

## Piper Pension & Profit Sharing

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CC:PA:LPD:DRU (Notice 2007-8)

Room 5203

Internal Revenue Service

POB 7604

Ben Franklin Station

Washington, D.C. 20044

**RE: Comments on Code Section 401(a)(36) and Proposed Rules Regarding  
Distributions from a Pension Plan under a Phased Retirement Program**

I appreciate this opportunity to provide comments regarding possible guidance under Code section 401(a)(36) and the proposed regulations regarding distributions from a pension plan under a phased retirement program.

I am owner and chief actuary of Piper Pension & Profit Sharing, an actuarial consulting and pension and profit sharing administration firm based in Culver City, California. We provide administration and actuarial services to approximately 300 clients who are small businesses and provide actuarial services to approximately 300 more small businesses who are clients of other administration firms. I was a member of the Board of Directors of the American Society of Pension Professionals and Actuaries, and helped to write many of their comment letters during the period when I chaired a subcommittee of ASPPA's Government Affairs Committee. However, this letter is not written on behalf of ASPPA but is instead written on behalf of my own small business clients and their employees.

**In-Service Distributions at age 62**

Notice 2007-8 asks whether an in-service distribution of a benefit to a participant who has attained age 62 but who has not attained normal retirement age be limited to no greater than the actuarial equivalent of the benefit to which the participant would be entitled at Normal Retirement Age or should subsidies be included.

I would say that lump sum subsidies should be included but not early retirement type subsidies in any "Code section 401(a)(36)" benefits. Otherwise there could arise a situation in which the Code section 401(a)(36) benefit is supposedly worth more than the actual benefit to which the participant is eventually due at actual retirement. The regulations should be generous to the participant but not at the possible expense of the other participants who must also be paid from the plan's assets. It is important to realize that the actual benefits that an employee eventually receives may or may not include the early retirement subsidy. For example, if the employee continues to work until Normal Retirement Age, then clearly he or she will not receive an early retirement subsidy. It would be

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inconceivable then for that non-existent subsidy to have already been paid at age 62. It would be just like the defined benefit pension plan paying plant closing benefits when the plant never ends up being closed.

## **Phased Retirement Regulations**

Notice 2007-8 asks whether final regulations permitting in-service distributions should be issued, in light of the ability of plans to permit in-service distributions after age 62 pursuant to Code section 401(a)(36).

I would say, no, final regulations permitting in-service distributions should *not* be issued. The major part of the proposed regulations are now moot due to code section 401(a)(36). The minor part that engaged in “clarifying that a plan’s normal retirement age cannot be set so low as to be a subterfuge for avoiding the requirements of Code section 401”, in its present form, appears to violate ERISA and current rules defining normal retirement age. The Service received many strong comments regarding this last issue and it is unnecessary to repeat them here. In addition, the major reason for many of the abnormal Normal Retirement Ages was to avoid the “whipsaw” caused by the application of the Code section 417(e) interest rates. Since Applicable Plans no longer have to worry about “whipsaw”, it is likely that few Applicable Plans will have abnormal Normal Retirement Ages. As many cash balance plans are converted to Applicable Plans, I suspect that they, too, will be amended to have more normal Normal Retirement Ages.

## **Conclusion**

It is in the interest of all parties to help defined benefit pension plans by making them as flexible to employee and employer choice as possible. Without sufficient choice within the defined benefit pension plan rules, employees and employers will choose 401(k) plans instead. Code section 401(a)(36) provides the right kind of flexibility and the Service should propose any rules it believes necessary to enhance that flexibility to make Code section 401(a)(36) benefits palatable to employees and employers and yet protect the interests of participants and beneficiaries.

If you have any questions, please feel free to call.

Sincerely,

Kurt F. Piper, M.A.A.A., A.S.A., M.S.P.A., C.O.P.A.  
Owner & Chief Actuary