilling to be gouged by the relentless teeth of the Whipsaw, provide less than a market rate of return to employee accounts. Do these rules benefit anyone? The IRS rules go out of their way to severely punish employers who credit true market related investment adjustments. These IRS rules truly assure that no good deed goes unpunished.

D. Some Conclusions Regarding the Whipsaw Effect

[13] This discussion is meant to suggest that because cash balance plans do not benefit in high interest rate environments by offering lump sums in the form of accounts, the law requiring minimum lump sums has no meaning in cash balance plans. Application of the minimum lump sum rate to lump sum distributions from cash balance plans therefore makes no sense in light of the legislative background. The IRS rules are like a solution hunting for a problem.

[14] The major problem inherent in the Whipsaw Effect is that the IRS pigeonholes cash balance plans in a manner that is fundamentally inconsistent with their basic design or rational pension policy. In the case of a traditional pension plan, an annuity is promised. If a lump sum is provided and if the amount of the lump sum is below market equivalence, the employer or the plan realizes profit on every such lump sum election. Thus employers have a financial interest to encourage lump sums. Employees are not actuaries. They rarely seek actuarial advice. In a high

interest rate environment in the absence of protective legislation, many would nonetheless take an inferior lump sum. As stated earlier, Congress passed the minimum lump sum law to avoid that situation.

[15] In the case of cash balance plans where a lump sum is the fundamental promise, the economics are reversed. Notice 96-8 first operates to reduce the earnings credit by applying the minimum lump sum rules in a way that does not acknowledge that the promise to employees in a cash balance plan is essentially different from the promise in a traditional defined benefit plan. Notice 96-8 also provides that a cash balance plan cannot subsidize the rates at which the account is converted to an annuity (to avoid an end-run around the rules that create the whipsaw problem). Thus rules designed to increase benefits in the traditional defined benefit plan tend to depress benefits in cash balance plans. Thus the rules tend to reduce employer costs in a cash balance plan at the expense of employee benefits. Although some employers may enjoy that result, many employers would prefer to credit a greater rate of return. What kind of policy precludes market rates of return from being applied to cash balance accounts or reducing the amount that may be paid as annuities? It is hard to explain such a policy.

[16] The IRS, however, would contend that its position is sound in that it requires the same mathematical relationship of annuity pensions to lump sum distributions in all type of defined benefit plans. Measured by that yardstick, the IRS is absolutely correct. This reasoning, however, is analogous to treating a nosebleed of a person by firmly applying a tour-

niquet around that person's neck. It works. The bleeding will stop. But like the IRS rules, the side effects are most unpleasant.

II. The Low Normal Retirement Age

[17] Sir Isaac Newton's third law of motion states that for every action there is an opposite and equal reaction. The IRS regulations needlessly created the Whipsaw Effect (the action). The Whipsaw Effect, however, disappears once a participant reaches his or her normal retirement age (because there is no longer a need to project into the future—the minimum lump sum rules require projection only until normal retirement age). Interestingly, the logical reaction to the IRS's action is to reduce the normal retirement age (the reaction) because the Whipsaw Effect would disappear at that point, Indeed, most cash balance plans with a low normal retirement age do provide earnings credits based on equity indices. Our belief is that the Whipsaw Effect should not be protected by legislation or further IRS guidance because the low normal retirement age, created by ERISA, /1/ should move the ever grinding teeth of the Whipsaw Effect away from harming plans and their participants.

[18] Rumors abound that the IRS is contemplating adopting rules that will preclude low normal retirement ages. Any such rules would, in our opinion, require legislation. The IRS simply does not have the authority to eliminate the low normal retirement age.

[19] *Section 411(a)(8) of the Internal Revenue Code* as added by ERISA defines the normal retire-

ment age as the earlier of (1) the time a plan participant attains the normal retirement age under the plan and (2) the later of age 65 or the 5th anniversary of plan participation. Clearly, Clause 1 permits a plan to define the normal retirement age as low as it pleases.

[20] *Revenue Ruling 78-120* permitting unrestricted use of low normal retirement ages was adopted contemporaneously with the ERISA regulations. It clearly permits the use of a low normal retirement age, based on *Section 411(a)(8) of the Code*.

III. Recommendation: IRS Elimination of the Whipsaw

[21] The IRS has the authority to eliminate the "Whipsaw Effect" by use of logic instead of blindly following technical rote in a model that the IRS itself created.

[22] The Congress provided an interest rate that must be used in computing minimum lump sums. What does that signify? If a participant received the lump sum, invested the distribution at the rate specified and withdrew assets ratably in equal installments, and if the participant was considerate enough to die precisely where the mortality table indicates, then the lump sum would accumulate sufficient funds to provide the precise annuity. To reach this conclusion, Congress concluded that this specified minimum lump sum interest rate is the rate of return participants are likely on average to obtain on a long-term investment of amounts received in the lump sum distribution. Otherwise, there would be no actuarial equivalence. This assumes that employees receiving

lump sums would, of course, have unlimited access to investment markets.

[23] Cash balance plans, however, either with or without investment choice, generally limit participants' abilities to obtain market rate earnings credits prior to the time they take a final distribution. Any limitation on rates of earnings credits available in a cash balance plan would result in lower investment returns than would otherwise be possible, not raise them. Thus as long as the available earnings credit rates do not exceed investment grade rates, the Whipsaw Effect could be eliminated by assuming that the Projected Rate is equal to the minimum lump sum rate. The IRS should issue guidance updating Notice 96-8 that articulates this principle; then plan sponsors would not be required to rely on a low normal retirement age to implement what is fundamentally sound pension policy.

IV. The Law Flaw in the Anti-Backloading Rules

[24] The IRS may be concerned about the use of low normal retirement ages for another reason. The rules against "backloading" the accrual of benefits in a defined benefit plan apply only to the accrual of benefits up to a participant's "normal retirement age." These rules are designed to prevent plans from providing for the accrual of most of a participant's benefits later in his or her career, thereby circumventing the minimum vesting rules.

[25] The anti-backloading rules came into the law in 1974 as part of the minimum vesting standards. Under the minimum vesting standards, a participant must vest in a percentage of his or her benefit no less

rapidly than under one of several statutory vesting schedules. Under the minimum vesting standards, a person's vested benefit is the product of (1) the benefit earned under the plan (the "accrued benefit") and (2) the vesting percentage. If an employer did not want to provide early vesting, the employer could provide negligible accruals until the point that employer desires to provide vesting; after all vesting 100% [] in an accrued benefit of zero is not different from not vesting at all.

[26] The fundamental problem was accruing large amounts in later years relative to small amounts in earlier years ("Backloading"). Therefore, Congress provided a floor of protection by enacting the Anti-Backloading Rules. The floor, however, was flawed. The Anti-Backloading Rules provide protection against backloading for the period from plan entry to the normal retirement age. As a matter of law, benefits accrued subsequent to the normal retirement age are not subject to anti-backloading requirements (the "Law Flaw"). This flaw is clearly undesirable, but will not be cured by trying to eliminate the low normal retirement age. The Law Flaw will still exist as applied to benefits accruing after a "normal" normal retirement age.

[27] The Law Flaw has existed for many years, but has not received significant attention until recently. The spotlight on the Law Flaw is likely to mean that the Law Flaw will be exploited in previously unimagined ways, even if the use of the low normal retirement age is inhibited through new IRS guidance. As a result, we would recommend legislation to fix the Law Flaw. Such legislation would essentially limit post-

normal retirement age accrual rates to some reasonable percentage of pre-normal retirement age accrual rates. With such legislation in place, the low normal retirement age would be incapable of manipulation as a means of avoiding the Anti- Backloading Rules.

V. Conclusions

[28] The IRS has needlessly created the Whipsaw Effect, which perversely causes cash balance participants to receive earnings credits below market rates. The IRS could eliminate the Whipsaw Effect in several different ways, but until such time as the IRS does so, the low normal retirement age avoids the Whipsaw Effect. The IRS may be thinking about changing its position on low normal retirement ages, thereby strengthening the Whipsaw Effect. The IRS does not have authority to change the definition in the statute, If administratively, however, the IRS were to be successful, then participants in cash balance plans will receive less than a market return because of the IRS-created Whipsaw Effect. It is only through the strength and wisdom of our hero in this saga (the low normal retirement age) that the pension policy dragon (the Whipsaw Effect) created by the IRS has been foiled. If the IRS decides to kill off our hero, it should slay the dragon as well—otherwise, it will be inhibiting the development of the only type of qualified defined benefit plan that provides a reasonable alternative to a private pension system that is dominated by the 401(k) plan.

Sincerely,

Ira Cohen
PricewaterhouseCoopers LLP
Teaneck, NJ