August 31, 2017

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Mr. Nicholas Fraser
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Dear Ms. Ahmed and Mr. Fraser:

On behalf of the American Benefits Council (the "Council") and the Committee on Investment of Employee Benefit Assets ("CIEBA"), we are writing with respect to the regulation that the Treasury Department sent to the Office of Information and Regulatory Affairs ("OIRA") on August 9 to update the mortality tables for purposes of the pension rules, including funding and benefit restrictions. It is our understanding that these regulations will also serve as the basis for follow-up Treasury guidance on valuing lump sum distributions under pension plans.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

CIEBA members are the chief investment officers of more than 100 of the Fortune 500 companies who individually manage and administer Employee Retirement Income Security Act ("ERISA") - governed corporate retirement plan assets. CIEBA members voluntarily sponsor plans and manage as fiduciaries almost $2 trillion of retirement assets on behalf of 15 million participants, representing a very significant portion of the largest private defined benefit plans in the US.

We strongly support the effort to update the mortality table – i.e., the statutory applicable mortality table -- to reflect the evidence of U.S. defined benefit plan participants' somewhat longer life expectancies. As reflected in our prior submissions and discussions with Treasury, we are committed to contributing constructively to this process. We view this letter as a continuation of our constructive dialogue with Treasury

and the Administration. It is in everyone's common interest to have a mortality table that is as accurate as possible and implemented in a manner that is fair and workable, for both administrators of plans and those employees who will receive plan benefits.

In that regard, as discussed at a recent meeting on August 23, 2017, we and our members have significant concerns regarding the rulemaking process with respect to the final mortality regulation, and we believe that our suggestions will improve the ultimate product from all perspectives.

SUMMARY

- Because, contrary to Executive Orders 12866 and 13563, no economic analysis was included in the proposed regulation for public comment, the regulation needs to be re-proposed.
- Because the proposed regulation contained no economic analysis, the finalization of the regulation without re-proposal would be inconsistent with the Administrative Procedure Act.
- The statutory "deadline" of January 1, 2018 is not a justification for committing regulatory errors, either substantively or procedurally. This is especially true in light of the longstanding Treasury and IRS precedent in taking appropriate additional time beyond statutory deadlines, particularly regarding the mortality tables, when rushing to meet statutory deadlines would cause unintended problems for employees and employers.
- A thorough economic analysis is needed, with a focus on at least these four major issues:
    - The need for an 18-month deferred effective date.
    - A review of the speculative assumption that mortality will improve on average 1% indefinitely.
    - The introduction of unprecedented volatility into the mortality tables.
    - The erroneous assumption that Treasury must rely on tables prepared by the Society of Actuaries given that an expanded reliance on other sources is statutorily permitted and very much warranted from a practical perspective.

  There is a need for an announcement immediately that the new mortality tables will not apply for plan years beginning in 2018.
- Plan participants will be adversely affected by the new mortality tables in many ways, which also warrants further analysis.
- The two regulations that are to be repealed to offset the cost of this regulation are required to be identified when the mortality regulation is finalized, and should benefit the plan sponsors that bear the cost of this regulation.

DISCUSSION

Because, contrary to Executive Orders 12866 and 13563, no economic analysis was included in the proposed regulation for public comment, the regulation needs to be re-proposed

In general. The proposed mortality tables, published on December 29, 2016, stated as follows:

> Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and affirmed by Executive Order 13563. Therefore, a regulatory assessment is not required.

However, as confirmed on the OIRA website, the proposed mortality table was in fact subject to Executive Order 12866 as an economically significant regulation. Accordingly, a cost/benefit analysis was required in connection with the proposed regulations, so that the public could comment on that analysis. In the absence of a cost-benefit analysis, the proposed regulation was not in compliance with Executive Order 12866. On those grounds, the proposed regulation should be withdrawn and a compliant proposed regulation should be issued.

The absence of an economic analysis is not just a harmless error. If the proposed regulations are not withdrawn and the regulations are published as final, the public would never have had any chance to comment on any economic analysis. This is directly contradictory to the goals of OIRA and the clear directives contained in the Executive Orders governing OIRA, such as Executive Order 13563:

> Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

In this case, if the mortality regulation is simply finalized, there would no "public participation" in the economic analysis and there would be no "open exchange of information and perspectives" regarding the analysis. Considering the enormous economic issues at stake in this regulation (as discussed below), the lack of a proposed economic analysis cannot be corrected without re-proposing the regulation in order to comply with the applicable Executive Orders.

No exception for "emergencies." Section 6(a)(3)(D) of Executive Order 12866 addresses the application of the Order to situations where there is a looming statutory deadline (which is discussed below). This section is very clear. There is no exception that would allow noncompliance with the Order. All of the Order's rules apply, but on an expedited basis. Here, the Order's rules were not complied with, despite there being more than ample time – almost 10 years -- during which there could have been compliance with the Order's rules.

Because the proposed regulation contained no economic analysis, the finalization of the regulation without re-proposal would be a violation of the Administrative Procedure Act

Application of notice and comment requirements. The regulation is clearly subject to the notice and comment requirements of the Administrative Procedure Act ("APA") because it is a legislative rule, not an interpretative rule exempt from notice and comment under APA section 553(b). In the leading case on the subject, the D.C. Circuit has opined that an agency rule's status as a "legislative" rule turns on "the prior existence or non-existence of legal duties and rights."[1] In other words, an interpretative rule interprets a statute that applies and is enforceable without regard to the existence of the regulation. Here, without the regulation, there are no new mortality regulations to apply or enforce. Moreover, Treasury was given very substantial latitude in drafting the new mortality tables, further underscoring the fact that the regulations are legislative, not interpretative.

Notice and comment requirements. In order for Treasury to conduct a valid rulemaking, APA section 553(b) requires Treasury to give notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved." This notice requirement is a fundamental pillar of a fair and thoughtful rulemaking, and courts interpreting section 553(b) of the APA have concluded that a mere recitation of the proposed regulation, by itself, does not satisfy the type of notice contemplated by the APA. Specifically, courts considering the APA's notice requirement have indicated that agencies are expected to disclose the data on which they have relied in proposing a new rule, "so that regulated parties can comment on that data and participate meaningfully in the rulemaking process."[2]

Without meaningful public participation, a regulator cannot validly exercise the regulatory authority that has been delegated to it by Congress. And as the Third Circuit Court of Appeals has explained, the APA's notice standard hinges on "whether the notice given was sufficient to fairly apprise interested parties of all significant subjects and issues involved."[3]

Because Treasury did not include an economic analysis as part of its notice of proposed rulemaking, and it has not yet made any economic analysis available for public comment, the mortality table rulemaking process has not satisfied the APA's crucial notice requirements. Moreover, the mortality tables will not be valid under the APA until the economic analysis conducted and considered by Treasury has been made available to the public and scrutinized during a reasonable public comment period.

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[1] Am. Min. Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1110 (D.C. Cir. 1993).

[2] Kristin E. Hickman & Richard J. Pierce, Jr., Federal Administrative Law: Cases and Materials 413 (Foundation Press 2010).

[3] NVE, Inc. v. Dept. of Health and Human Services, 436 F.3d 182, 191 (3d Cir. 2006).

The leading judicial opinion considering which information must be disclosed under the APA as part of a valid notice and comment rulemaking is the case of *Portland Cement Association v. Ruckelshaus*. In that opinion, the D.C. Circuit held that an "orderly rulemaking" requires regulators to disclose the basis for any rule "***at the time of issuance***" of the proposed regulation or "if this is not feasible," the regulator should disclose such information "***as it becomes available***."[4] Since *Portland Cement* was decided in 1973, courts have repeatedly reaffirmed this position and explained that the APA's notice provisions require the disclosure of information that is critical to an agency's decision making process – either as part of the notice of proposed rulemaking or as such information is discovered or developed by the agency promulgating a new standard.

Based on these standards, Treasury cannot satisfy the APA's notice and comment procedures until the public has had an opportunity to comment on the economic analysis that Treasury must produce in connection with its revised mortality tables. In the absence of an additional comment period for interested parties to weigh in on Treasury's economic analysis, it would be hard to argue that Treasury has satisfied the APA's notice requirements.

Good cause exception not applicable. There is an exception from notice and comment "when the agency for good cause finds . . . that notice and comment and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[5] The argument would be that in order to meet the statutory deadline, Treasury no longer has the time to issue a proposed economic analysis, and thus notice and comment on the economic analysis is not required.

The courts, however, have narrowly construed the good cause exception. As the Congressional Research Service has noted in its report on the subject, an approaching deadline or emergency of an agency's own creation cannot constitute good cause to dispense with the APA's notice-and-comment procedures. *See* CONG. RESEARCH SERV., THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION 18 (2016) (citing *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004)). Generally, only an agency's diligent response to unforeseen events will justify such a departure from the notice and comment rulemaking process.

In the case of the mortality regulation, Treasury has had plenty of time to use the notice and comment process. Under the case law described above (which we would be happy to provide in more detail), an agency cannot wait until shortly before a deadline

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[4] 486 F.2d 375, 394 (D.C. Cir. 1973) (emphasis added).

[5] 5 U.S.C. §553(b)(B).

and then skip the notice and comment process simply because there is no time left to use that process.

The statutory "deadline" of January 1, 2018 is not a justification for committing regulatory errors, either substantively or procedurally. This is especially true in light of the longstanding Treasury and IRS precedent of taking appropriate additional time beyond statutory deadlines, particularly regarding the mortality tables, when rushing to meet statutory deadlines would cause unintended problems for employees and employers.

We do not agree with the argument that the rule needs to be rushed to conclusion in order to have the new mortality regulation effective as of January 1, 2018 to comply with the requirement in Code section 430(h)(3)(B) to revise the tables at least every 10 years. Interestingly, OIRA's website states that there is no legal deadline for the mortality table regulations, but for purposes of discussion, we will assume *arguendo* that there is.

In short, a statutory deadline is not a justification for noncompliance with Executive Order 12866 and the APA. Nor is a statutory deadline a justification for not analyzing the economic effect of the regulation sufficiently to ensure that damage is not being done. And a statutory deadline is not a reason to prescribe an unworkable effective date that cannot be met by many and that would cause unnecessary and unwarranted disruption to others, including participants who would receive information hurriedly assembled due to an unrealistic deadline.

A few other points bear mentioning here.

- The current time pressures did not arise from an event out of anyone's control since the statutory requirement has existed for almost 10 years.
- The industry has had a robust and very constructive dialogue with Treasury on this mortality regulation over the last three years, and has alerted Treasury in writing several times that we will need a long time between the publication date and the effective date of this regulation, as discussed in more detail below. (We have previously forwarded you some of those letters.) Treasury has done an amazing amount of work on many issues over the past several years, so this is not a criticism in any way. We simply note this to clarify that our position on the amount of time needed to implement this regulation is a longstanding position.
- In one of the Council's March 29, 2017 letters, the Council discussed at length the need for an economic analysis of the mortality regulation since it was economically significant.
- On April 13, the Council testified before the IRS regarding the need for an economic analysis since the regulation was economically significant.

Moreover, there is overwhelming precedent for Treasury doing exactly what we are recommending: ensuring that a regulation is done right and not letting a statutory deadline compel errors. In many instances, we have applauded Treasury for doing

exactly that – slowing down to ensure that things are done right both substantively and procedurally, just as we would applaud them here, especially where the impact of a rushed process may be adverse to pension plan participants making long-term financial retirement decisions.

Just a few examples of statutory deadlines not being met are set forth below:

- Section 503 of the Bipartisan Budget Act of 2015 (the "Budget Act") expressly permitted plans to use blended substitute mortality tables that are based on a combination of the regulatory tables and plan experience. ***The Budget Act change applied beginning with the 2016 plan year; on November 18, 2015, the Council wrote to Treasury to request implementation of the legislation for 2016.*** This statutory directive has not yet been implemented, even though it has a statutory deadline of January 1, 2016.
- The Pension Protection Act of 2006 required fully credible substitute mortality tables to be effective for plan years starting on or after January 1, 2008. These tables were delayed by regulation until plan years beginning on or after January 1, 2009.
- Section 645 of the Economic Growth and Tax Relief Reconciliation Act of 2001 directed the Secretary of the Treasury to issue regulations under Code section 411(d)(6) and ERISA section 204(g), no later than December 31, 2003. Final regulations were not issued, however, until August 12, 2005.[6]
- Section 326 of Title III of the USA PATRIOT Act mandated that the Treasury and other financial regulatory agencies jointly prescribe regulations to require a broad range of financial institutions to implement new identification verification procedures. The statute required the final rules to take effect by October 26, 2002, one year after the enactment of the law.
  - The final rule regulating banks, savings associations, and credit unions was not published in the Federal Register until May 9, 2003.[7]
  - Separate final rules regulating futures commission merchants,[8] broker-dealers,[9] and mutual funds[10] were also published on May 9, 2003, after the deadline imposed by the statute had passed.
- Section 941 of the Dodd-Frank Wall Street Reform and Consumer Protection Act required federal banking regulatory agencies, including Treasury's Office of the

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[6] 70 Fed. Reg. 47,109 (Aug. 12, 2005).

[7] 68 Fed. Reg. 25,089 (May 9, 2003).

[8] 68 Fed. Reg. 25,149 (May 9, 2003).

[9] 68 Fed. Reg. 25,113 (May 9, 2003).

[10] 68 Fed. Reg. 25,131 (May 9, 2003).

Comptroller of the Currency, to jointly issue final regulations on the asset-backed securitization process by 270 days after the law's enactment on July 21, 2010. A final rule was not published until December 24, 2014.[11]

- Section 503 of the Credit Card Accountability Responsibility and Disclosure Act required the Treasury to issue final regulations on prepaid access products by 270 days after the law was enacted on May 22, 2009. Regulations were not proposed until June 28, 2010.[12]
- The Tax Increase Prevention Act of 2014 directed the IRS to create and implement a voluntary PEO certification program and to begin accepting applications for the program by July 1, 2015. The law was set to take effect on January 1, 2016. Nevertheless, the IRS did not begin accepting applications for the program until July 1, 2016, a year after the statutory deadline, and PEO certifications did not become effective until January 1, 2017.[13]
- Section 8246 of the Small Business and Work Opportunity Act of 2007 amended the Code's return preparer penalty provisions, effective May 25, 2007. The IRS delayed the implementation of these provisions until 2008 to develop appropriate regulations and guidance.[14]

A thorough economic analysis is needed, with a focus on at least the following four major issues:

- **The need for an 18-month deferred effective date,**
- **A review of the unfounded assumption that mortality will improve on average 1% indefinitely,**
- **The introduction of unprecedented volatility into the mortality tables, and**
- **The erroneous assumption that Treasury must rely on tables prepared by the Society of Actuaries given that an expanded reliance on other sources is statutorily permitted and very much warranted from a practical perspective.**

These issues are discussed below.

Need for an 18-month deferred effective date

The reasons why it is so important that there be a minimum of an 18-month

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[11] 79 Fed. Reg. 77,601 (Dec. 24, 2014).

[12] 75 Fed. Reg. 36,589 (June 28, 2010).

[13] Rev. Proc. 2016-33, 2016-25 I.R.B. 1034.

[14] Notice 2007-54, 2007-2 C.B. 12.

period between the finalization of any regulations containing new mortality assumptions and the effective date of those regulations are the following:

- **Planning time needed**. An earlier effective date would almost certainly leave insufficient time between publication of the final rules and the effective date of the rules. The new assumptions in the proposed regulations would have a significant effect on plan sponsors' funding and PBGC premium obligations, increasing such 2018 obligations by well over $100 million in some cases. Changes of this magnitude have an effect on the company's entire corporate budget, disrupting or cancelling corporate growth initiatives and potentially having a deleterious impact on jobs. Accordingly, plan sponsors will generally need at least 18 months prior to the effective date to adjust business plans in order to take the new assumptions into account.
    - **NOTE**: This budgeting issue is far more acute for companies facing financial challenges. For such companies, a suddenly arising liability like this can create enormous business planning problems, as there likely would be very little cash available to address the new liability.

- **Inability to use substitute mortality tables under a January 1, 2018 effective date.** Without an extension of the transition period well beyond January 1, 2018, under the regulations, plan sponsors wishing to use a substitute mortality table for the first year of the new tables will be effectively precluded from doing so until ***after*** the effective date. The process to develop the needed experience studies will take months, likely followed by several more months of review by the Service, and possibly further followed by Service-required changes to the substitute table. All of this needs to be done far in advance of the beginning of the year so that companies can reasonably budget and make any changes to critical corporate initiatives that result from increased funding obligations.

  If there is a 2018 effective date, the above process cannot feasibly be completed until well into 2018, long past the date for quarterly contributions for 2018 and the date that business plans for 2018 must be finalized. This is not a workable schedule. In effect, for planning purposes, the timing would force employers to forego the benefits of a substitute mortality table that Congress required Treasury and the Service to effectuate *back in 2016*.

  This is true regardless of whether there is a regulatory mechanism for making the substitute tables retroactive to the beginning of 2018. There will thus be significant uncertainty for those plan sponsors who reasonably anticipate, but cannot be certain, that they will obtain approval of plan-specific substitute mortality tables that would result in significantly lower and more appropriate contribution obligations than those produced by the general mortality tables that disregard their own plan's experience.

- **Time-consuming administrative steps needed**. As explained further below**,** significant changes to (1) administrative and pension calculation systems and (2)

valuation calculations and programs will be needed to comply with the regulations, adding to the need for an 18-month period between the regulations' finalization and effective date. The complex defined benefit plan calculations (including annuity calculations in hybrid plans), mandatory disclosures (e.g., relative value disclosures), and notices under the Code and Department of Labor regulations are painstakingly programmed into Council members' defined benefit plan administration systems and reviewed with the plan sponsor, so that the benefits and optional payment forms can be properly and fairly reviewed, and informed elections may be made by the prospective payees within the plan's applicable election period for benefits.

  - **NOTE**: These challenges may be even more problematic for small employers that lack the resources available to large companies to address complex new systems changes.
  - **NOTE**: These issues are exacerbated if the increased liability attributable to the new mortality tables triggers the application of the benefit restrictions under Internal Revenue Code section 436, which can very easily occur. These restrictions could affect the types of distributions that are permissible during the 2018 plan year, which will require new employee communications and distribution forms.

- **Service providers will not be able to handle the demands**. The overwhelming percentage of all retirement plans are calendar year plans, which would mean that all of the budgeting and administrative work described above would have to be crammed into a very short amount of time in the fall. Our service providers have expressed great skepticism that they have the capacity to perform services of this magnitude in this period of time.

- **Treasury has expressly recognized the need for more time for plans to make lump sum calculations that significantly impact participant retirees**. Under Treasury Regulation §1.417(e)-1(d)(4)(iii), calendar year plans are allowed to use the interest rates from the preceding August to make lump sum calculations for the current year, in light of the amount of work needed simply to incorporate a different interest rate into a lump sum calculation and the need to provide participant retirees with reliable information in advance of their benefit elections. If an adjustment to a wholly expected new interest rate requires four months advance notice, it is inconceivable that an adjustment to an entire new mortality table could be made in the same or less time.

As referenced above, for the large number of plans that offer lump sums and other payments subject to section 417(e) (to be addressed in follow-up guidance after finalization of the regulations), updating systems will be very time consuming, particularly considering the need to certify the systems and to review the new rules with plan sponsors. And this information will be needed very soon for participants contemplating retirement in January or February.

While our plan sponsor members have different internal protocols and schedules

for their professional services, here are the tasks, in general and greatly simplified, which our members will need to conduct, especially for defined benefit plan benefit certification.

1. Develop a project scope and change coding to meet any final regulation
2. Prepare and check test cases
3. Comply with internal peer review standards
4. Comply with external industry professional requirements (i.e., Actuarial Standards of Practice ("ASOPs"))
5. Certify that the calculation engine is complete
6. Prepare internal plan sponsor communications and, in some cases, for participants.
7. Meetings between service providers and plan sponsors' benefits experts to discuss new assumptions and participant communications.
8. Finalize plans to implement and communicate new assumptions.

This process cannot be squeezed into a short period of time in the case of very significant and complicated changes. Based on the enormous experience of our members, our view is that a minimum of eighteen months is needed between the date of finalization and the effective date of the new assumptions.

Need for an announcement immediately that the new mortality table will not apply for plan years beginning in 2018. We want to take a moment to focus on ***announcement timing,*** separate from the discussion above regarding the need for a deferred effective date.

For a variety of reasons provided above, and as we have previously indicated to Treasury and OIRA, plans have a clear practical need for at least an 18-month period between finalization of new mortality assumptions and the effective date of those assumptions. In terms of timing, the need for an immediate announcement that the new assumptions will not apply to plan years beginning in 2018 has now become urgent. Continued uncertainty will cause plans to divert resources to wasteful planning for rules that may not go into effect.

Speculative assumptions regarding future mortality improvement

There is a clear need for an economic analysis regarding any assumption regarding future mortality improvement.

Under the proposed regulations, both the generally applicable mortality tables and any substitute mortality tables must reflect the mortality improvement rates contained in the Mortality Improvement Scale MP-2016 Report ("MP-2016 Report") prepared by the Society of Actuaries ("SOA"). The MP-2016 Report includes a flat long-term mortality improvement rate of 1.0% to age 85, with linear decreases to 0.85% at age 95 and 0.0% at age 115.

As we have previously stated in comments, opinions about future rates of

mortality improvement are inherently highly speculative and a wide range of views exists among experts. Three important reasons to question the mortality improvement rates contained in the MP-2016 Report are the following:

- Historical rates of mortality improvement have shown a more significant grade-down after age 85 than are reflected in the MP-2016 Report. Although this may seem like a minor point, it has a significant effect on defined benefit plan liabilities. Mortality rates at these ages are currently high and thus liabilities change more significantly when the MP-2016 mortality improvement rates are applied.
- In contrast to the MP-2016 Report, the Social Security Administration's ("SSA") mortality improvement projections at later ages (and in general) are more in line with long-term historical observations than shorter-term trends, which are more volatile. The SSA generally uses a lower average rate of long-term improvement (with a longer convergence period but more rapid grading to long-term rates). Although the SSA's rate of improvement varies by age, it is more equivalent to using a 0.75% long-term rate of mortality improvement than the 1.0% used in the MP-2016 Report.
- The RP-2014 Mortality Tables Report was based on what has proved to be significantly overstated projections regarding mortality improvements between 2006 and 2014. Although the SOA has corrected some of these short-term overstatements through updates issued in 2015 and 2016 (though there are concerns about the 2016 correction), it has not revised the long-term 1% projected improvement rate that was determined at the same time that shorter-term improvement rates were overstated.

The proposed regulations would introduce unprecedented volatility into defined benefit plan funding and premium obligations

The downturn of the defined benefit system was not caused by the gross cost of pensions. The downturn was triggered by two factors: cost volatility and the pro-cyclical nature of funding obligations (i.e., funding obligations rise during economic downturns). The proposed regulations would introduce an unprecedented new source of volatility into funding and premium obligations, clearly meriting close economic analysis.

Under current law, between major updates, the mortality tables are updated each year in a mechanical manner that can be easily anticipated and planned for. In the preamble to the proposed regulations, Treasury announced a whole new system that would make it nearly impossible to predict the nature of future annual updates, thus introducing a major new source of volatility:

> Treasury and the IRS understand that RPEC expects to issue updated mortality improvement rates that reflect new data for mortality improvement trends for the general population on an annual basis. Treasury and the IRS expect to take those updates into account in

determining the mortality rates to be used under section 430(h)(3) for valuation dates in years after 2018.

Here is the background on the above quote. RPEC is the small group within the SOA that published the mortality studies on which the Treasury regulations are based. As noted above, when the SOA first published its study in 2014, it overestimated longevity because it overestimated improvement in mortality from 2006 to 2014. There was accordingly significant controversy over the studies. The SOA modified its original tables in 2015 to respond to the issues raised. The SOA issued a further modification in 2016 in response to the same issues, and is expected to issue a third modification in 2017. It is expected that the SOA will be issuing modifications annually in the future. These are the modifications that Treasury will be incorporating annually.

This approach, which was in the preamble to the proposed regulations and not included in the proposed regulation itself, introduces major and unprecedented volatility into the mortality tables. Plans will not be able to predict in any way what future tables will provide. It is critical that this issue be the subject of extensive economic analysis, since volatility is so harmful to business planning.

The argument that Treasury has to rely on tables prepared by the Society of Actuaries is incorrect both statutorily and practically

We understand that the argument has been made that Treasury must rely on the mortality tables prepared by the SOA because those tables were the only ones submitted to Treasury. That argument is flawed for the following reasons:

- The statute does not compel Treasury in any way to rely exclusively on SOA's studies. Internal Revenue Code section 430(h)(3)A) requires Treasury to "take into account" independent studies of mortality. However, Congress never intended Treasury to follow those studies, particularly if flaws are identified or valid concerns about the studies are raised.
- In early 2015, the Council submitted comment letters identifying flaws in the SOA studies, which have been partially corrected and are widely expected to be further corrected. Under the statute and the APA, Treasury should take into account both the SOA's tables and all comment letters submitted, including those identifying flaws in such studies.
- A brief note is warranted regarding why the SOA was the only entity to submit a study. A mortality study takes many years and thousands of person hours to complete and requires data from the entire industry. It is almost literally impossible for any other private entity to undertake a similar study. That does not mean that that study should not be examined critically for flaws.

While not directly part of the statutory and regulatory process for determining the new mortality tables, public sources such as a recent *New York Times* article[15] have highlighted the uncertainty and confusion among researchers on broad mortality trends. At a minimum, these sources should be considered with respect to the critical funding and retiree benefit decisions that will need to be made based on new mortality tables.

Plan participants can be adversely affected by the new mortality tables in many ways, which warrants further analysis

It is clear that updated mortality tables will result in larger lump sum distributions to defined benefit plan participants. So, some may contend that to defer the effective date of the mortality regulations is harmful to participants and that accordingly deferral of the effective date is wrong. We take this issue very seriously, as the employees of our members are the lifeblood of our members' businesses. Here are our thoughts on this issue.

- **The objective is to get the mortality tables right; inaccurate tables hurt participants in many ways.** If the new mortality tables inaccurately overvalue lump sums, then the pension plan overpays current benefits, effectively inappropriately allocating benefits to one group of retirees at the potential expense of other retirees. This can also jeopardize the ability of the plan to pay benefits when due, and it can cause the employer to reduce or eliminate future benefits. And it can cause the employer to eliminate jobs. None of this should happen by reason of erroneous overpayments of benefits because of an incomplete analysis as to the accuracy of mortality tables.
- **Inaccurate mortality tables can actually deprive employees of lump sum distributions, benefit accruals, and benefit increases, and this is likely to happen in many cases.** An inaccurate mortality table can artificially increase pension liabilities, which in many cases will trigger the application of "benefit restrictions" under Code section 436, as noted above. Under Code section 436, if a plan's funded status falls below certain prescribed levels, the plan cannot pay lump sum distributions, cannot increase benefits, and cannot provide any future benefits. This is not theoretical or rare; this can happen very easily if pension liabilities are artificially inflated by inaccurate mortality tables.
- **Increases in longevity do not always result in larger benefits for participants.** Although the updated mortality tables will increase lump sum distributions, they will have the opposite effect in other situations, such as the determination of annuity equivalents under hybrid plans, where the new tables will result in reduced annuity payments.

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[15] https://www.nytimes.com/2016/12/08/health/life-expectancy-us-declines.html?mcubz=0

- **If employers do not have time to prepare helpful guidance to employees considering retirement, those employees may get insufficient help in making a critical life decision.** As you know, employee education is something our members take very seriously. Our members want to communicate clearly and simply so that employees can make critical life decisions based on the best possible information.

  If employers have insufficient time to prepare employee communications regarding the very substantial effects of a new mortality table, it is the employees who will suffer with less effective communications on this critical issue. The communications will comply with applicable law, but more is needed in crafting effective and understandable communications.

The two regulations that are to be repealed to offset the cost of this regulation are required to be identified when the mortality regulation is finalized, and should benefit the plan sponsors that bear the cost of this regulation

Identification of regulations to be repealed. The February 2 "Memorandum: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled 'Reducing Regulation and Controlling Regulatory Costs'" states: "At a minimum, the agency should identify all of the associated regulatory actions to be repealed, along with cost savings estimates, no later than the date of issuance of the corresponding new significant regulatory action."

The Memorandum provides an exception for regulations that need to be finalized in order to comply with an imminent statutory or judicial deadline. But this exception should not apply for two reasons. First, the January 30 Executive Order came out seven months ago, which is enough time to identify two regulations for repeal.

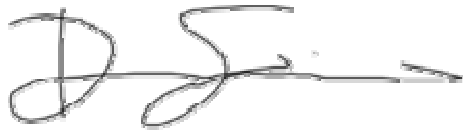
Second, as discussed above, there has been a consistent pattern regarding the mortality tables not to adhere strictly to statutory deadlines, so again this would not be a good reason to not comply with the Executive Order.

Type of regulations to be repealed. The mortality table regulation would impose enormous costs on those businesses that continue to maintain defined benefit plans, directing too many resources unnecessarily away from those companies' new investments, job growth, and other economic activities. Therefore, because the economic cost of the mortality table regulations would be borne solely by plan sponsors of defined benefit plans, we believe that the right way to implement Executive Order 13771 with respect to the mortality table regulations is to ensure that Treasury identifies offsetting regulations for repeal that would specifically ease the burdens on businesses with defined benefit plans.

We thank you for your consideration of the issues addressed in this letter.

Sincerely,

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy
American Benefits Council



Dennis Simmons
Executive Director
Committee on Investment of Employee Benefit Assets