

MEMORANDUM

TO: BOARD OF TRUSTEES

FROM: STEPHEN H. CYPEN, ESQ.

DATE: OCTOBER 10, 2008

**RE: EXTENSION OF EFFECTIVE DATE OF NORMAL
RETIREMENT AGE REGULATIONS FOR
GOVERNMENTAL PLANS**

Notice 2008-98 indicates that Internal Revenue Service and Treasury intend to extend the date by which a governmental plan must comply with final regulations on distributions from a public plan upon attainment of normal retirement age, which were published in the Federal Register on May 22, 2007. Under the extension, the 2007 final regulations will be effective for a governmental plan for plan years beginning on or after January 1, 2011. The Notice does not change the effective date of the 2007 final regulations for a plan that is not a governmental plan.

By way of background, IRC Section 411(a)(8) provides that the term "normal retirement age" means the earlier of (A) the time a plan participant attains normal retirement age under the plan or (B) the later of age 65 or the fifth anniversary of the time a plan participant commenced participation in the plan. A plan's normal retirement age is relevant for a number of purposes, including for purposes of determining the date at which a participant is eligible to receive his or her normal retirement benefit and calculating the amount of the benefit received.

Prior to being amended by the 2007 final regulations, Income Tax Regulations required a pension plan to be maintained primarily to provide systematically for payment of definitely determinable benefits after retirement. The 2007 final regulations amended the Income Tax Regulations to provide an exception to the rule that pension benefits be paid only after retirement, by permitting a pension plan to commence payment of retirement benefits to a participant after the participant has attained normal retirement age, even if the participant has not yet had a severance from employment with the employer maintaining the plan.

The 2007 final regulations require a pension plan's normal retirement age to 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. The 2007 final regulations provide that a normal retirement age of 62 or later (or age 50 or later, in case of a plan in which substantially all participants are qualified public safety employees) is deemed to satisfy this requirement, and a normal retirement age lower than 55 is

presumed not to satisfy the requirement unless the Commissioner of Internal Revenue determines otherwise on the basis of facts and circumstances. Whether a normal retirement age that is at least 55 but below 62 satisfies the requirement is based on facts and circumstances.

The 2007 final regulations are generally effective May 22, 2007, with a later effective date for governmental plans and certain collectively bargained plans. For governmental plans, the 2007 final regulations are effective for plan years beginning on or after January 1, 2009.

Notice 2007-69 pointed out that the 2007 final regulations do not contain a safe harbor or other guidance with respect to a normal retirement age conditioned on completion of a stated number of years of service, stating that a plan under which a participant's normal retirement age changes to an earlier date upon completion of a stated number of years of service typically will not satisfy the vesting or accrual rules of IRC § 411. The notice asked for comments from sponsors of plans that are not subject to requirements of IRC § 411, such as governmental plans, on whether such a plan may define normal retirement age based on years of service. Specifically, comments were requested on whether and how a pension plan with a normal retirement age conditioned on completion of a stated number of years of service satisfies the requirement in the Income Tax Regulations that a pension plan be maintained primarily to provide for payment of definitely determinable benefits after retirement or attainment of normal retirement age and how such a plan satisfies pre-ERISA vesting rules.

Internal Revenue Service and Treasury intend to amend the 2007 final regulations to change the effective date for governmental plans to plan years beginning on or after January 1, 2011. Governmental plan sponsors may rely on the notice with respect to the extension until such time as the 2007 final regulations are so amended. Notice 2008-98 will be in IRB 2008-44 (November 3, 2008).

Well, now, another two years to figure out a way to resolve this thorny problem.

If you have any questions, do not hesitate to give us a call.

SHC:jes