No.

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**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 *et seq.*, establishes a comprehensive, reticulated framework governing various aspects of employee-benefit plans, within which plan sponsors exercise broad discretion to determine what benefits to provide. Section 3(24)(A) of ERISA expressly permits a plan to determine the “normal retirement age” used to calculate certain aspects of participants’ benefits, defining “normal retirement age” in relevant part as “the time a plan participant attains normal retirement age *under the plan*.” 29 U.S.C. § 1002(24)(A) (emphasis added). Explicitly disagreeing with the Fourth and Seventh Circuits, the Second Circuit held that ERISA imposes an unwritten limitation on the “normal retirement age” a plan may prescribe, and forbids a plan from establishing a “normal retirement age” that does not bear a “reasonable relation” to the “typical” age at which the employer, “under normal circumstances,” would “reasonably expect its employees to retire” from working. The question presented is:

Whether ERISA requires that a plan’s definition of “normal retirement age” must be based on the typical age at which the employer expects the plan’s participants would retire from working.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding in this Court are named in the caption.

Michael A. Weil was a plaintiff in the district court but did not participate in the case in the court of appeals.

Neither PricewaterhouseCoopers LLP, The Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP, nor The Administrative Committee to The Retirement Benefit Accumulation Plan for Employees of Pricewaterhouse-Coopers LLP (which is no longer in existence) has any parent corporation, and no publicly held corporation owns 10 percent or more of any of their stock.

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# PETITION FOR A WRIT OF CERTIORARI

Petitioners 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 respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a) is reported at 794 F.3d 272. The district court's relevant opinion (Pet. App. 80a) is reported at 963 F. Supp. 2d 310.

## JURISDICTION

The court of appeals entered its judgment on July 23, 2015. C.A. Dkt. 138. On September 17, 2015, Justice Ginsburg extended the time for filing a petition for a writ of certiorari until November 20, 2015. No. 15A302. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced at Pet. App. 145a.

## STATEMENT

When Congress established a comprehensive federal framework governing employee-benefit plans in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, it made a conscious choice: Rather than *compel* employers to provide particular employee benefits, Congress sought to *encourage* creation of employee-benefit plans by creating a uniform legal framework that minimized uncertainty likely to deter employers from offering benefits. ERISA's core objective is to provide all stakeholders—employers, employees, and plan administrators—with clarity and predictability about their rights and obligations, while preserving employers' broad discretion concerning what benefits (if any) to offer.

The Second Circuit's decision here and the circuit conflict it concededly created undermine that objective. Expressly disagreeing with decisions of two other circuits applying the same statutory text to materially indistinguishable facts, the Second Circuit construed a provision of ERISA that explicitly confers broad discretion as imposing restrictions on employers. That interpretation of ERISA is wrong, but more importantly for present purposes, both the substance of the decision below and the resulting circuit split create precisely the uncertainty that ERISA was enacted to prevent.

At stake is a statutory term of art, "normal retirement age," that ERISA expressly defines. 29 U.S.C. § 1002(24). The Seventh and Fourth Circuits read that term, consistent with the definition's plain language, to allow employers to adopt any age up to (at least) 65. That reading makes perfect sense given the role "normal retirement age" plays in

ERISA and benefit plans. "Normal retirement age" is not defined in ERISA as a standard time when employees leave the workforce; it is instead a term of art that Congress wrote for employers to use in structuring plans and that affects various aspects of plan administration. The Second Circuit here, however, read that phrase very differently—as requiring plans' "normal retirement age" to bear a "reasonable relation" to when employers "reasonably expect" their employees will leave the workforce for good. Pet. App. 21a, 26a-27a.

Federal 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. Moreover, the Second Circuit gave virtually no guidance about what its "reasonable relation" standard means—let alone how it will apply to plans (like the plan here) covering workers in different occupations (in the same or different companies). Consequently, employers, employees, and plan administrators potentially subject to the Second Circuit's standard cannot know whether their plans' terms are valid overall; the lawfulness of a plan's "normal retirement age" now depends on where plans are sued and what age a court determines is "typical" for employees in a particular company, occupation, or industry to conclude their careers. Pet. App. 23a.

That result is untenable, especially for a federal statute written to promote certainty and predictability. This Court's intervention is warranted to restore to this important area of federal law the clarity and uniformity that Congress intended.

The petition should be granted.

1. Congress enacted ERISA to "creat[e] a comprehensive statute for the regulation of employee benefit plans." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004). ERISA does *not*, however, dictate what benefits employers must offer; indeed, "Congress did not require employers to establish benefit plans in the first place." *Conkright* v. *Frommert*, 130 S. Ct. 1640, 1648 (2010). Instead, Congress endeavored to "'induc[e] employers to offer benefits by assuring a predictable'" and "uniform" set of rules governing benefits that employers voluntarily elect to offer. *Id.* at 1649 (citation omitted).

Congress thus did not "impos[e] mandatory pension levels or methods for calculating benefits," but merely "set outer bounds on permissible accrual practices." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 512 (1981). Congress consciously permitted "total benefit levels and formulas for determining their accrual" to "vary from plan to plan" as determined by the plan sponsor. *Id.* at 513-14. And while ERISA places "outer bounds" on certain aspects of plan administration, Congress "sought 'to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans'" at all. *Conkright*, 130 S. Ct. at 1649 (citation and brackets omitted).

2. "Normal retirement age" is a term of art defined in ERISA and is used in ERISA plans. "[A] 'normal retirement age' in a pension plan does not control when employees must retire, but only when certain rights vest and how benefits are adjusted." *Fry* v. *Exelon Corp. Cash Balance Pension Plan*, 571 F.3d 644, 646-48 (7th Cir. 2009) (Easterbrook, C.J.). The phrase appears throughout ERISA in pro-

visions affecting various aspects of benefits and their administration. For example, the terms "normal retirement benefit," "accrued benefit," and "vested liabilities" are defined in terms of "normal retirement age." 29 U.S.C. § 1002(22), (23), (25). "Normal retirement age" also sets an outer limit on when benefits become "nonforfeitable," *id.* § 1053(a), and when participants are entitled to receive benefit payments, *id.* § 1056(a)(1), and is integral to calculation of benefit accrual for certain plans, *id.* § 1054(b)(1)(A)-(C).

The phrase "normal retirement age" in this term-of-art sense did not originate with ERISA, but has its roots in pre-ERISA Internal Revenue Service ("IRS") guidance concerning retirement-benefit payments made to employees who continued working for their employer (known as "in-service" distributions). *Before* ERISA's enactment, the IRS permitted "in-service" distributions to employees who reached the normal retirement age defined in the plan. Rev. Rul. 71-24, 1971-1 C.B. 114. But the IRS added a caveat: A normal retirement age could not be "lower than 65" *unless* it "represent[ed] the age at which employees customarily retire in the particular company or industry." Rev. Rul. 71-147, 1971-1 C.B. 116.

In ERISA, Congress used the term "normal retirement age," and (like the IRS) ERISA permits in-service distributions to employees who have reached that age. 29 U.S.C. § 1054(b)(1)(H)(iii). But Congress did *not* incorporate into ERISA the IRS's restriction that normal retirement ages below 65 must "represen[t]" typical practice in the company or industry. Instead, the definition Congress wrote permits plans themselves to define their "normal retirement age" as any age up to (at least) age 65 without limitation. Section 3(24) of ERISA, as amended, defines "normal retirement age" as:

> the earlier of—
>
> > (A) the time a plan participant attains normal retirement age *under the plan*, or
> >
> > (B) the later of—
> >
> > > (i) the time a plan participant attains age 65, or
> > >
> > > (ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. § 1002(24) (emphasis added).

The IRS recognized that Congress had not included the IRS's caveat prohibiting "normal retirement age[s]" below 65 unless they reflected the age at which employees typically retire. *See* Rev. Rul. 78-120, 1978-1 C.B. 117. Citing "the absence of any statutory prohibition or limitation" on normal retirement ages under 65, the IRS concluded that ERISA allows "a plan [to] specify any age that is less than 65 as the normal retirement age." *Ibid.* The IRS maintained that understanding for many years, *see*, *e.g.*, IRS Technical Advice Memorandum 8808006 (Nov. 27, 1987), including at all times relevant to this case, *see* Pet. App. 35a.[1]

[1] In a 2007 regulation, the IRS adopted a different view. 72 Fed. Reg. 28,604 (May 22, 2007), *codified in pertinent part at* 26 C.F.R. § 1.401(a)–1. As the court of appeals recognized, however, that regulation is "prospective only" and thus inapplicable here. Pet. App. 35a; 26 C.F.R. § 1.401(a)–1(b)(4) (establishing effective date of May 22, 2007 or later).

3. This case concerns a retirement plan that petitioner PricewaterhouseCoopers LLP ("PwC") offered its partners and employees (collectively, "participants"). ERISA recognizes two types of retirement plans. One type is a defined-*contribution* plan, in which each participant has an actual individual account into which contributions are made periodically and invested. The benefits the participant eventually receives are based on those contributions and any gains or losses in the value of his investments. 29 U.S.C. § 1002(34). "The familiar 401(k)" plan "is a common example of a defined contribution plan." Pet. App. 5a n.2. The second type is a defined-*benefit* plan, in which the participant is *guaranteed* a certain level of benefits (their "accrued benefits"). 29 U.S.C. § 1002(23)(A). How benefits are distributed varies, but a participant's "accrued benefit" in a defined-benefit plan is "expressed in the form of an annual benefit commencing at normal retirement age." *Ibid.*

PwC adopted a common type of plan known as a "cash-balance" plan. Pet. App. 10a. In a cash-balance plan, the employer maintains a single pool of assets, but each participant has a "hypothetical account," to which the employer makes "hypothetical 'contributions.'" *Id.* at 7a. The value of each participant's notional account is determined by those contributions and notional earnings attributed to those accounts over time (known as "interest credits"). *Ibid.* Cash-balance plans thus in some ways resemble defined-contribution plans, but are classified as defined-benefit plans. *Id.* at 6a.

PwC's plan was fully funded by contributions from PwC. Pet. App. 10a. Participants could allocate their notional account balances among several investment options, *e.g.*, a money-market fund. *Ibid.*

The plan did "not guarantee any set rate of return," but adjusted each participant's notional account based on increases or decreases in the value of her chosen investments. *Ibid.*

PwC's plan gave vested participants who left PwC the option either to keep their accrued benefits invested in the plan—where they would continue accruing interest credits—or to withdraw their funds. Pet. App. 10a. The Plan defined both the date benefits vest and "normal retirement age" as "'five (5) Years of Service.'" *Id.* at 10a-11a; *see also id.* at 141a-43a. Under these definitions, a departing plan participant whose benefits had vested, *i.e.*, who had completed five years of service, would already have reached "normal retirement age," and thus could receive benefits immediately, including as a lump sum. *Id.* at 10a-11a; C.A. App. 350-65, 633-35.

This option for immediate lump-sum distribution is not required under ERISA. Pet. App. 8a; *see Esden* v. *Bank of Boston*, 229 F.3d 154, 172-73 (2d Cir. 2000). And it can be a significant benefit for plan participants. Because payout is not *required* before a participant reaches "normal retirement age," if that age were set at (for example) 65, a plan could withhold distributing benefits until participants turn 65, which might not occur until years after the participant leaves the company. The PwC plan structure thus made a participant's vested lump-sum benefit portable when that person left PwC. The withdrawn benefits would no longer earn interest credits under the PwC plan, but the departing participant could reinvest them elsewhere.

4. Respondents are PwC plan participants who left the company after at least five years of service, and thus were vested and had also reached normal

retirement age under the plan. Pet. App. 10a. They chose to take lump-sum distributions of their accrued benefits after departing. *Id.* at 11a. They filed this class action in 2006, alleging (as relevant) that the PwC plan's "normal retirement age" violates ERISA because "five years of service [is] not a 'normal retirement age.'" *Id.* at 9a, 11a-12a; C.A. App. 218-19. Respondents argued that the plan's "normal retirement age" should be "excised," and that the statutory default "normal retirement age"—*i.e.* "age 65"—should apply instead. C.A. App. 219, 230. A "normal retirement age" of 65, they argued, would have yielded them larger lump-sum distributions, because under then-applicable benefit-calculation principles (they claimed) they were entitled to receive the value of *future* earnings. Pet. App. 11a-12a.[2]

[2] Specifically, respondents claim that, although they withdrew their accrued benefits (and so ceased to earn interest credits), their distributions should have been increased to reflect the gains they *would* have earned if they kept their funds invested in the plan. Pet. App. 7a-9a, 11a. Their claim relies on case law and IRS guidance requiring (prior to a 2006 statutory amendment) that, if a participant received a lump-sum distribution *before* normal retirement age, he was also entitled to future interest credits that he would have earned in the plan until he reached normal retirement age, discounted back to the distribution date using a congressionally determined discount rate. This additional amount was known as a "whipsaw" payment because of how it was calculated. *Id.* at 8a. Because the PwC plan made the date benefits vest and "normal retirement age" the same—five years of service—no "whipsaw" payments were necessary; any participant whose benefits vested, by definition, had already reached normal retirement age. But under the statutory default normal retirement age of 65, respondents claimed, they were entitled to such payments. *Id.* at 10a-11a. Congress amended ERISA in 2006 to eliminate claims to "whipsaw" payments prospectively. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 701(a)(2), 120 Stat. 780, 984.

PwC moved to dismiss. Pet. App. 13a. The district court denied the motion, holding (as relevant) that a "normal retirement age" cannot be "defined in reference to length of service." *Id.* at 51a.

Respondents subsequently amended their complaint, and defendants again moved to dismiss. Pet. App. 13a. The district court (a different judge) denied the motion, but for different reasons: The court held (as relevant) that five years of service "is 'normal' and satisfies the 'retirement' requirement," but does not establish an "age." *Id.* at 96a-100a.

The district court certified its decision for interlocutory appeal under 28 U.S.C. § 1292(b), and the Second Circuit granted PwC leave to appeal. Pet. App. 131a-38a.

5. The Second Circuit affirmed, but on still other grounds. Pet. App. 17a-38a. Five years of service, it found, *is* an "age." *Id.* at 21a-22a. "There is no indication in the statute," it explained, "that normal retirement age must be a literal calendar age"; indeed, "the statutory default itself includes a variation on that theme, allowing normal retirement age to be defined as five years after the commencement of participation in the plan." *Ibid.* (citing 29 U.S.C. § 1002(24)(B)(ii)).

The Second Circuit held, however, that "five years of service" is not a "normal retirement" age. Pet. App. 20a-29a. It acknowledged "Congress's intent to give employers wide latitude in deciding" a plan's "normal retirement age." *Id.* at 19a. But it reasoned—based on dictionary definitions of "'normal'" as "'usual or typical,'" and of "'retire'" as "'withdraw from business or public life and live on one's income, savings, or pension'"—that a plan's definition of "normal retirement age" must bear a "reasonable relation" to "when the plan's participants would, under normal circumstances," actually "retire" from the workforce. *Id.* at 20a, 26a-27a.

Using these separate dictionary definitions, the court concluded that "[f]ive years on the job at an accounting firm is not a normal retirement age" because it does not relate to a participant's retirement from the workforce. Pet. App. 27a. On that basis, it deemed PwC's definition "invalid" and held that it "violates ERISA." *Id.* at 29a, 38a.

The Second Circuit acknowledged that its interpretation of "normal retirement age" directly conflicts with the Seventh Circuit's decision in *Fry*, 571 F.3d 644, and the Fourth Circuit's decision in *McCorkle* v. *Bank of America Corp.*, 688 F.3d 164 (4th Cir. 2012)—which read ERISA *not* to impose any such limitation and deemed valid "normal retirement age[s]" indistinguishable from PwC's. Pet. App. 24a-27a, 29a n.17. The Second Circuit "disagree[d]" with *Fry*, rejecting the district court's effort to distinguish it. *Id.* at 24a-29a. It also rejected *McCorkle* as "unpersuasive" because the Fourth Circuit had "relied heavily on *Fry*," and described *McCorkle*'s conclusion as "dicta" because the plaintiffs there eventually conceded that the plan's definition was valid. *Id.* at 29a n.17. The Second Circuit stayed its mandate pending the filing of this petition. *Id.* at 139a-40a.

## REASONS FOR GRANTING THE PETITION

Certiorari is warranted to resolve a direct and acknowledged circuit split on an important question concerning the interpretation of a federal statute that applies to employee-benefit plans nationwide. The Second Circuit recognized that its interpretation of "normal retirement age" in ERISA, a statutorily defined term of art, conflicts with two other circuits' reading of the same term. And its holding that the "normal retirement age" here violates ERISA contradicts the Seventh and Fourth Circuits' conclusions that materially identical plan provisions comply with the statute. This Court's intervention is necessary to resolve this conflict and restore certainty and uniformity to this important area of federal law.

The Second Circuit's decision cannot be reconciled with ERISA's plain language or the statutory framework—both of which reflect Congress's decision to reserve broad discretion to employers in designing benefit plans, which the decision below eviscerates. As this Court has explained, ERISA does not dictate what benefits (if any) employers must offer, but simply establishes uniform rules governing the administration of benefits employers elect to provide. Consistent with that model, ERISA expressly permits a pension plan itself to define "normal retirement age" as any age below 65.

The Second Circuit's holding contravenes ERISA's text and overarching design by severely curtailing the broad discretion Congress granted to employers. Until now, in 40 years of ERISA litigation, no court had ruled a plan's normal retirement age "invalid." But the Second Circuit—instead of allowing employers to set a "normal retirement age" in light of the plan's objectives—requires plans to define "normal retirement age" in "reasonable relation" to when plan participants typically retire from the workforce. That reading cannot be squared with the statutory text or structure, and thwarts ERISA's aims of preserving employer discretion and promoting certainty and predictability for all stakeholders.

Clear, definitive guidance on the meaning of a broadly applicable federal statute is essential. The decision below construed the definition of a term used throughout ERISA. Employers designing plans, administrators implementing them, and employees making long-term decisions are entitled to certainty about the law's requirements and the meaning of plan terms that determine the calculation of benefits. Both the Second Circuit's ill-defined standard and the circuit split it created undermine that certainty. Its approach also invites serious practical problems, for which it gave no guidance, that a faithful reading of ERISA avoids. This case provides an excellent opportunity to resolve this uncertainty and restore clarity and uniformity to this important area of federal law.

## I. THE DECISION BELOW EXPLICITLY CREATES A DIRECT CIRCUIT CONFLICT.

As the Second Circuit acknowledged, its decision creates a direct circuit conflict regarding the correct interpretation of a statutory term in ERISA. Pet. App. 24a-27a, 29a & n.17. Certiorari is warranted to resolve this square circuit split.

A. The Seventh and Fourth Circuits correctly interpret ERISA to permit plans to define "normal retirement age" as any age below 65, without regard to when participants "typically" leave the workforce or actually retire, and each has deemed definitions virtually identical to PwC's fully compliant with ERISA.

1. *Fry*, like this case, concerned a cash-balance defined-benefit plan. 571 F.3d at 646-47. Like PwC's plan, the *Fry* plan defined "normal retirement age" as "arriv[ing] after five years on the job." *Id.* at 646. The *Fry* plaintiff, a former employee who participated in the plan, sued alleging that that definition of "normal retirement age" violated ERISA because "five years on the job" is not a "normal" retirement "age." *Id.* at 647. On that basis, the plaintiff (like respondents here) claimed he was entitled to a larger lump-sum payout when he left the employer's service at age 55. *Id.* at 646-67.

Writing for a unanimous panel, then-Chief Judge Easterbrook rejected the plaintiff's claims. 571 F.3d at 647. "[T]he Plan's formula" for normal retirement age, *Fry* held—"the participant's age when beginning work, plus five years"—"is an 'age.'" *Ibid.* Indeed, that definition "is lifted right of out of the statute": Section 3(24)(B)(ii) itself "defines … the highest possible 'normal retirement age'" in nearly identical terms. *Ibid.* That the resulting "normal retirement age" is "employee specific," *Fry* explained, is irrelevant; as Section 3(24)(B)(ii) "shows," "ERISA does not require the 'normal retirement age' to be the same for every employee." *Ibid.*

*Fry* specifically rejected the plaintiff's claim that the plan's definition of "five years on the job" is not a "normal" retirement age because it does not reflect "the mean or median for retirement at the firm." 571 F.3d at 647. "[T]he statutory language," *Fry* held, "allows employers to specify a 'normal retirement age' that differs from typical retirement patterns," and "does not compel a pension plan's retirement age to track the actuarial tables." *Id.* at 647-48. Instead, "[u]nder § 1002(24)(A), an age is the 'normal retirement age' because the plan's text makes it so." *Id.* at 647. Had Congress intended to require plans' "normal retirement age[s]" to reflect typical practice, "then instead of granting discretion to the plan's sponsor the statute would read something like: 'The term "normal retirement age" means the median age at which participants retire.'" *Ibid.* "But the statute does not say this[.]" *Ibid.*

The statutory context, *Fry* explained, confirms that Congress did not intend that "normal retirement age" must reflect the average age at which plan participants actually retire. 571 F.3d at 647. Section 3(24)(B)(ii) sets a statutory default "normal retirement age" of 65—which is also the maximum "normal retirement age" for most participants. Yet "[s]ome industries have much younger retirement ages" than 65—"under 30 for football and under 40 for futures commission merchants"—making the default age a poor proxy for those industries. *Ibid.* And as a "statutory cap," age 65 also "requires some departure from the normal practices at law firms, universities, and other employers where people work past the time when they can start drawing full Social Security benefits." *Ibid.* As used in ERISA, "normal retirement age" has no connection to when participants actually leave the workforce for good.

Permitting the plan itself to define a "normal retirement age" that may not track actual retirement age does not, *Fry* held, render "normal" a nullity: "The age in the plan is 'normal' in the sense that it applies across the board, to every participant in the plan." 571 F.3d at 647. That fits perfectly with the statutory scheme: "[A] 'normal retirement age' in a pension plan does *not* control when employees must retire, but only when certain rights vest and how benefits are adjusted." *Ibid.* (emphasis added). It therefore "makes sense to speak of an age being 'normal' to the plan's operation rather than to anyone's retirement prospects." *Ibid.*

Applying this interpretation, the Seventh Circuit rejected the plaintiff's claim that the definition of "normal retirement age" at issue—"five years on the job"—violated ERISA. 571 F.3d at 647-48.[3]

2. The Fourth Circuit, confronting materially indistinguishable plan provisions, embraced *Fry*'s reasoning and result in *McCorkle*, 688 F.3d at 167, 171. There, too, participants in a cash-balance plan claimed that its definition of "normal retirement age"—"'sixty (60) months of Vesting Service'" or age 65, whichever came first—violated ERISA. *Id.* at 167. The plaintiffs ultimately abandoned that argument on appeal, conceding that the plan's definition was lawful. *Id.* at 171. The Fourth Circuit, however, did not simply rely on forfeiture, but proceeded to explain that the "[p]laintiffs' concession [was] well-counseled" because the plan's definition in fact "complies with ERISA." *Ibid.*

As *McCorkle* explained, Section 3(24)(A)'s text permits a plan itself to define normal retirement age, and "IRS guidance has long recognized" that, given "'the absence of any statutory prohibition or limitation, a plan may specify any age that is less than 65'" as the "normal retirement age." 688 F.3d at 171

[3] *Fry* deemed the IRS's 2007 regulation irrelevant because it "operates only prospectively." 571 F.3d at 648 (citing 26 C.F.R. § 1.401(a)–1(b)(4) and *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)).

(quoting Rev. Rul. 78-120). The Fourth Circuit expressly "agree[d] with the *Fry* court that [normal retirement age] need not be the same age for all participants in the plan," and "f[ou]nd persuasive [*Fry*'s] reasoning" in upholding an indistinguishable definition. *Ibid.* *McCorkle* concluded that, "[i]nsomuch as the Plan states a valid [normal retirement age] within the meaning of § 1002(24), there is no longer any substance supporting Plaintiffs' allegation that the Plan violates ERISA" by awarding lump-sum payouts based on that definition. *Id.* at 171-72.

B. The Second Circuit expressly "disagree[d]" with these decisions, rejecting the Seventh and Fourth Circuits' interpretation of ERISA and the specific result those courts reached. Pet. App. 24a-29a & n.17.

Like *Fry* and *McCorkle*, the Second Circuit here confronted a plan defining "normal retirement age" as five years of service. Pet. App. 2a. Unlike the district court, the Second Circuit agreed with *Fry* and *McCorkle* that plans may define "normal retirement age" based on years of service "rather than as a literal age." *Id.* at 21a. And it acknowledged "Congress's intent to give employers wide latitude" in defining "normal retirement age" and that the appropriate ages for different jobs "are discretionary calls for the plan sponsor to make, to which courts should defer." *Id.* at 19a. Nevertheless, the Second Circuit held—contrary to *Fry* and *McCorkle*—that the nearly identical definition in PwC's plan "is invalid, because five years of service" is not, in the court's view, a "normal retirement age." *Id.* at 29a.

1. The Second Circuit "disagree[d]" with *Fry*'s holding that "ERISA 'does not compel a pension plan's retirement age to track the actuarial tables.'"

Pet. App. 25a (quoting *Fry*, 571 F.3d at 647). In the Second Circuit's view, ERISA *does* require that the "'normal retirement age under the plan' must bear some reasonable relation to a time when the plan's participants would, under normal circumstances, retire." *Id.* at 26a-27a (citation omitted). Using dictionary definitions of "normal" and "retirement," it held than an employer may *only* adopt a "normal retirement age" under 65 if it could "reasonably expect its employees to retire at that time." *Id.* at 20a-21a. The Second Circuit then concluded, without analysis, that "[f]ive years on the job at an accounting firm is not a normal retirement age," and on that basis held PwC's definition "invalid." *Id.* at 27a, 29a.

Erasing any possible doubt about the conflict, the Second Circuit specifically rejected the district court's attempts to "distinguis[h] *Fry*" on its facts. Pet. App. 27a. The district court had asserted that *Fry* upheld only a definition of "normal retirement age" tied to a participant's "anniversary" of commencing employment or participation in a plan, rather than "years of service." *Id.* at 96a-100a. The Second Circuit dismissed this distinction as "essentially semantic," explaining that "there is no functional difference" between the two approaches. *Id.* at 27a-28a. In all relevant respects, *Fry* and this case are on all fours, but their reasoning and results cannot be reconciled.

2. The Second Circuit also expressly disagreed with the Fourth Circuit's decision in *McCorkle*. Pet. App. 29a n.17. It deemed *McCorkle* "unpersuasive" because it "relied heavily on *Fry*," *ibid.*, thus compounding the circuit conflict.

The Second Circuit further dismissed *McCorkle*'s conclusion as "dicta" because the plaintiffs there ultimately "conceded that the plan's definition of normal retirement age was valid." Pet. App. 29a n.17. *McCorkle*, however, analyzed the statutory text, the IRS's position, and *Fry*'s reasoning and concluded that the concession was *correct* and that the plan's "normal retirement age" "complie[d] with ERISA." 688 F.3d at 171. Regardless of whether it was strictly necessary, the Fourth Circuit addressed the issue and explained in a published opinion why the position the plaintiffs conceded was right. Courts in the Fourth Circuit are unlikely to disregard that detailed analysis as merely advisory.

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The conflict between the decision below and the Seventh and Fourth Circuit's decisions in *Fry* and *McCorkle*, respectively, is direct, explicit, and irreconcilable. If allowed to stand, the decision below will foment even broader uncertainty and confusion. The Second Circuit's standard 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. App. 23a) that the Second Circuit prescribed. *See*, *e.g.*, *Bance* v. *Trs. of the Alaska Carpenters Ret. Plan*, 829 F.2d 820, 823-27 (9th Cir. 1987) (upholding plan defining normal retirement age as 62 plus either 10 years of service or the 10th anniversary of commencing participation in the plan, without inquiry into typical retirement age); *Ryan* v. *Asbestos Workers Union Local 42 Pension Fund*, 27 F. App'x 100, 102 (3d Cir. 2002) (approving definition tied to 25 years of service). In these circuits, such plans are valid, full stop, but in the Second Circuit their validity now turns on whether a court concludes that they stray too far from employees' "typical" experience.

In an area of federal employee-benefits law where Congress sought to foster national uniformity and predictability, such conflict and confusion must not persist. Plans like PwC's potentially subject to suit in multiple circuits should not face inconsistent legal standards that invite forum shopping. This Court's review is needed to resolve the square, acknowledged circuit split that the decision below overtly created and restore certainty and uniformity to this important area of federal law.

## II. THE DECISION BELOW CONTRAVENES ERISA AND THIS COURT'S PRECEDENTS.

The direct, acknowledged conflict between the Second Circuit's holding and other circuits' decisions interpreting the same statute—and reaching diametrically opposite conclusions on materially indistinguishable facts—suffices alone to merit certiorari. The Second Circuit's decision, moreover, departs markedly from ERISA's text and purpose, and it upends the statutory design by replacing the broad employer flexibility and predictability that Congress sought to preserve with *post hoc* judicial micromanagement of plans' terms.

### A. The Second Circuit's Interpretation Contradicts ERISA's Text And Settled Principles Of Statutory Interpretation.

The Second Circuit's strained reading of ERISA transgresses the fundamental principle that courts must "enforce plain and unambiguous statutory language according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010). This Court "ha[s] stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there," and "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992) (citation omitted). That principle applies with even greater force to ERISA, which "is a 'comprehensive and reticulated statute' and is 'enormously complex and detailed,'" making judicial tinkering based on "'extratextual'" notions especially inappropriate. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 447 (1999) (citation omitted). The Second Circuit disregarded this command, reading into ERISA restrictions that Congress never imposed.

1. Section 3(24) expressly permits an ERISA plan to establish any "normal retirement age" up to an explicitly stated statutory maximum. The statute defines "normal retirement age" as "the earlier of— (A) the time a plan participant attains normal retirement age *under the plan*, or (B) the later of— (i) the time a plan participant attains age 65, or (ii) the 5th anniversary of the time a plan participant commenced participation in the plan." 29 U.S.C. § 1002(24) (emphasis added). The plain import of this language is that a plan itself may define the plan's "normal retirement age" up to the statutory ceiling—age 65 for most workers, or, for those who first participate in a plan *after* age 60, five years after they join. Other provisions confirm that Congress intended to permit the plan itself to prescribe "normal retirement age." Section 206 of ERISA, for example, lists "the normal retirement age *specified under the plan*" as one event that triggers a plan's obligation to begin paying benefits (unless the participant "elects" to defer distribution). *Id.* § 1056(a)(1)

(emphasis added). Nothing in ERISA's text requires plans to select an age that tracks when employees in the workforce generally, or in particular industries specifically, *typically* retire from working—which makes it implausible to assume that Congress imposed such a restriction. *See Jama* v. *Immigration & Customs Enf't*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply[.]").

That, however, is how the Second Circuit construed the statute, using dictionary definitions of "normal" and "retirement" to read in a requirement that plans' "normal retirement age" must "bea[r] some relationship to typical retirement age for workers covered by the plan." Pet. App. 23a. The court reasoned from those definitions that "normal" and "retirement" mean the "'typical'" or "'usual'" time when a worker "'*withdraw[s] from business or public life* and live[s] on [her] income, savings, or pension.'" *Id.* at 20a-21a (emphasis added) (citation omitted). On that basis, it held, employers may not select an ERISA "normal retirement age" at which they "could not, under normal circumstances, reasonably expect [their] employees to retire." *Id.* at 21a. That reading cannot be squared with the statute.

"'When a statute includes an explicit definition,'" courts "'must follow'" it. *Burgess* v. *United States*, 553 U.S. 124, 130 (2008) (citation omitted). And when Congress defines a multi-word "phrase" as a "term of art," courts must heed that definition, even if combining the ordinary meanings of the phrase's *individual* words might suggest a different composite definition. *Ibid.* In statutes, as in everyday speech, "two words together may assume a more particular meaning than those words in isolation." *FCC* v. *AT&T Inc.*, 131 S. Ct. 1177, 1183 (2011) ("We understand a golden cup to be a cup made of or resembling gold. A golden boy, on the other hand, is one who is charming, lucky, and talented. A golden opportunity is one not to be missed.").

Congress did exactly that here, defining the phrase "normal retirement age" as a term of art—in a statute chock-full of terms and phrases given specialized, ERISA-specific meanings, *see generally* 29 U.S.C. § 1002—with one definition being the age a plan itself selects. *Id.* § 1002(24)(A). The Second Circuit was not free to cobble together its own, idiosyncratic understanding of the phrase based on separate meanings of its component words when Congress defined the *phrase*. Whatever relevance dictionary meanings of "normal" and "retirement" might have in isolation, they are trumped here by Congress's express direction that a plan may select its own "normal retirement age."

2. The lay meanings of individual words the Second Circuit imported are also inconsistent with the "statutory context." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). The Second Circuit assumed that, by "retirement," Congress must have meant the age when a worker "'withdraw[s] from business or public life'" altogether and begins relying on her preexisting "'income, savings, or pension.'" Pet. App. 20a (citation omitted). Both the definition of "normal retirement age" and its function in ERISA refute that unsupported assumption.

Section 3(24) shows that Congress did not have the Second Circuit's colloquial view of "retirement" in mind. As the Seventh Circuit explained in *Fry*, Section 3(24)'s fallback "normal retirement age"—age 65 for most workers—"itself requires some departure from normal practices" in various occupations. 571 F.3d at 647. "Some industries have much younger retirement ages—under 30 for football and under 40 for futures commission merchants." *Ibid.* In other sectors, conversely, retirement age often exceeds the statute's ceiling—such as "law firms, universities, and other employers where people work past the time when they can start drawing full Social Security benefits." *Ibid.* For plans in such industries that adopt the statutory default "normal retirement age" of 65, the "normal retirement age" will not reflect typical practice. That is a feature of the statute Congress enacted, and shows that Congress did not intend that "normal retirement age" must track when employees actually leave the workforce.

Congress's approach makes perfect sense because, under ERISA, "normal retirement age" does not dictate when employees may or must cease working altogether (or even leave their current employer). "[A] 'normal retirement age' in a pension plan does not control when employees must retire, but only when certain rights vest and how benefits are adjusted." *Fry*, 571 F.3d at 647. In contrast, importing a colloquial understanding of "retire," as the Second Circuit did, makes no sense in this setting. Often workers who depart are simply changing employers, *not* leaving the workforce for good. And by adopting a "normal retirement age" earlier than when many participants cease working entirely, PwC afforded vested 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.

Adopting a "normal retirement age" that occurs earlier than participants typically stop working can benefit participants in other ways. A plan's "normal retirement age" sets an outer limit for when pension benefits must vest, *see* 29 U.S.C. § 1053(a), and when pension-benefit payments must begin, *see id.* § 1056(a)(1). Adopting a lower normal retirement age also may enable plans to begin making "in-service" distributions to current workers. *Id.* § 1054(b)(1)(H)(iii). Given the role "normal retirement age" plays in ERISA, there is no reason to assume that Congress intended to require that it reflect when employees typically exit the workforce.

### B. The Second Circuit's View Undermines Congress's Purposes Of Preserving Employer Flexibility And Providing Predictability For All Stakeholders.

The Second Circuit's misreading of "normal retirement age" is flawed at an even more basic level because it is irreconcilable with ERISA's overarching design. Its interpretation thwarts Congress's purpose of preserving employers' broad discretion in designing benefit plans. And the Second Circuit's murky, indeterminate "reasonable relation" standard frustrates the certainty and predictability that Congress sought to foster for employers, employees, and plan administrators alike.

1. As this Court has recognized, ERISA does not dictate what (if any) benefits employers must offer. *See Conkright*, 130 S. Ct. at 1649. "ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits," and instead leaves "employers or other plan sponsors … generally free … , for any reason at any time, to adopt" or "modify" welfare plans.

*Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995). Likewise, in the pension context, Congress did not "impos[e] mandatory pension levels or methods for calculating benefits," but merely "set outer bounds on permissible accrual practices." *Alessi*, 451 U.S. at 512. Instead, Congress sought to establish uniform rules to govern administration of the benefits employers choose to offer. Congress consciously permitted "total benefit levels" in pension plans "and formulas for determining their accrual" to "vary from plan to plan," as determined by the plan sponsor. *Id.* at 513-14.

Construing Section 3(24)'s definition of "normal retirement age"—as the Seventh and Fourth Circuits do—to allow the plan itself to determine that age is perfectly consistent with that design. Indeed, the structure of Section 3(24) itself confirms Congress's intent to leave employers broad leeway with regard to the specific issue of "normal retirement age." The statute sets a ceiling on "normal retirement age," but conspicuously omits any explicit floor. And the only possible purpose of its language defining "normal retirement age" as the "normal retirement age under the plan" is to allow plans to establish an age *below* the statutory maximum. 29 U.S.C. § 1002(24)(A). Congress was concerned, in short, that "normal retirement age" should not occur at a time Congress deemed *too late*, and it crafted the statute to prevent that outcome. But it placed no restriction on establishing *earlier* dates, leaving employers free to choose lower normal retirement ages.

The Second Circuit's interpretation turns the statutory scheme on its head. Its reading replaces the broad discretion Congress preserved for employers to determine the terms of benefit plans with a restrictive standard confining employers' flexibility within narrow, judicially decreed bounds. And it imposes a mandatory minimum "normal retirement age"—to be determined under a vague and impressionistic "typical" standard—where ERISA establishes none, supplanting Congress's policy choice with the court of appeals' views.

The Second Circuit asserted, without explanation, that imposing that limitation "advances the Act's stated purpose of protecting employees 'with long years of employment' from 'losing anticipated retirement benefits.'" Pet. App. 23a (citation omitted). The court had things backwards. Making "normal retirement age" occur earlier means if anything that vested benefits are payable *sooner* and can be made appropriately portable as workers change jobs. *Supra* pp. 21-22. And insofar as "normal retirement age" affects the amount of benefits a participant receives, ERISA leaves that choice to the employer in the first place.

The Second Circuit's real concern appears to have been that construing Section 3(24) to impose no requirement on a "normal retirement age" below 65 enables plans to avoid paying "whipsaw" payments to which respondents claim an entitlement. Pet. App. 31a. Some courts (including the Second Circuit) and the IRS held that, prior to a 2006 amendment to ERISA, defined-benefit plans that allowed vested participants to receive lump-sum distributions before "normal retirement age" also had to pay participants a discounted amount of the *future* interest credits they would have earned if they had not withdrawn their funds. *Id.* at 7a-10a. In the Second Circuit's view, plans that set a "normal retirement age" to coincide with vesting deprive participants of this potentially higher payment, thus "penaliz[ing] employees based on the time when, and form in which, they take their distribution." *Id.* at 31a.

The court of appeals' concern was misplaced and cannot justify its distortion of the statutory scheme. Even the Second Circuit has recognized that ERISA does not require employers to offer early, pre-retirement distributions *at all*, let alone as lump sums. *See Esden*, 229 F.3d 172-73. Some employers, like PwC, voluntarily offer lump-sum distributions to departing participants long before age 65 (the statutory default "normal retirement age") as an additional advantage, but plans are perfectly free to require that departing participants wait until 65 to receive benefit payments. It makes no sense to stretch the statute to bar employers from offering certain benefits in a particular manner when employers undisputedly can decline to offer such benefits altogether.[4]

The Second Circuit's approach, moreover, would perversely discourage employers from offering valuable, but purely voluntary, advantages. Congress, tellingly, saw no problem in permitting employers to offer pre-retirement, lump-sum payments without affording a "whipsaw" windfall, as it amended the statute in 2006 to eliminate claims to such windfall payments entirely. Pub. L. No. 109-280, § 701(a)(2), 120 Stat. at 984; *see also* H.R. Rep. No. 109-232, Pt. 2, at 126-27 (2005).

[4] PwC's plan also did not disadvantage participants. The plan did not guarantee a set rate of return—only interest credits based on actual market outcomes. *Supra* pp. 7-8. Departing participants who elected immediate lump-sum distributions could invest them directly and earn market-based returns.

2. The Second Circuit's decision also undercuts ERISA's aims of providing predictability and certainty to employers, employees, and administrators. As this Court has repeatedly recognized, ERISA seeks to "'induc[e] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards.'" *Conkright*, 130 S. Ct. at 1649 (citation omitted). It simultaneously strives to ensure that employees' expectations are not upset. *See ibid.*; 29 U.S.C. §§ 1001(a), 1001a(c). Clear rules are also critical to efficient plan administration. *See Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002) (uniform rules "'help administrators … predict the legality of proposed actions'" (citation omitted) (omission in original)); *cf. Florida* v. *Long*, 487 U.S. 223, 230-38 (1988) (addressing limits on imposing retroactive liability on pension plans based on new judicial decisions).

The opaque "reasonable relation" standard the Second Circuit adopted here (Pet. App. 26a) is antithetical to those objectives. The decision below offers no meaningful guideposts to determine what "normal retirement age" is appropriate for any particular occupation or industry; the range of ages that "reasonabl[y] relat[e]" to "typical retirement age" will inevitably be in the eye of the beholder. *Id.* at 20a, 23a. Indeed, the court of appeals' opinion does not even make clear whether it is the statistical correspondence between a plan's normal retirement age and typical practice, the method or motivation behind the plan sponsor's selection of that age, or some combination of the two that determines whether a plan's definition is valid. *Compare*, *id.* at 19a, 21a-22a, 27a (validity of "normal retirement age" depends on common practice in the occupation), *with id.* at 27a n.15 (validity turns on how plan's age is selected and why). Employers designing or revising plans, administrators implementing them, and employees participating in them all will be forced to guess.

This harmful uncertainty and unpredictability are exacerbated by the fact that retirement practices in any given industry or occupation may change over time. Even if employers accurately assess the relevant "typical retirement age" (Pet. App. 23a) at the time a plan is adopted, they face the risk under the decision below that a court will conclude years later—based on *then*-prevailing practices—that the plan's "normal retirement age" is off-kilter, rendering a once-valid normal retirement age suddenly unlawful. Unless plans abandon any attempt to define "normal retirement age"—which would render Section 3(24)(A) a dead letter, and make the statutory default definition mandatory and exclusive—they will face the threat of liability for choosing an age that is deemed (or, in a court's view, subsequently comes to be) too high or too low.

These questions and complexities are compounded for plans that—as is common across the economy—encompass workers in multiple occupations or even multiple industries. The Second Circuit speculated that an appropriate "normal retirement age" for a shortstop might be "35 or 40," and similar for an NBA star. Pet. App. 19a, 22a. But it provided no clue of how to assess normal retirement age if a team's plan *also* covers its scouts and front-office management. The same will be true of manufacturers whose plans cover employees from assembly-line workers to marketing executives. PwC's plan, for instance, "covers [its] entire workforce, ranging from partners and principals to rank-and-file employees and support staff." C.A. App. 196. Such employers either must forgo efforts to adopt any plan-specific "normal retirement age," or establish *multiple* ages tailored to workers with different typical career trajectories. For plans covering multiple employers or even multiple industries, the latter course may be practically impossible.

### C. The Statute's History Contradicts The Second Circuit's Interpretation.

The court of appeals purported to find support for its reading in the evolution of the view of the IRS, which it noted "has 'primary jurisdiction and rulemaking authority over ERISA's funding, participation, benefit accrual, and vesting provisions.'" Pet. App. 33a (citation omitted). But the history of ERISA and the IRS's view only undermine the Second Circuit's reading.

The concept of "normal retirement age," as noted, did not originate with ERISA, but has its roots in pre-ERISA IRS guidance. Before ERISA, the IRS permitted "in-service" distributions to current employees who had reached the normal retirement age defined in the plan, but the plan's normal retirement age could not be "lower than 65" *unless* it "represent[ed] the age at which employees customarily retire in the particular company or industry." Rev. Rul. 71-147.

When Congress enacted ERISA, it adopted the general rule allowing in-service distributions to current employees who had reached normal retirement age. 29 U.S.C. § 1054(b)(1)(H)(iii). But it *rejected* the restriction that normal retirement ages below 65 must "represen[t]" typical practice in the company or industry. Section 3(24) establishes the maximum "normal retirement age" at 65 (except for those who join a plan after age 60), but sets no floor. The legislative history confirms this. *See*, *e.g.*, H.R. Rep. No. 93-1280, at 273 (1974) (Conf. Rep.) ("Normal retirement age generally is to be the age specified under the plan. However, it may not be *later* than age 65 or the tenth [since amended to fifth] anniversary of the time the participant commenced participation, whichever last occurs." (emphasis added)).

The IRS itself acknowledged this soon after ERISA's enactment. It conceded that Congress chose *not* to accept the agency's representative-of-actual-retirement limitation. Rev. Rul. 78-120. Citing "the absence of any statutory prohibition or limitation" on normal retirement ages under 65, the IRS modified its pre-ERISA guidance to make clear that "a plan may specify *any age* that is less than 65 as the normal retirement age." *Ibid.* (emphasis added). The agency's candid acknowledgment, shortly after the statute's enactment and for decades thereafter, that its own version of "normal retirement age" materially identical to the Second Circuit's definition did not survive ERISA's enactment is powerful proof that the court of appeals' interpretation is off the mark.[5]

[5] The Second Circuit suggested that, although the 2007 IRS regulation that "revert[ed]" to the agency's *pre*-ERISA view is "prospective only" and thus inapplicable here, it "reinforce[d]" the court's interpretation. Pet. App. 35a. But the Second Circuit never explained how the IRS's return to a position that the agency recognized Congress *rejected* bolsters the court's reading of the statute.

## III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING AN IMPORTANT ISSUE OF FEDERAL LAW CONCERNING EMPLOYEE BENEFITS.

The question presented concerns an important issue of federal employee-benefits law that governs plans nationwide. The uncertainty the circuit split creates amply warrants this Court's intervention.

The term "normal retirement age" appears many times throughout ERISA, in provisions that affect various aspects of pension plans' terms and administration on which employers, employees, and plan administrators all need clear guidance. Other terms are defined explicitly by reference to "normal retirement age." *See*, *e.g.*, 29 U.S.C. § 1002(22), (23), (25). And it is integral to ERISA's provisions addressing issues such as when pension benefits must vest, *id.* § 1053(a), how accrual of benefits is calculated, *id.* § 1054(b)(1)(A)-(C), and when payment of benefits must begin, *see id.* § 1056(a)(1); *see also*, *e.g.*, *id.* §§ 1054(c), 1056(d), 1085(e), 1322a(c).

The need for clarity is heightened by the inherently long-term character of pension benefits. Employers designing or revising pension plans for employees whose benefits may continue accruing decades into the future—and plan administrators implementing them—need to know what plan definitions of "normal retirement age" will comply with ERISA. And employees making important decisions concerning their jobs and benefits need to know the whether the "normal retirement ages" in their respective plans are valid and the consequences for their benefits. The Second Circuit's "we-know-it-when-we-see-it" standard does not come close to providing the requisite clarity.

Indeed, no plan is safe from litigation under the paradigm constructed by the Second Circuit, where normal retirement age must be set in conformity with external factors, *i.e.*, the age at which employees in a particular industry typically retire from the workforce. That principle would necessarily require employers in certain industries to select an age *less than 65* as normal retirement age. In this case, because PwC allowed participants to elect immediate lump-sum distributions, respondents seek a higher normal retirement age than that set in the plan; in the next case, where an employer did not offer such an option, retiree-plaintiffs could argue for a lower normal retirement age, based on industry- or company-specific factors, so as to accelerate the payment of benefits. *See* 29 U.S.C. § 1056 (allowing employers to withhold payment of benefits until the later of three events, including attainment of normal retirement age). The only predictability provided by the Second Circuit's scheme is that litigation will flourish.

Invalidating a plan's normal retirement age also may upset the expectations of other plan participants who arranged their affairs in reliance on the plan. If a court holds that a plan's normal retirement age is too *low*, for example, employees who counted on receiving distributions at a certain age may have to wait years more for their benefits.

Worse, the circuit split that the decision below creates puts employers, administrators, and employees in an impossible position. Plans can be sued in federal court in any district "where the plan is administered, where the breach took place, or where a defendant resides or may be found," and in state court in certain cases. 29 U.S.C. § 1132(e). Plans like PwC's that operate nationwide or in multiple

States (as many do) may be subject to any of several Circuits' laws. Participants, employers, and administrators cannot know for certain what law will govern and thus whether a particular plan's definition is valid.

Such diversity in the applicable legal framework is anathema to ERISA, in which Congress deliberately sought to create a single, uniform set of legal rules to avoid a geographical "patchwork" of different regimes that would frustrate efficiency and "'unduly discourage employers from offering ERISA plans in the first place.'" *Conkright*, 130 S. Ct. at 1649 (citation and brackets omitted). Indeed, Congress included in ERISA a sweeping express-preemption provision, 29 U.S.C. § 1144(a), to preserve uniformity that is crucial to efficient administration of benefit plans. *See Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990). Circuit-by-Circuit variance places plans, employees, and employers in the same predicament as State-by-State disparities, and poses the same threat to fair and efficient plan administration and predictability.

This case provides a prime opportunity for the Court to provide clarity on this important and recurring question. The question presented was fully pressed and passed upon below. And it is the sole basis the court of appeals gave for its judgment. Indeed, recognizing the significance of this purely legal issue to the case's outcome, the district court certified—and the court of appeals accepted—an appeal under 28 U.S.C. § 1292(b) to facilitate resolution of this important question.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 13, 2015

# APPENDIX

# APPENDIX A

## UNITED STATES COURT OF APPEALS
**FOR THE SECOND CIRCUIT**

August Term, 2014

(Argued: April 14, 2015 Decided: July 23, 2015)

Docket No. 14-1179

TIMOTHY D. LAURENT, SMEETA SHARON

*Plaintiffs-Appellees,*

MICHAEL A. WEIL,

*Plaintiff,*

- v. -

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

*Defendants-Appellants.*[*]

[*] The Clerk of Court is respectfully directed to amend the official caption in this case to confirm to the caption above.

Before:

CABRANES, LYNCH, AND DRONEY, *Circuit Judges.*

Former employees of PricewaterhouseCoopers LLP sued the company and its retirement plan, alleging that the plan violated the Employee Retirement Income Security Act of 1974 ("ERISA"). The plan defines "normal retirement age" as five years of service, so that it coincides with the time at which employees vest in the plan. Plaintiffs allege that this scheme deprives plan participants of so-called "whipsaw payments," which guarantee that participants who take distributions in the form of a lump sum when they terminate employment will receive the actuarial equivalent of the value of their accounts at retirement. The district court (J. Paul Oetken, *Judge*) denied defendants' motion to dismiss, holding that the PricewaterhouseCoopers plan violated ERISA because (1) five years of service is not an "age" under ERISA, (2) the plan violated ERISA's anti-backloading rules, and (3) the plan's documents violated ERISA's notice requirements. We agree that the plan violates ERISA, but for different reasons than those cited by the district court. We hold that the plan's definition of "normal retirement age" as five years of service violates the statute not because five years of service is not an "age," but because it bears no plausible relation to "normal retirement." We therefore AFFIRM, without reaching the district court's alternative reasons for denying defendants' motion to dismiss.

* * *

GERARD E. LYNCH, *Circuit Judge*:

The Employee Retirement Income Security Act of 1974 ("ERISA"), as amended 29 U.S.C. § 1001 *et seq.*, protects retirement benefits that have accrued over the course of an employee's tenure until that employee reaches normal retirement age. The question in this case is how much leeway retirement plan sponsors have to define what "normal retirement age" is, in order to avoid paying future interest credits when the employee leaves employment and elects to receive the value of his or her retirement account in a lump-sum distribution. Plaintiffs, former employees of PricewaterhouseCoopers LLP ("PwC"), sued the company and its retirement plan, alleging that the plan violated ERISA. The plan defines "normal retirement age" as five years of service, so that it coincides with the time at which employees vest in the plan. Plaintiffs allege that this scheme deprives them of so-called "whipsaw payments," which guarantee that plan participants who take distributions in the form of a lump sum when they terminate employment will receive the actuarial equivalent of the value of their accounts at retirement.

Defendants moved to dismiss the complaint. The district court (J. Paul Oetken, *Judge*) denied the motion to dismiss, holding that the PwC plan violated ERISA because (1) five years of service is not an "age" under ERISA, (2) the plan violated ERISA's anti-backloading rules, and (3) the plan's documents violated ERISA's notice requirements. It then certified its decision for interlocutory review, and we accepted the certification. We agree that the plan violates ERISA, but for different reasons than those cited by the district court.[1] We hold that the plan's definition of "normal retirement age" as five years of service violates the statute not because five years of service is not an "age," but because it bears no plausible relation to "normal retirement," and is therefore inconsistent with the plain meaning of the statute. We accordingly AFFIRM, without reaching the district court's alternative reasons for denying defendants' motion to dismiss.

## BACKGROUND

Before discussing plaintiffs' suit and the issues raised on appeal, it is necessary to provide some background on ERISA and how its minimum vesting provisions apply to the kind of plan that PwC offers its employees, in order to clarify the framework in which those issues must be analyzed.

### I. ERISA's Vesting Requirements for Cash Balance Plans

Congress passed ERISA in response to findings that inadequate vesting protections in private retirement plans were causing retirees to lose their anticipated benefits. *See* 29 U.S.C. § 1001(a). The statute addresses that problem largely by imposing various requirements on plans as a condition for receiving preferential tax treatment. ERISA recognizes two basic types of retirement plans: defined contribution plans (also known as individual account plans) and defined benefit plans. A defined contribution plan is "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the par-

[1] We may affirm on any ground the record supports, and are not limited to the reasons expressed by the district court. *See Grieve v. Tamerin*, 269 F.3d 149, 154 (2d Cir. 2001).

ticipant's account, and any income, expenses, gains and losses." ERISA § 3(34); 29 U.S.C. § 1002(34).[2] By contrast, a defined benefit plan consists of a general pool of assets, which may be funded by employer or employee contributions, or a combination of both, and guarantees a defined level of benefits, known as accrued benefits, which are "expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(A); 29 U.S.C. § 1002(23)(A); *see Lonecke v. Citigroup Pension Plan*, 584 F.3d 457, 461-62 (2d Cir. 2009).

In order to qualify as ERISA-compliant, retirement plans must meet the statute's "[n]onforfeitability requirements." *See* ERISA § 203(a); 29 U.S.C. § 1053(a). Those requirements are minimum vesting standards mandating that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." *Id.* In addition, specifically for defined benefit plans, a plan satisfies the nonforfeitability requirements if, *inter* alia, "an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions." 29 U.S.C. § 1053(a)(2)(A)(ii). Thus, to satisfy ERISA, a defined benefit plan must allow an employee's interest in his or her accrued

[2] The familiar 401(k) – so called because it is a tax-qualified profit-sharing plan with a cash or deferred arrangement within the meaning of section 401(k) of the Internal Revenue Code – is a common example of a defined contribution plan. *See Hirt v. Equitable Ret. Plan for Emps., Managers & Agents*, 533 F.3d 102, 104 (2d Cir. 2008).

benefit to vest fully when the employee has completed five years of service with the employer.[3]

Two statutory definitions are critical to understanding this vesting requirement: First, as noted, under the Act, "accrued benefit" means, "in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age." *Id.* § 1002(23)(A). Second, the Act defines "normal retirement age" as "the earlier of (A) the time a plan participant attains normal retirement age under the plan, or (B) the later of (i) the time a plan participant attains age 65, or (ii) the 5th anniversary of the time a plan participant commenced participation in the plan." *Id.* § 1002(24). In plain English, this means that an employee's accrued benefit is the amount she would receive annually as an annuity after she reaches normal retirement age, and normal retirement age is the earlier of a normal retirement age selected by the plan *or* a statutory default, which is usually age 65, unless the employee begins participating in the plan later than age 60, in which case normal retirement age is five years from that date.

In the 1980s and '90s, many companies created a third type of plan, known as a "cash balance" plan. Cash balance plans combine attributes of both defined contribution and defined benefit plans. They simulate the structure of defined contribution plans, but they are treated as defined benefit plans. Under

[3] A "year of service" is defined by the statute as any consecutive 12-month period in which an employee completes 1,000 hours of service. 29 U.S.C. § 1053(b)(2)(A). As will be discussed further below, that is the same way the PwC plan defines a year of service.

cash balance plans, "employers do not deposit funds in actual individual accounts, and employers, not employees, bear the market risks." *Hirt v. Equitable Ret. Plan for Emps., Managers, & Agents*, 533 F.3d 102, 105 (2d Cir. 2008). Instead of an actual individual account, a participant in a cash balance plan has a hypothetical account, the value of which is "driven by two variables: (1) the employer's hypothetical 'contributions,' and (2) hypothetical earnings expressed as interest credits." *Esden v. Bank of Boston*, 229 F.3d 154, 158 (2d Cir. 2000). For this reason, "[c]ash balance plans are considered defined benefit plans under ERISA." *Lonecke*, 584 F.3d at 462. "As a result of this classification, the term 'accrued benefit' in a cash balance plan is expressed in the form of an annual benefit commencing at normal retirement age," just like the accrued benefit in a defined benefit plan. *Id.* (internal quotation marks, citations, and alteration omitted); *see also Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 757-58 (7th Cir. 2003); *Esden*, 229 F.3d at 158.

Generally with cash balance plans, interest credits continue to accumulate even after an employee terminates employment and until the benefits are distributed. *See Esden*, 229 F.3d at 160. Thus, if a vested employee leaves employment before reaching retirement age, his or her benefit at retirement will be based on the contributions made during employment, plus the interest accruing over time, both during employment and between the employee's departure and retirement age. In a cash balance plan, the employer may offer the departing employee the option of either an annuity or a lump sum; however, "any such [lump-sum] payout must be worth at least as much, in present terms, as the annuity payable at normal retirement age." *Lonecke*, 548 F.3d at 463 (internal quotation marks omitted); *accord*, *Esden*, 229 F.3d at 163. In other words, plans are not required to offer participants a lump-sum distribution, but if they do, they cannot deprive the participants of the value that would accrue if the participants waited and took their distributions as an annuity at normal if the retirement age.

The difference between the hypothetical value of a cash balance plan account at any given time and the value of the account as an annuity payable at normal retirement age is known as the "whipsaw calculation."[4] To determine the whipsaw calculation, the account balance is increased by the plan's interest rate multiplied by the time to normal retirement age, then discounted back to present value at a set rate, usually the rate on 30-year Treasury securities. *See Esden*, 229 F.3d at 159, 164 n.13. Assume, for example, that a benefit plan's normal retirement age is 65 and a 64-year-old employee has an account balance of $100,000. Assume further that the plan provides a corporate bond rate of return, which today is 8% – a rate that is 2% higher than the current Treasury rate of 6%. To determine the whipsaw-calculated lump sum, or "whipsaw payment," one increases the account balance by today's corporate bond rate, to get $108,000 at age 65; then discounts it back to present value at the Treasury rate. The calculation then results in a lump-sum payment of roughly $102,000, as opposed to the account balance

[4] One suspects that whoever coined that name for the calculation was not a fan of paying out that difference. We use the term, which has become standard, without any negative implication. It is simply a requirement derived from the obligation to equalize the value of the lump-sum payout at departure to the annuity payable at normal retirement age.

of $100,000. *See* Barry Kozak, *The Cash Balance Plan: An Integral Component of the Defined Benefit Plan Renaissance*, 37 J. Marshall L. Rev. 753, 773 (2004).

Before turning to plaintiffs' lawsuit, we must note that the rule of actuarial equivalence and the whipsaw calculation just discussed are throwbacks to an earlier era of ERISA litigation. Prior to 2006, several courts, including this one, had held that ERISA required whipsaw payments. *See*, *e.g.*, *Berger*, 338 F.3d at 762; *Esden*, 484 F.3d at 172-73; *Lyons v. Georgia-Pacific Corp. Salaried Emps. Ret. Plan*, 221 F.3d 1235, 1252 (11th Cir. 2000).[5] That year, however, Congress passed the Pension Protection Act, which provided that plans did not fail to satisfy ERISA solely because they did not provide actuarial equivalence for participants who terminated employment before normal retirement age and took a lump-sum payment, and thus eliminated mandatory whipsaw payments. Pension Protection Act of 2006, Pub. L. No. 109-280, § 701(a)(2), 120 Stat. 780 (2006), codified at 29 U.S.C. § 1053(f)(1)(B). Plaintiffs filed this suit in 2006,[6] distributions at issue in it predate the passage of the Pension Protection Act. The parties therefore agree that the Act does not apply to this case. *See West v. AK Steel Corp.*, 484 F.3d

[5] The IRS similarly took the position that if a cash balance plan allowed for a lump-sum distribution of vested benefits to participants before they attain normal retirement age, then any such lump sum had to be the actuarial equivalent of an annuity taken at retirement age. *See* I.R.S. Notice, *Cash Balance Pension Plans*, 96-8, 1996-1 C.B. 359 (Jan. 18, 1996).

[6] As will be explained below, this case has had a complicated procedural history since it was filed in 2006, involving two motions to dismiss and a previous certification of interlocutory appeal by the district court.

395, 412 (6th Cir. 2007) (concluding that Pension Protection Act does not apply retroactively).

With these principles in mind, we turn to plaintiffs' lawsuit.

## II. PwC's Retirement Plan and Plaintiffs' Suit

Plaintiffs are, and represent a class of, former PwC employees who terminated their employment after completing at least five years of service at the firm. Based on their years of service, plaintiffs had fully vested in PwC's retirement plan, the Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP ("the RBAP" or "the Plan"). The RBAP is a cash balance plan, funded entirely by the employer. The funds deposited by PwC into the Plan, and represented in the participants' hypothetical individual accounts, may be "invested" through various investment options at the election of the employee, such as money-market funds or more aggressive strategies. Under some cash balance plans, the employer specifies the annual investment return; however, the RBAP does not guarantee any set rate of return. Instead, the balance in a participant's account appreciates or depreciates in the form of daily-adjusted interest credits, according to the participant's chosen investment option.

The RBAP permits participants either to receive their account balances upon termination of employment, provided they have fully vested, or to retain their account balances in the Plan after terminating employment, and to continue to accrue the interest credits as long as they remain participants – until age 70½ at the latest. Vesting under the Plan occurs after five years of service, with a year of service being defined as any 12-month period during which the employee worked at least 1,000 hours. Upon termination of employment (or anytime thereafter), an account can be distributed to the participant, at her election, in one of two ways: in the form of an annuity or in a lump-sum cash payment once the participant reaches normal retirement age. Of central importance here, however, the Plan defines "normal retirement age" as "[t]he *earlier* of the date a Participant attains age 65 *or completes five (5) Years of Service*" at PwC. Joint App'x at 337 (emphases added). In other words, for any employee who starts work at PwC before age 60, her interest will vest *and* she will attain normal retirement age at the same time: after five years of service. For those employees, there is no time period between their vesting date and normal retirement age, and consequently no time in which interest credits would accrue between those dates. Thus, the PwC Plan eliminates the possibility of a whipsaw payment. Because vesting and the attainment of normal retirement age occur simultaneously under the Plan, if an employee takes out a lump-sum payment anytime after vesting, the account will, by definition, already be equal in value to the value possible at normal retirement age.

After fully vesting and terminating their employment with PwC, plaintiffs elected to receive lump-sum payments. Under the Plan, the amount of the lump sum was defined as the participant's vested account balance – *i.e.*, the specific cash balance at the time of the distribution. Plaintiffs sued, alleging that they were entitled to receive greater amounts based on a whipsaw calculation of their account balances.[7] What makes plaintiffs' claim for whipsaw-calculated payments unique, however, is that, under the terms of the RBAP, they were in fact *past* normal retirement age once they had vested, because the Plan defined "normal retirement age" as "[t]he *earlier* of the date a Participant attains age 65 or completes five (5) Years of Service" as an employee at PwC. Joint App'x at 337 (emphasis added). Plaintiffs alleged three flaws with this definition.

First, they alleged that it violated ERISA § 3(24), because that provision of the statute defines normal retirement age as "the time a plan participant attains normal retirement age under the plan." 29 U.S.C. § 1002(24)(A). Plaintiffs argued that five years of service was not a "normal retirement age," and therefore that the RBAP's definition was not a "time a plan participant attains normal retirement age under the plan," as required by the statute.

Second, plaintiffs alleged that the Plan's definition violated the provisions of ERISA that were meant to prevent "backloading," which occurs when a covered employee receives disproportionately higher benefit accruals for later years of service and therefore disadvantages shorter-term employees. *See* 29 U.S.C. § 1054(b)(1)(A)-(C); *Lonecke*, 584 F.3d at 464.

Third, plaintiffs alleged that they were not informed of the definition of "normal retirement age" in the Summary Plan Description ("SPD"), the docu-

[7] As the foregoing discussion of the Pension Protection Act makes clear, plaintiffs' claim of entitlement to whipsaw payments depends on principles of actuarial equivalence that were in effect at the time they took their distributions but have since been abrogated by Congress.

ment provided to employees that explains the terms of PwC's plan. The omission, they contended, constitutes an independent violation of the notice requirements in ERISA's implementing regulations. *See* 29 C.F.R. § 2520.102-3; *Frommert v. Conkright*, 738 F.3d 522, 532 (2d Cir. 2013).

III. Procedural History

Plaintiffs originally brought this action on March 23, 2006, and PwC moved to dismiss. On September 5, 2006, the district court, then-Judge Michael B. Mukasey, denied in part PwC's motion to dismiss, determining that the Plan's definition of normal retirement age based on years of service violated ERISA § 3(24), relying on our decision in *Duchow v. New York State Teamsters Conference Pension and Retirement Fund*, 691 F.2d 74 (2d Cir. 1982). *Laurent v. PricewaterhouseCoopers LLP*, 448 F. Supp. 2d 537, 545 (S.D.N.Y. 2006) ("*Laurent I*"). Because the normal retirement age set by the Plan was invalid, the district court set the normal retirement age for purposes of the Plan at age 65, which it characterized as the "statutory default." *Id.* at 546. The case was then transferred to Judge George B. Daniels, who denied a motion for reconsideration, but certified Judge Mukasey's opinion for interlocutory appeal. *Laurent v. PricewaterhouseCoopers LLP*, No. 06 Civ. 2280(GBD), 2007 WL 2363616 (S.D.N.Y. Aug, 17, 2007) ("*Laurent II*"). After we declined to hear the interlocutory appeal, the district court again denied reconsideration. *Laurent v. Pricewaterhouse-Coopers LLP*, No. 06 Civ. 2280(GBD), 2010 WL 5396089 (S.D.N.Y. Dec. 22, 2010) ("*Laurent III*"). Subsequently, plaintiffs filed a Second Amended Complaint on August 22, 2012. PwC again moved to dismiss, in light of intervening out-of-circuit precedent. The district court, now Judge Oetken, denied the motion to dismiss, but for different reasons than Judge Mukasey. *Laurent v. PricewaterhouseCoopers LLP*, 963 F. Supp. 2d 310 (S.D.N.Y. 2013) ("*Laurent IV*"). That decision is now before us on appeal.

In denying PwC's motion to dismiss the Second Amended Complaint, Judge Oetken first analyzed whether our decision in *Duchow* controlled the case, as Judge Mukasey had ruled. In *Duchow*, we rejected the defendant plan's reading of "normal retirement age" as incorporating a years-of-service requirement through its inclusion of the term "anniversary" in ERISA § 3(24)(B)(ii), because the ordinary meaning of "anniversary" "plainly denotes a date rather than the years between the date and the past event." 691 F.2d at 79. Judge Oetken determined that *Duchow* dealt exclusively with age-based requirements for vesting independent of length of service, and did not consider the possibility of a service-based normal retirement age. *Laurent IV*, 963 F. Supp. 2d at 317. Thus, where *Duchow* referred to "age," it meant "age" under § 203(a)," the nonforfeitability requirements, and interpreted only the anniversary provision of the statutory default, *i.e.*, the anniversary of commencing participation in a plan. *Id.*[8] Accordingly, the district court concluded that *Duchow* did not dictate that the RBAP's years-of-service definition violated ERISA. *Id.* at 318-19.

[8] *Duchow* did include dictum, the district court acknowledged, that relied on an assumption that normal retirement age would generally be defined in terms of age, but it did not prohibit a years-of-service based definition; "[r]ather, it recognized that § 203(a) imposes two requirements, one based on service and the other on normal retirement age." *Laurent IV*, 963 F. Supp. 2d at 317.

The district court then proceeded to analyze the statutory requirements. It noted that ERISA provided that "normal retirement age" can mean "the time a plan participant attains normal retirement age under the plan," but held that this definition did not confer limitless discretion on the plan sponsor to define any event or condition as the normal retirement age, such as "on the first occasion that a double rainbow appears over Tokyo, or when Meryl Streep wins her next Emmy, or when the plan participant consumes his fiftieth cupcake." *Id.* at 319. Instead, the statute must be interpreted in accordance with the ordinary meaning some reference to their ordinary meaning of its terms, so "normal," "retirement," and "age" must all be interpreted with some reference to their ordinary meaning. *Id.* at 320. The district court determined that the RBAP's retirement age was "'normal' in the sense that it applie[d] across the board, to every participant in the plan," and that "normal retirement age . . . does not control when employees must retire, but only when certain rights vest and how benefits are adjusted." *Id.* (internal quotation marks omitted), quoting *Fry v. Exelon Corp. Cash Balance Pension Plan*, 571 F.3d 644, 647 (7th Cir. 2009).[9] Therefore, it held, the RBAP's normal retirement age "is 'normal' and satisfies the 'retirement' requirement." *Id.*

But the district court concluded that defining "age" in terms of years of service was a "strained construction" that departed from the ordinary meaning of the word, and thus was inconsistent with the meaning of normal retirement age in ERISA. *Id.* at

[9] The district court's discussion of the validity of the RBAP relied heavily on the Seventh Circuit's decision in Fry, which will be discussed more fully below.

321 (internal quotation marks omitted). The district court assumed that age could be defined in terms of an anniversary, such as "age [at hiring] + 5," but held that years of service – defined in terms of years in which the employee worked a minimum of 1,000 hours – is not the same as an anniversary. *Id.* As the court explained, "As a matter of ordinary usage, the query 'what's your age?' should not be met with the response, 'the first time I went to work, as modified by an algorithm I'll now describe.'" *Id.* at 320. Accordingly, based on the statutory text's inclusion of the word "age," the district court concluded that the RBAP's normal retirement age was not an age, and therefore violated ERISA.[10]

As alternative bases for denying PwC's motion to dismiss, the district court determined that the RBAP violated ERISA's prohibitions on "backloading," which prevent retirement plan sponsors from evading the statute's minimum vesting requirements by keeping rates of benefit accrual low in the early years of an employee's service (when the employee is more likely to terminate employment prior to retirement), and concentrating accrual in the later years of service (when the employee is more likely to stay with the employer until retirement). *See id.* at 323 & n.6, citing H.R. Rep. No. 93-807 (Feb. 21, 1974), 1974 U.S.C.C.A.N. 4670, 4688 (explaining purpose of rule against backloading). The district court also con-

[10] The district court noted that this interpretation was consistent with the employee-protective purposes of ERISA because "[i]f pension plans were free to define normal retirement age without any meaningful limitation based on the 'age' requirement, . . . the role of the normal retirement age as a robust participant-protective mechanism in ERISA's vesting rules might be compromised." *Id.* at 321.

cluded that the RBAP's plan documents, the SPDs, violated ERISA's notice requirements by misleading plan participants as to the Plan's definition of normal retirement age. *Id.* at 330.

The district court certified an interlocutory appeal on the foregoing issues, *Laurent v. PricewaterhouseCoopers LLP*, No. 06 Civ. 2280(JPO), 2014 WL 251986 (S.D.N.Y. Jan. 22, 2014) ("*Laurent V*"), and we granted leave to appeal, *Laurent v. PricewaterhouseCoopers LLP*, No. 14-314 (2d Cir. Apr. 22, 2014), ECF No. 1.

## DISCUSSION

### I. Standard of Review

We review the denial of a motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) *de novo*. *See Drimal v. Tai*, 786 F.3d 219, 223 (2d Cir. 2015). "Because on a 12(b)(6) motion a court must treat as true the pleading's factual allegations," we assume for the purposes of our review that the facts alleged in the complaint are true. *Toussie v. Powell*, 323 F.3d 178, 180 (2d Cir. 2003).

### II. Statutory Construction

As with any statute, our interpretation of ERISA's terms begins with the statutory text. *See Jimico Enters. v. Lehigh Gas Corp.*, 708 F.3d 106, 110 (2d Cir. 2013). ERISA § 3(24) defines "normal retirement age" as "the earlier of –

> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of—
>
> > (i) the time a plan participant attains age 65, or

> (ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. § 1002(24). Because the RBAP has its own definition of normal retirement age, this case concerns the proper construction of § 3(24)(A), "the time a plan participant attains normal retirement age under the plan."[11] That definition must be read in context, however, and "with a view to [its] place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted); *accord*, *King v. Burwell*, No. 14-114, slip op. at 9 (U.S. June 25, 2015).

[11] The district court correctly recognized that our decision in *Duchow v. New York State Teamsters Conference Pension & Retirement Fund*, is not controlling, as *Laurent I* had held. In *Duchow*, we held that ERISA "indicate[s] that two discrete vesting requirements are imposed, the first linked to age without regard to length of service and the second depending on the length of service without regard to age." 691 F.2d 74, 77 (2d Cir. 1982). But our decision did not address a situation where "normal retirement age" under § 3(24) was defined by the *plan*; instead, *Duchow* was concerned the statutory definition of normal retirement age under § 3(24)(B), *i.e.*, the later of age 65, or, as the statute provided at that time, ten years after a plan participant commenced participation in the plan. "In short," we held, "we are persuaded that Congress intended that an employee's pension rights would vest, irrespective of the length of his service, either on his 65th birthday or on the tenth anniversary of his joining the plan, whichever occurred later, *unless the plan itself allowed earlier vesting*." *Id.* at 80 (emphasis added). Thus, *Duchow* reserved the question whether normal retirement age could be defined differently under a plan than as part of the statutory default, and consequently does not control the disposition of this case.

Considering the plain meaning of the text in the context in which it appears, it is immediately apparent that the statute confers considerable discretion on retirement plan creators to determine normal retirement age. The plain text allows for the selection of a retirement age "under the plan" as an alternative to the statutory default, and specifies that normal retirement age shall be the *earlier* of those two points in time. One can easily imagine why Congress would want courts to defer to employers' determination of a retirement age that is earlier than the default: in many jobs and industries, normal retirement occurs earlier than age 65. Employers of firefighters, ballerinas, or professional athletes, for example, could quite reasonably select a much younger normal retirement age than the statutory default. The structure of the statute therefore 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.

PwC emphasizes that discretion, arguing that the statute "allows a [plan] sponsor to specify 'the time'" that a participant attains normal retirement age, with time meaning simply "a point or period when something occurs." Appellants' Br. at 25 (internal quotation marks omitted). PwC argues that Congress placed no limits on when a plan could determine that normal retirement age had been reached, and "[c]onditions, if any, are left up to the sponsor." *Id.* at 27. That does not mean, PwC agrees, that the district court's double rainbow, Meryl Streep, and cupcake examples are permissible under the statute – the definition of normal retirement age by a plan is still limited to a period of "time," and thus, according to PwC, so long as the plan designates a measure of time, it complies with ERISA.

But a closer reading of the statute compels the conclusion that it does not confer boundless discretion to select *any* point in or measure of time. True, § 3(24)(A) permits plans to define a "time," but that is not simply any time: under the statute's plain terms, it must be "the time a plan participant attains *normal retirement age*." 29 U.S.C. § 1002(24)(A) (emphasis added). ERISA does not define normal retirement age as the earlier of age 65 or 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.

Instead, the statute defines "normal retirement age" as the earlier of "the time a plan participant attains normal retirement age under the plan" or the statutory default of age 65 or the fifth anniversary of plan participation. The repetition of the phrase, "normal retirement age," in § 3(24)(A) is no mere tautology. Rather, it 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. The statute does not define what "normal" or "retirement" mean, and where a statute does not define a term, we "give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012). "Normal" means "[c]onforming, adhering to, or constituting a usual or typical standard, pattern, level, or type," and, importantly, to "retire" means, *inter alia*, "[t]o withdraw from business or public life and live on one's income, savings, or pension." Am.

Heritage Dictionary 848, 1055 (2d ed. 1982); *accord*, Webster's New Riverside Univ. Dictionary 803, 1003 (2d ed. 1984). Thus, "normal retirement" does not, in its ordinary meaning, suggest anytime the employer wishes, or whenever an employee leaves a company after a few years on the job. The plain meaning of the statute does not allow for an ordinary industrial or financial services company to pick, say, 35 as its normal retirement age, since such a company could not, under normal circumstances, reasonably expect its employees to retire at that time.[12]

The district court's conclusion that the RBAP violated ERISA because it defined normal retirement age in terms of years of service, rather than as a literal age, placed undue emphasis on the word "age" to the exclusion of its modifiers, "normal retirement." Words in a statutory text should not be interpreted in isolation; "[o]ur duty, after all, is to construe statutes," not isolated words or phrases. *King*, slip op. at 9 (internal quotation marks omitted). There is no indication in the statute that normal retirement age must be a literal calendar age. To the contrary, the statutory default itself includes a variation on that

[12] Analogously, imagine that Congress offered subsidies to states that protect the habitat of "whatever species the state selects as the state bird" (and, to make the analogy even closer to ERISA, if the state does not select its own bird, the statutory default is the bald eagle). Such a statute clearly confers wide discretion on each state to select any species of bird to be its state bird. But a state could not claim entitlement to the subsidies by picking a species of wildcat or frog, simply because those are both "species." Similarly here, the statute grants leeway to plan sponsors to select any time that a participant attains normal retirement age, but it cannot pick an age, date, or occurrence that bears no plausible relationship to any conventional or anticipated retirement age.

theme, allowing normal retirement age to be defined as five years after the commencement of participation in the plan. *See* 29 U.S.C. § 1002(24)(B)(ii). Treating any literal calendar age as sufficient to meet ERISA's requirements also 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. PwC cannot reasonably expect its employees to retire at 35 any more than the National Basketball Association can reasonably expect its players to retire at 65. The problem with these numbers is not, of course, that they are not ages, but rather that they bear no relationship to *normal retirement* ages for their respective industries, and thus stretch the statute's words beyond what they can be reasonably interpreted to mean. Conversely, had PwC selected *30* years of service as its normal retirement age, plaintiffs would be hard put to argue that that is not a "time a plan participant attains normal retirement age."[13]

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). Such a reading would also be inconsistent with the statutory default, § 3(24)(B), which defines normal retirement age as 65 or five years after hiring, whichever is *later*. That definition is consistent

[13] Indeed, as will be discussed more fully below, Congress recently clarified that 30 years of service *is* an acceptable retirement age under the statute. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2827 (2014), codified at 29 U.S.C. § 1054(k).

with the ordinary understanding of normal retirement age: 65 for most people, but with an exception for someone who is hired within five years of her 65th birthday. And that commonsense definition fits the "symmetrical and coherent regulatory scheme," *Brown & Williamson*, 529 U.S. at 133 (internal quotation marks omitted), created by the statute: requiring that plans pick an age that bears some relationship to typical retirement age for workers covered by the plan advances the Act's stated purpose of protecting employees "with long years of employment" from "losing anticipated retirement benefits." 29 U.S.C. § 1001(a). Construing § 3(24) to prohibit plans from selecting any age, simply because it is an age, is therefore consistent with the "broader structure of the Act." *King*, slip op. at 15, citing *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").

The district court's alternate conclusion was based on an attempt to distinguish PwC's plan from the plan at issue in *Fry v. Exelon Corp. Cash Balance Pension Plan*. In that case, the Seventh Circuit upheld a plan that defined normal retirement age as "five years on the job." 571 F.3d 644, 646 (7th Cir. 2009). Like the RBAP, that was also the plan's vesting date, and thus the employees' first opportunity to demand a lump-sum distribution when terminating their employment. The Seventh Circuit held that the plan's definition did not violate ERISA, because:

> [T]he Plan's formula – the participant's age when beginning work, plus five years – is an "age." It is employee specific, to be sure, but "age + 5" remains an age. It is not as if the Plan provided that "an employee reaches normal retirement age when he owns ten umbrellas." The Plan's formula not only specifies an "age" but also is lifted right out of the statute. Subsection (B)(ii) defines as the highest possible "normal retirement age" (for a person hired at 65 or older) "the 5th anniversary of the time a plan participant commenced participation in the plan." Making that statutory definition of "normal retirement age" universally applicable can't be rejected on the ground that the formula does not yield an "age." ERISA does not require the "normal retirement age" to be the same for every employee; § 1002(24)(B)(ii) shows that too.

*Id.* at 647.

We respectfully disagree with the Seventh Circuit's conclusion that five years on the job is a permissible normal retirement age under ERISA, simply because it is an "age." Adopting its rule would permit PwC to pick an unreasonably low age as its normal retirement age, which would contravene the language of the statute, for the reasons described above. The Seventh Circuit's reliance on ERISA § 3(24)(B)(ii) for the conclusion that a five year anniversary normal retirement age is permissible takes that provision out of its statutory context. 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.

The Seventh Circuit rejected the argument that five years on the job is not a "*normal retirement* age," however, because, it stated, ERISA "does not compel a pension plan's retirement age to track the actuarial tables." *Id.* (emphasis added) (internal quotation marks omitted). Instead, the court held, under § 3(24)(A), "an age is the 'normal retirement age' because the plan's text makes it so. The age in the plan is 'normal' in the sense that it applies across the board, to every participant in the plan." *Id.* Regarding "retirement," the court explained, "It is important to understand that a 'normal retirement age' in a pension plan does not control when employees must retire, but only when certain rights vest and how benefits are adjusted. That's why it makes sense to speak of an age being 'normal' to the plan's operation rather than to anyone's retirement prospects." *Id.*

Again we respectfully disagree. The statute sets as a default an age that anyone would recognize as a traditional age for retirement. It allows plans to set an earlier date, but that too must be a normal retirement age. The argument that a "normal retirement age" need not have any relationship to the age at which plan participants normally retire because the phrase is used to trigger certain benefits or adjustments rather than to mandate retirement is a non sequitur. Congress could have chosen any age or triggering event, or allowed plans to select any such trigger, but it chose to tie the benefits and adjustments respectively governed by §§ 203 and 204 to a (plan-selected) "normal retirement age," presumably because it believed that the rights involved were best triggered by an employee's reaching an age that is reasonably so defined.

Moreover, there is no reason to think that ERISA's drafters meant by "normal" the ordinary age of retirement in one part of its definition, and "normal" merely in the sense of "applies across the board" in a different part of the same sentence. Such a reading would defy the "presumption that a given term is used to mean the same thing throughout a statute, a presumption surely at its most vigorous when a term is repeated within a given sentence." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citation omitted). In any event, even in isolation from the present context, "normal" does not ordinarily mean "uniform," and had Congress wanted to mandate uniformity, it could have allowed plans to select "the time a plan participant attains *the uniform* retirement age under the plan."[14] Construing 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 circum-

[14] In fact, a requirement of uniformity would just as naturally follow if Congress had simply used the phrase "retirement age" without including "normal." It would be odd to construe a statute that permits an employer to set the "retirement age" for its employees to allow that employer then to vary that age from one employee to the next.

stances, retire. Five years on the job at an accounting firm is not a normal retirement age.[15]

Inasmuch as we find *Fry*'s reading of the statute unpersuasive, we are similarly skeptical of the distinction between five "anniversaries" in *Fry* and five "years of service" in this case. The district court here recognized that five years of service, as calculated in increments of 1,000 hours, was a different measure of time than five anniversaries, because a year of service might not correspond to a chronological year. It therefore distinguished *Fry* and held that unlike the plan in that case, the RBAP violated ERISA because it did not pick an "age" as its normal retirement age. *Laurent IV*, 963 F. Supp. 2d at 321. But when one considers the function of normal retirement age in the overall scheme of statutory protections, that distinction between anniversaries and years of service is revealed to be essentially semantic.

If an employee's fifth anniversary at the company and her five years of service coincide, there is literally no difference between how a years-of-service plan and an anniversary plan would treat that employee. The question, then, is whether the result differs if they do not coincide. Theoretically, under an

[15] We emphasize that this leaves 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 the RBAP at 58 or 60 or 62 would be inappropriate. The problem in this case is not that we disagree with PwC about what is a normal retirement age for its employees, but that the chosen age, having been selected to eliminate whipsaw payments rather than with an eye toward assessing what is a reasonable approximation of "normal retirement age," unsurprisingly bears no relationship at all to such an age.

anniversary plan, normal retirement age "under the plan" could be reached before the benefit has fully vested, if it takes an employee longer than five years on the job to fulfill five years of service. But in that situation, the employee would be no better or worse off than an employee whose normal retirement age is tied to years of service: neither would be entitled to a whipsaw payment because neither would have a normal retirement age that occurs subsequent to vesting. The alternative – vesting before anniversary – is impossible because it would take a minimum of five years on the job to obtain five years of service. Accordingly, there is no functional difference for employees between tying normal retirement age to an anniversary and tying it to years of service.[16]

Because the PwC Plan and the plan in *Fry* are no different in their effect, it would elevate form over function to hold PwC liable for violating ERISA

[16] The district court pointed to one difference between anniversaries and years of service that is more compelling, namely, that the completion of five years of service is *likely* to "cluster around employees' fifth anniversaries," but unlike anniversaries, a years-of-service metric does not provide a date-certain for employees' normal retirement age. *Laurent IV*, 963 F. Supp. 2d at 321. We agree with the district court that, consistent with ERISA's purposes of protecting retirees' settled expectations in anticipated benefits, normal retirement age cannot be too "nebulous" a benchmark, *id.*, but we do not think that the statute requires complete certainty. An employee with a normal retirement age that is defined by years of service will still be able to predict roughly when she will reach retirement under the plan, even if she does not know the date precisely. Furthermore, because the statute builds the less certain years-of-service benchmark into its minimum vesting requirement, it is clear that Congress was willing to tolerate such a moderate degree of unpredictability in the overall statutory scheme.

simply because it did not use the right words to eliminate a benefit to which its employees were entitled. If PwC could accomplish the same result permissibly under the statute by picking a normal retirement age of 35 or the fifth anniversary of hire, holding that it violated the statute by instead choosing five years of service would amount to little more than a "gotcha" outcome lacking any substantive protection for pension plan participants.

Accordingly, we do not find either the Seventh Circuit's reading of the statute or the distinction between anniversaries and years of service persuasive.[17] We nevertheless concur in the district court's determination that the RBAP is invalid, because five years of service is no more a normal retirement age than five years on the job. And 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.

### III. Consistency with Precedent

Our determination that the clear statutory text governs this case is sufficient to end the inquiry. *See Tapia v. United States*, 131 S. Ct. 2382, 2388 (2011). We find additional support for that conclusion, however, in the fact that PwC's interpretation of the

[17] We agree with the district court that the Fourth Circuit's decision in *McCorkle v. Bank of America Corp.*, 688 F.3d 164 (4th Cir. 2012), is unpersuasive. *See Laurent IV*, 963 F. Supp. 2d at 322 n.5. Plaintiffs in that case conceded that the defendant's plan's definition of normal retirement age was valid under § 3(24), and the Fourth Circuit's discussion of why, in its view, that "concession [wa]s well-counseled" was dicta that relied heavily on *Fry* and did not explore what, if any, limits the statute might place on a plan's discretion. *McCorkle*, 688 F.3d at 171.

statute would effectively nullify our decision in *Esden v. Bank of Boston*. The plan at issue in *Esden* had attempted to eliminate whipsaw payments by projecting the interest rate at 4% compounded annually, notwithstanding the fact that the actual interest credits, though variable, could not accrue at a rate lower than 5.5%. *See* 229 F.3d at 161. Because the actual interest rate always exceeded the projected rate, "the Plan guarantee[d] that 'whipsaw' will never occur . . . [and a]s a consequence, the Plan w[ould] always pay out the Current Cash Account Balance." *Id.* We held that under ERISA, for any defined benefit plan (which, of course, a cash balance plan is), the accrued benefit must be valued in terms of the annuity that it will yield at normal retirement age, and the plan could not alter that entitlement based on the (plan-approved) time when, or form in which, an employee takes his or her distribution. *Id.* at 164. We noted that ERISA did not leave plans free to choose their own methodology for determining the actuarial equivalent of the accrued benefit; rather, we stated, "If plans were free to determine their own assumptions and methodology, they could effectively eviscerate the protections provided by ERISA's requirement of actuarial equivalence." *Id.* (internal quotation marks omitted). The driving force behind our decision was the various statutory limitations on the freedom of plan creation that ERISA imposes. *See id.* at 173 ("The Plan cannot contract around the statute."). Those limitations apply regardless of whether the plan in question permits participants to elect a lump-sum payment at termination, rather than an annuity at retirement. Plans need not provide the opportunity for such an election, but where they do, a "participant may not elect a forfeiture." *Id.*

*Esden* does not directly control this case because the rule of actuarial equivalence was there defined in terms of equivalence between the point at which the participant elects to take a lump sum distribution and the participant's normal retirement age (65 in that case). The PwC Plan's elimination of the whipsaw by foreshortening the time to normal retirement age therefore complies with the *letter* of our decision. But by pegging normal retirement age to the vesting date, the Plan accomplishes the same result that we proscribed in *Esden*: it effectively penalizes employees based on the time when, and form in which, they take their distribution. Had plaintiffs kept their accounts and not taken a lump sum when they terminated their employment with PwC, their accounts would have been valued differently (though not necessarily higher, because the value of the accounts fluctuated based on whatever investment option each participant chose) when they took an annuity later. Therefore, taking the lump sum at the termination of their employment deprived plaintiffs of the actuarial equivalent of what their accounts would have been worth had they later taken an annuity. Again, that is not technically a forfeiture under the statute, because forfeiture is defined in reference to normal retirement age. But in substance, the PwC Plan accomplishes precisely what we forbade in *Esden*, by choosing a methodology for calculating actuarial equivalence that effectively withholds that statutory protection from plaintiffs' accounts.

PwC argues that *Esden* recognized that there are ways a plan can permissibly avoid any whipsaw payout, and indeed, we said, "If the plan's projection rate (that is the hypothetical interest credits it provides) and the statutorily prescribed discount rate are identical, then the present value of the hypothetical account projected forward to normal retirement age determined by this computation will be exactly the current cash account balance." *Id.* at 165. Such plans may pay out the cash account balance as the actuarial equivalent of the accrued benefit. But that is not how PwC's plan is set up: the participant is given a number of options in which she can choose to have her hypothetical balance invested. If the investment were to yield a rate of return greater than the discount rate, the participant would effectively forfeit the difference by electing to take her distribution in a lump sum at the time of termination. That is exactly what we said a plan cannot do in *Esden*, though in that case the difference between the future interest credits and the guaranteed minimum actual value of those credits could be precisely ascertained. *See id.* at 167. Here, we do not know what plaintiffs' accounts would be worth if they stayed in the Plan until age 65 – or, as the Plan permits, until age 70½ – but to the extent their value will exceed the discounted present value, defining normal retirement age in a way that coincides with vesting effects the kind of forfeiture that *Esden* forbids.[18]

[18] Put another way, as Judge Posner characterized the defendant's attempt to eliminate whipsaw payments in *Berger v. Xerox Corp.*:

> Xerox tells its employees who leave the company before they reach . . . [normal retirement] age that if they leave their money with the company they will obtain a pension beginning at age 65 that will reflect future interest credits. They are offered the alternative of taking a lump sum now in lieu of a pension later, but the lump sum is not the prescribed actuarial equivalent of the pension that they are invited to surrender by accepting the lump sum because it excludes those credits.

IV. Other Considerations

We pause to discuss two additional considerations that are relevant to our holding.

First, we acknowledge that our interpretation of the statute is not wholly consistent with that of the IRS, though its interpretation has shifted over time. The IRS has "primary jurisdiction and rule-making authority over ERISA's funding, participation, benefit accrual, and vesting provisions," *Esden*, 229 F.3d at 157 n.2, and ERISA itself provides that "[r]egulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in [ERISA]," 29 U.S.C. § 1202(c). Because the relevant IRS interpretation of "normal retirement age" is contained in a Revenue Ruling, not in a regulation subject to public notice and comment, it is "entitled to respect" only to the extent it has "the power to persuade," *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (internal quotation marks omitted), and is not subject to *Chevron* deference. *See IRS v. WorldCom, Inc. (In re WorldCom, Inc.)*, 723 F.3d 346, 357 (2d Cir. 2013).

> They are, in short, being invited to sell their pension entitlement back to the company cheap, and that is a sale that ERISA prohibits.

338 F.3d at 761-62. Here, similarly, plaintiffs' election to take a lump sum when they terminated employment forced them to sell their accounts back to PwC for whatever they were worth at that time, rather than their value if taken later as an annuity.

Even if it were entitled to deference, moreover, where the agency interpretation is inconsistent with the statute's plain meaning, we need not defer to that interpretation. *See Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004) ("[D]eference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."); *cf. Hurwitz v. Sher*, 982 F.2d 778, 782 (2d Cir. 1992) (explaining, under prior precedent that accorded great weight to the IRS's interpretations of ERISA, that its interpretations need not be sustained if "plainly inconsistent" with the statute (internal quotation marks omitted)).

Prior to the enactment of ERISA, an IRS Revenue Ruling provided that, to qualify for tax benefit status, a retirement plan could set its normal retirement age lower than age 65, but only if the age in the plan represented the age at which employees customarily retired in the particular company or industry, and was not a device to accelerate funding. Rev. Rul. 71-147, 1971-1 C.B. 116. Following the enactment of I.R.C. § 411(a)(8), the Internal Revenue Code's analogue to ERISA § 3(24), however, another Revenue Ruling permitted a plan to set normal retirement age at any age, including lower than age 65, *regardless* of the age at which employees customarily retired in the particular company or industry. *See* Rev. Rul 78-120, 1978-1 C.B. 117. That 1978 Revenue Ruling represented the IRS's position until 2007, when, in response to the passage of the Pension Protection Act, the agency changed course again and ruled – this time in a formal regulation following notice and comment, *see* IRS Notice 2007-8, *In-Service Benefits Permitted to be Provided at Age 62 by a Pension Plan*, 2007-1 C.B. 276 (Dec. 22, 2006) – that "normal retirement age could not be earlier than the earliest age that is reasonably representative of a typical retirement age for the covered workforce." 72 Fed. Reg. 28604-01, at *28605 (2007).

Although it postdates the relevant period for this case and is prospective only, we find it noteworthy that the IRS's latest interpretation of the statute reverts to the agency's original position, requiring that normal retirement age be an age that is reasonably representative of the typical retirement age for the industry in which the covered employee worked. That the agency has changed its position does not, in and of itself, suggest that we should not defer to the interpretation that was operative at the relevant time. *See Himes v. Shalala*, 999 F.2d 684, 690 (2d Cir. 1993). But given that the IRS's prior view was announced in a Revenue Ruling, while its current view followed from public notice and comment, we think it more likely that the IRS's current position represents the agency's "fair and considered judgment on the matter." *Esden*, 299 F.3d at 169 (internal quotation marks omitted). Moreover, the IRS's current view coheres more naturally with the text of the statute, and 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. *Cf. Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) (declining to defer to agency interpretation of statute where that interpretation "leads to consequences Congress could not have intended" (internal quotation marks omitted)). Consequently, the position of the IRS in the 1978 Revenue Ruling does not persuade us of an interpretation of the statute contrary to the one we have reached here.

Second, we note that a provision in the 2015 Appropriations Act provided a "clarification" of the meaning of normal retirement age that applies retroactively. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2827 (2014), codified at 29 U.S.C. § 1054(k). The new statute provides that, notwithstanding ERISA § 3(24), an "applicable plan" does not violate any requirement of ERISA, or fail to have a uniform normal retirement age, solely because the plan defines normal retirement age as the earlier of (i) an "age otherwise permitted under section 3(24)" or (ii) 30 (or more) years of service. *Id.* "Applicable plan" is defined as any plan that sets normal retirement age on one of those two bases.

Plaintiffs contended at oral argument and in a post-argument supplemental brief that the new statute invalidates PwC's plan, because it precludes normal retirement ages based on less than 30 years of service. But the new statute does not say either way how Congress views a plan that defines normal retirement age based on *less* than 30 years of service; it merely states that a 30-year plan does not violate ERISA. In fact, the new statute cuts against plaintiffs' argument that years of service can never be an acceptable "age" under ERISA, because Congress recognized in its clarification the acceptability of a plan that included a years-of-service component. That shows that Congress is not averse to a years-of-service-based normal retirement age, in the same way that its use of an anniversary date in ERISA § 3(24)(B)(ii) shows that it is not averse to an anniversary-based normal retirement age. *See Fry*, 571 F.3d at 647. But that does not necessarily mean that plans may use those measures of time without limitation, any more than the fact that the statute uses a precise calendar age as its statutory default means that a plan could pick age 21 as its normal retirement age. And it is instructive that Congress permitted a years-of-service normal retirement age that is sufficiently long that it bears a close relationship to what we ordinarily view as a time period after which it would be "normal" to retire. The new statute therefore neither permits nor precludes PwC's five-year plan.

Finally, PwC argues that even if the RBAP is invalid under ERISA, the district court erred by imposing 65 as a "default" statutory age to which the Plan must now adhere. It is not clear to us that the district court did anything of the sort. Although Judge Oetken stated that he "embrace[d] *Laurent I*'s result," *Laurent IV*, 963 F. Supp. 2d at 315, that statement is more plausibly read, in the context of the court's further discussion, to concur with Judge Mukasey's denial of PwC's motion to dismiss, not necessarily to adopt the remedy that Judge Mukasey imposed.[19] Because it did not address the appropriate relief, we leave it to the district court to consider that question in the first instance.

[19] We note, however, that 65 is not only (part of) the statutory default normal retirement age, but it is also the default normal retirement age under the plan. *See* Joint App'x at 337 (defining normal retirement age "[t]he earlier of *the date a Participant attains age 65* or completes five (5) Years of Service" (emphasis added)). Since ERISA grants a private cause of action to enforce, *inter alia*, "the terms of the plan," 29 U.S.C. § 1132(a)(3), PwC may be compelled to "act 'in accordance with the documents and instruments governing the plan' insofar as they accord with the statute." *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1548 (2013), quoting 29 U.S.C. § 1104(a)(1)(D).

## CONCLUSION

For the foregoing reasons, we hold that PwC's retirement plan violates ERISA, because five years of service is not a "normal retirement age" under the statute. Having so concluded, we need not reach the alternative bases for the district court's denial of PwC's motion to dismiss. Accordingly, the district court's denial of PwC's motion is AFFIRMED.

## APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| ----------------------------------------------- | X | |
| TIMOTHY D. LAURENT,<br>on behalf of himself and on behalf<br>of all others similarly situated, | : | |
| Plaintiff, | : | |
| -against- | : | |
| 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, | : | 06 Civ. 2280<br>(MBM)<br>OPINION<br>AND<br>ORDER |
| Defendants. | : | |
| ----------------------------------------------- | X | |

* * *

MICHAEL B. MUKASEY, U.S.D.J.

Plaintiffs Timothy Laurent, Smeeta Sharon, and Michael A. Weil sue Defendant PriceWaterhouse-Coopers ("PWC") alleging that PWC's Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP ("the RBAP") violates the

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* (2000) ("ERISA"). In particular plaintiffs allege that the RBAP violates ERISA's standards for calculating lump-sum benefits payable from a cash balance pension plan, standards for calculating accrued benefits, and age discrimination rules. PWC has moved to dismiss all four claims, denominated "counts," of plaintiffs' First Amended Class Action Complaint. For the reasons stated below, PWC's motion to dismiss is denied as to the first claim, but is granted as to the second, third, and fourth claims, which are dismissed.

## I.

Because all assertions in the complaint are accepted as true upon a motion to dismiss, *DiVittorio v. Equidyne Extractive Industries, Inc.*, 822 F.2d 1242, 1244 (2d Cir. 1987), the following facts are based on plaintiffs' amended complaint and those documents which are incorporated into the amended complaint by reference. *See* Fed. R. Civ. P. 10(c).

Federal law recognizes two forms of employer-provided pension plans: defined benefit plans and defined contribution plans. In a defined contribution plan, an individual account is established for each participant and the employer makes periodic contributions to that account. The participant's retirement benefit is the balance in the individual account. A defined benefit plan entitles a participant to fixed periodic benefit payments upon retirement that are paid out pursuant to a formula outlined in the plan.

On July 1, 1994, Price Waterhouse LLP replaced its previous retirement plan with a defined benefit plan identical to the RBAP. (Amended Compl. ¶17) On July 1, 1998, Price Waterhouse LLP and Coopers

& Lybrand LLP merged to create PWC. (Amended Compl. ¶18) On July 1, 1999, the Coopers & Lybrand retirement plan merged with the Price Waterhouse retirement plan to form the RBAP. (Amended Compl. ¶18)

The RBAP is a "cash balance" defined benefit plan sponsored by PWC that covers its entire workforce. (Amended Compl. ¶1) A cash balance plan is a defined benefit plan that strongly resembles a defined contribution plan. *See Esden v. Bank of Boston*, 299 F.3d 154, 176 (2d Cir. 2000). Under a cash balance plan, a hypothetical account is established in each participant's name and the benefits payable under the plan are calculated based on the value of that hypothetical account. (Amended Compl. ¶19) The account is funded by PWC's hypothetical "contributions" in the form of "pay credits" and hypothetical earnings expressed as "interest credits." (Amended Compl. ¶20)

Instead of using guaranteed periodic interest credits based on a fixed or variable rate to value the hypothetical interest credits, the RBAP adjusts account balances daily by hypothetical interest credits that reflect the hypothetical performance of investment vehicles chosen by each participant from a PWC selected list of investments. (Amended Compl. ¶21) The RBAP participant accounts are updated daily so that participants can track their hypothetical investment choices. (Pl. Mem. of Law, Ex. C) Therefore, although a defined benefit plan, the RBAP is designed to mimic a defined contribution plan in that it does not guarantee its participants any return on the hypothetical investments that constitute their pension.

The RBAP allows most participants to leave their account balances in the RBAP after terminating employment or retiring; if the participant does so he will continue to receive interest credits even though he is no longer a PWC employee. (Amended Compl. ¶22) A participant with an account balance over $5,000 at the time his employment ends can leave his benefits in the RBAP through April 1 of the year following the later of his retirement or the date he reaches age 70 ½. (Amended Compl. ¶22) Thus, the RBAP is a "front-loaded" interest credit plan, defined as one in which "future interest credits to an employee's hypothetical account balance are not conditioned upon future service." I.R.S. Notice 96-8 at 4. To be tax-qualified, a cash balance plan must be front-loaded, I.R.S. Notice 96-8, "that is, [it] must include interest on the money in the employee's hypothetical account for the period between his leaving the employer and his reaching" the normal retirement age. *Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 762 (7th Cir. 2003).

Under the RBAP, a participant is fully vested after 5 years of employment with PWC, meaning PWC must then provide the employee with 100% of PWC's contributions to his RBAP account. (Amended Compl. ¶24) RBAP participants who leave PWC after this five year vesting period can elect to receive their "normal retirement benefit" as a lump sum distribution at the time they leave.

The RBAP states that "[a] Participant's Normal Retirement Benefit shall be an amount equal to the Actuarial Equivalent (calculated by projecting the Deemed Account Balance to Normal Retirement Age using the Deemed Plan Interest Rate) of his or her Deemed Account Balance." (Amended Compl. ¶28)

The Deemed Plan Interest Rate is defined as the annual rate of interest equal to the interest rate on 30-year Treasury securities, as specified by the IRS for the month of February (or before July 1, 2001, the month of May) immediately preceding the plan year in which the calculation is made. (Amended Compl. ¶29) The RBAP defines normal retirement age as "[t]he earlier of a date a Participant attains age 65 or completes five (5) Years of Service." (Amended Compl. ¶30)

Plaintiffs Laurent, Sharon, and Weil are former PWC employees who were and are RBAP participants. (Amended Compl. ¶¶11-13) In 2002, Laurent ended his employment with PWC and requested a single lump-sum distribution of his benefits. (Amended Compl. ¶11) On May 20, 2002, Laurent was paid the balance of his cash balance account, and he claims that he was paid an amount less than the value of his accrued benefit as defined under ERISA. (Amended Compl. ¶11) In 2002, Sharon's employment with PWC ended and she requested a single lump-sum distribution of her benefits under RBAP, which she received on April 30, 2002. (Amended Compl. ¶12) Sharon was paid the balance of her cash balance account, an amount she claims was less than the value of her accrued benefit. (Amended Compl. ¶12) Weil ended his employment with PWC on December 14, 2001 but has not requested a lump-sum distribution under the RBAP. (Amended Compl. ¶13) Laurent, Sharon, and Weil had fully vested accounts under the RBAP and all of their account balances exceeded $5000 at the time their employment with PWC ended. (Amended Compl. ¶24)

In a September 1999 letter to the IRS, PWC stated that "a low normal retirement age in a qualified defined benefit plan" was PWC's response to "poor rule making by the Treasury Department" and that such a low normal retirement age should not be considered to be an attempt to circumvent "reasonable" rules. (Amended Compl. Ex. 1) Further, PWC contends that the regulatory requirement that a "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" is "neither mandated nor suggested by the law or the legislative history." (Amended Compl. Ex. 1) PWC continued on to explain that it was adopting a low normal retirement age so that it would not be forced by the IRS regulations to provide employees seeking a lump-sum distribution with more money than was in their hypothetical account at the time of the distribution. (Amended Compl. Ex. 1)

In their first claim, plaintiffs allege that the RBAP violates ERISA, because under the RBAP the accrued benefit is not expressed in terms of the annuity that it will yield at normal retirement age and the lump sum benefit paid to the plaintiffs is worth less than such an annuity. (Amended Compl. ¶36) Specifically, plaintiffs allege the RBAP's "normal retirement age" of five years of service is invalid under ERISA and, in the alternative, is invalid because it was not stated clearly in PWC's Summary Plan Description ("SPD"). Under plaintiffs' theory, the normal retirement age under the RBAP becomes the statutory default of age 65 because the RBAP did not provide for an alternative, valid normal retirement age. Thus, as a cash balance defined benefit plan paying lump-sum distributions to former employees who had not reached the normal retirement age, the

RBAP was required to project the balance of the hypothetical account forward to age 65 and then pay out the present value of that projected balance. (Amended Compl. ¶¶37-38) Additionally, plaintiffs allege the RBAP violates ERISA because it does not provide a projection rate that accurately reflects a reasonable estimate of future interest credits. (Amended Compl. ¶59)

Second, plaintiffs claim that the RBAP violates ERISA, because after a participant satisfies the vesting standards her benefit is conditioned on the distribution option chosen. (Amended Compl. ¶68) Specifically, plaintiffs take issue with the RBAP's definition of a participant's accrued benefit as that participant's hypothetical current account balance, which they allege is an incomplete definition because it does not reflect the participant's total "accrued benefit" as defined under ERISA. (Amended Compl. ¶69) Because a participant who leaves his money in the RBAP after he reaches normal retirement age can continue to receive interest credits until age 70 ½, plaintiffs argue that a participant's accrued benefit under the RBAP includes both his current account balance and the stream of future investment credits payable with respect to that account balance until the participant reaches age 70 ½. (Amended Compl. ¶70)

Third, plaintiffs claim that the RBAP violates the ERISA age discrimination rules, because the older RBAP participants accrue less benefits than younger employees who receive the same pay and interest credits. (Amended Compl. ¶¶76-78)

Fourth, plaintiffs claim that the RBAP violates ERISA because it does not actuarially increase a participant's benefit after normal retirement age.

(Amended Compl. ¶¶81-84) Although the RBAP continues to provide interest credits to participants after the normal retirement age who leave their money in the RBAP, plaintiffs allege these interest credits are not a substitute for an actuarial adjustment because they do not maintain the actuarial value of a participant's normal retirement benefit or any larger benefit accrued as of a date after normal retirement age. (Amended Compl. ¶85)

## II.

In deciding a rule 12(b)(6) motion to dismiss, the allegations of the complaint are taken as true and construed in a manner favorable to the plaintiffs. *Hoover v. Ronwin*, 466 U.S. 558, 587 (1984); *Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 188 (2d Cir. 1998). Such a motion can be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 335 U.S. 41, 45-46 (1957), and cannot be granted merely because recovery appears unlikely on the face of the complaint. *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996).

## III.

The RBAP is a defined benefit plan under ERISA even though it imitates a defined contribution plan and "[t]he regulatory consequences of this classification are wide-reaching." *Esden*, 229 F.3d at 158. Under ERISA, a defined contribution plan is "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses . . . ." ERISA § 3(34). A "defined benefit plan" is any plan other than a defined contribution plan, thus a cash balance plan such as the RBAP is a defined contribution plan. ERISA § 3(35).

Cash balance plans differ from the traditional final-pay plans for which the defined benefit plan regulations were designed, and ERISA sometimes requires "outcomes that are in tension with the objectives" of the cash balance plans. *Esden*, 229 F.3d at 159. Thus, ERISA can mandate the completion of a "whipsaw" calculation to determine the correct value of a cash balance plan that is distributed as a lump-sum before normal retirement age. Under ERISA, any distribution from a cash balance plan other than a single-life annuity payable at normal retirement age must be "no less than the actuarial equivalent of such benefit. For a cash balance plan this calculation involves projecting the cash balance forward and then discounting back to present value." *Id.* It is the forward projecting and discounting back that accounts for the whipsaw terminology. Under a whipsaw calculation, if a plan's projection rate is higher than the statutorily prescribed discount rate, the present value of the accrued benefit will exceed the participant's account balance. If that higher accrued benefit is not paid out, an impermissible forfeiture has occurred in violation of ERISA § 203(a) and I.R.C. § 411(a)(2).[1] *Esden*, 229 F.3d at 159. Thus, in calculating the accrued benefit due to PWC employees based upon a normal retirement age, PWC can be required to engage in a whipsaw calculation. *Esden*, 299 F.3d at 173 ("[a] defined benefit pension plan,

[1] The IRS has primary jurisdiction and rule-making authority over ERISA's funding, participation, benefit accrual, and vesting provisions and ERISA § 2003(c) specifically adopts the regulations promulgated under I.R.C. §§ 410(a), 411, and 412. *Esden*, 229 F.3d at n. 2.

including one adopting a cash balance format, need not offer a lump-sum distribution as an optional form of benefit . . . when it does so provide, that distribution must be the actuarial equivalent of the accrued benefit valued according to the statutory methodology . . . The Plan cannot contract around the statute." (internal citations omitted)).

A. Calculation of a lump-sum distribution under the RBAP

Under ERISA, a "normal retirement benefit" is "the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age." ERISA § 3(22); I.R.C. § 411(a)(9). Normal retirement age is defined as 65, unless otherwise provided by the pension plan. ERISA § 3(24); I.R.C. § 411(a)(8). The RBAP defines normal retirement age as the earlier of age 65 or five years of service. (Amended Compl. ¶30). Thus, the relevant question to determine if plaintiffs' lump-sum distributions were properly calculated is whether plaintiffs had reached normal retirement age at the time they consented to such a distribution. If plaintiffs had not reached normal retirement age, then the lump-sum distribution must be equivalent to the present value of the single-life annuity that would be payable if the participant had reached normal retirement age.

The RBAP's defined normal retirement age of five years of service is invalid and, therefore, the normal retirement age under the RBAP becomes the statutory default of age 65. The RBAP normal retirement age is invalid because it is expressed as a term of years of service as opposed to a certain, specified age in contravention of the intent of ERISA as interpreted by the Second Circuit. In the alternative, the RBAP normal retirement age is invalid, because it was not defined, or even mentioned, in the RBAP Summary Plan Description ("SPD"); the SPD controls when it conflicts with the pension plan itself, thus the RBAP has no defined normal retirement age and the age 65 statutory default applies. Further, defendant's argument that a whipsaw calculation does not apply because the RBAP did not guarantee its participants a minimum interest rate is without merit; a whipsaw calculation is required to determine the proper pension benefit owed to plaintiffs. Therefore, defendant's motion to dismiss the first claim of the amended complaint is denied, as explained more fully below.

1. Definition of Normal Retirement Age

Defendant argues that plaintiffs' first claim should be dismissed, because ERISA authorizes the plan sponsor to define the "normal retirement age as any age below age 65" and, thus, the RBAP "normal retirement age" of five years of service is valid. (Def. Mem. of Law at 2) While defendant's argument that a normal retirement age can be any age before 65 may be true, the RBAP does not specify one consistent age as the normal retirement age. Instead the RBAP defines the normal retirement age as five years of service, which means that each employee will be a different age at the time he reaches the normal retirement age. Such a normal retirement age is invalid under the Second Circuit's interpretation of ERISA.

In § 203(a)(2)(B), ERISA enacted certain minimum vesting requirements that all covered pension plans must meet to decrease the number of pension benefits lost; these minimum vesting standards are calculated in terms of years of service. A pension must vest by the time an employee has completed five years of service, thereby entitling the employee to the percentage of his accrued benefits derived from employer contributions. ERISA § 203(a)(2)(B); I.R.C. § 411(a)(2)(A). In addition to the vesting standards, ERISA § 203(a) states that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age . . . ." Normal retirement age is defined in ERISA § 3(24) as the earlier of "(A) the time a plan participant attains normal retirement age under the plan, or (B) the later of (i) the time a plan participant attains age 65, or (ii) the 10th anniversary of the time a plan participant commenced participation in the plan."

The Second Circuit has stated that ERISA § 203(a)'s provisions "with regard to employer contributions are properly interpreted as imposing two distinct types of minimum vesting requirements, one of which is independent of the employee's years of service." *Duchow v. New York State Teamsters Conference Pension and Ret. Fund*, 691 F.2d 74, 77 (2d Cir. 1982). The Court further explained:

> [a]ccordingly § 203(a)(2) has been described as requiring vesting of rights 'prior to retirement.' *See, e.g.*, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 510. In complementary fashion, the first clause of § 203(a) refers only to the attainment of normal retirement age and makes no mention of periods of service. Thus both the format of § 203(a) and the disparate contents of its conjoined parts indicate that two discrete vesting requirements are imposed, the first *linked to age without regard to length of ser-*

> *vice* and the second depending on the length of service without regard to age.

*Duchow*, 691 F.2d at 77 (emphasis added). The Eleventh Circuit takes this view also, finding that normal retirement age is a term of art under ERISA that was incorporated into the Act in 1976 to differentiate it from the vesting period limitations of a pension, which are based upon years of service as opposed to a set age. *See Deak v. Masters, Mates and Pilots Pension Plan*, 821 F.2d 572, n.5 (11th Cir. 1987). Thus, a normal retirement age below age 65 cannot be defined in reference to length of service.

Further, the Second Circuit explained that the use of the phrase "10th anniversary" in ERISA's definition of the default normal retirement age does not impose a service requirement such that years of service can be used to define a normal retirement age. *Duchow*, 691 F.2d at 80. The Court explained, "had Congress intended 'normal retirement age' to be dependent on ten years of service, it would hardly have selected such convoluted and imprecise . . . language as 'the 10th anniversary of the time a plan participant commenced participation in the plan' instead of a clear and direct phrase such as 'the participant's completion of ten years of service.'" *Id.* The Court then confirmed its holding "that Congress intended that an employee's pension rights would vest, irrespective of the length of his service" at a certain age. *Id.*

Additionally, in explaining the ability of an employer to set a normal retirement age below 65, the I.R.S. described normal retirement age as a "certain specified age." Rev. Rul. 78-20 (1978). Under this ruling, a pension plan can set a normal retirement age of less then 65 years old, but it must be a set age as opposed to a term of years in service. *Id.*

Because a normal retirement age cannot be defined in reference to years of service, the RBAP proposed normal retirement age is invalid. Because the RBAP does not provide for an alternative, valid normal retirement age, the normal retirement age for purposes of the RBAP is age 65.

2. Summary plan description

In the alternative, plaintiffs contend that the RBAP's five years of service normal retirement age is invalid because it was not clearly stated in the relevant SPDs. Defendant counters that it did not conceal or misrepresent the normal retirement age under the RBAP. Specifically, defendant claims that the RBAP documents defined normal retirement age as "[t]he earlier of the date a Participant attains age 65 or completes give (5) Years of Service." (Def. Mem. of Law Ex. A, RBAP at 27) To gain access to the documents, RBAP participants had to make a written request to PWC and defendant argues this is enough to alert the participants of the normal retirement age provided by the RBAP. (Def. Mem. of Law, Ex. B, RBAP SPD (1999) at 15) Neither the PWC 1999 SPD nor the 2001 SPD states what the "normal retirement age" under the RBAP is. (Callen Decl. Ex. B; Ex. C) Further, when the former Coopers & Lybrand Pension Plan was amended to incorporate RBAP's five-year normal retirement age, the relevant SPD did not disclose this change or that the RBAP's normal retirement age was five years of service, as opposed to age 65 under the old Coopers & Lybrand plan. (Amended Compl. ¶¶49-50)

Employers are required to distribute SPDs describing pension plan benefits to employees and the SPD "must be sufficiently accurate and comprehensive to apprise participants and beneficiaries of their rights and obligations under the plan." *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 110 (2d Cir. 2003); ERISA § 102 ("[T]he summary plan description . . . shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."). Specifically, 29 C.F.R. § 2520.102-3(j)(1) states "[f]or employee pension benefit plans, [the SPD] shall also include a statement describing the plan's normal retirement age, as that term is defined in section 3(24) of the Act, and a statement describing any other conditions which must be met before a participant will be eligible to receive benefits." The SPD may be relied on by employees as the "'primary source of information regarding employment benefits,'" and it controls over conflicting provisions of the pension plan itself. *Frommert v. Conkright*, 433 F.3d 254, 268-69 (2d Cir. 2006) (quoting *Layaou v. Xerox Corp.*, 239 F.3d 205, 209 (2d Cir. 2001)); *Burke*, 336 F.3d at 110 ("Where the terms of a plan and the SPD conflict, the SPD controls.").

Under Second Circuit law, a faulty SPD violates ERISA if the plaintiff shows he was prejudiced by the fault. *Frommert*, 433 F.3d at 267. A showing of prejudice requires "that a plan participant or beneficiary was *likely* to have been harmed as a result of a deficient SPD." *Burke*, 336 F.3d at 113. Here, the complaint, read in the light most favorable to plaintiffs, could support a finding that the omission of a statement that the normal retirement age under

RBAP is five years of service "likely, and quite reasonably, led plan participants to believe" that the normal retirement age upon which their benefits would be calculated was age 65. *Frommert*, 433 F.3d at 267. Plaintiffs likely were harmed, because it was reasonable for plaintiffs to assume that they would continue to accrue interest credits until age 65 even if they terminated their employment before that point, thus grossly overestimating the value of their pension benefits. "There is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004). Additionally, because plaintiffs were not informed that the normal retirement age under the RBAP was five years, they were prevented from immediately "seeking injunctive relief, altering their retirement investment strategies, or perhaps considering other employment," which is enough to meet the likely prejudice standard. *Frommert*, 433 F.2d at 267. An "employer may rebut a showing of likely prejudice by demonstrating that the deficiency was in fact a harmless error." *Frommert*, 433 F.3d at 267. PWC has not made such a showing.

Thus, the normal retirement age provided in the RBAP is invalid, because it was not clearly stated in the SPD and plaintiffs were likely to have been harmed by their reliance on the faulty SPD. Because the SPD, which stated no normal retirement age, controls, the normal retirement age for purposes of the RBAP is the statutory default of age 65.

### 3. Lump-sum distribution for participants who have not reached normal retirement age

Because plaintiffs had not reached the normal retirement age, the lump-sum distributions they received must include the pay and interest credits that would have been attained at age 65 as part of the accrued benefit; thus PWC may have inaccurately calculated the amount owed to plaintiffs under the RBAP. *See Esden*, 229 F.3d at 154.

As discussed above, the RBAP is a defined benefit plan. The term "accrued benefit" has different definitions under ERISA § 3(23) for defined benefit and defined contribution plans. An "accrued benefit" for a defined contribution plan is "the balance of the individual's account," while an "accrued benefit" for a defined benefit plan is "the individual's accrued benefit . . . expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(B); I.R.C. § 411(a)(7)(A); ERISA § 3(23)(A); I.R.C. § 411(a)(7)(A)(I).

Under a defined benefit plan "if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age [such as a lump-sum distribution at termination] . . . the employee's accrued benefit . . . shall be the actuarial equivalent of such benefit . . ." ERISA § 204(c)(3); I.R.C. § 411(c)(3); Treas. Reg. § 1.411(c)-1(e) (confirming this general rule). Thus, for a cash balance plan, the accrued benefit is not the hypothetical account balance, but rather an amount derived from such hypothetical accounts that expresses an annuity with payments commencing at normal retirement age. *Esden*, 229 F.3d at 166-67; *Berger v. Nazametz*, 157 F. Supp. 2d 998, 1007 (S.D. Ill. 2001); *Lyons v. Georgia-Pacific Corp.*, 221 F.3d

1235, 1251 (11th Cir. 2000) ("Thus, [plaintiff] did not have a statutory right to the amount found in his hypothetical account prior to the normal retirement date, and [defendant] did not have a right to limit any distribution to him to that amount."). The lump-sum distribution "must be valued in terms of the annuity that it will yield at normal retirement age and . . . it must be worth at least as much as that annuity." *Esden*, 299 F.3d at 163; *see also McDaniel v. The Chevron Corp.*, 203 F.3d 1099, 1120 (9th Cir. 2000); *Spacek v. Maritime Assoc., I L A Pension Plan*, 134 F.3d 283, 290 (5th Cir. 1998).

When determining the amount owed to an employee whose pension plan has vested but who has not reached normal retirement age, a whipsaw calculation must be performed. "[T]he actuarial equivalent is calculated by projecting a participant's hypothetical account balance to normal retirement age using the rate at which future interest credits would have been calculated if the participant had remained in the plan until retirement age and then discounting it back to its present value." *West v. AK Steel Corp. Retirement Accumulation Pension Plan*, 318 F. Supp. 2d 579, 583 (S.D. Ohio 2004) (citing *Xerox*, 338 F.3d at 760; *Esden*, 229 F.3d at 159).

In *Esden*, as here, the plaintiff consented to a lump-sum benefit payment after her pension benefits had vested but before she reached normal retirement age. 299 F.3d at 159-60. The Second Circuit required the pension plan to perform a whipsaw calculation and held that "when a cash balance plan guarantees that interest will be credited to a participant's hypothetical account at a minimum rate, it violates ERISA to assume a lower rate when projecting that account's value out to normal retirement age for the purposes of calculating the lump-sum . . . ." 229 F.3d at 157. Defendant argues that it need not undertake a whipsaw calculation because, unlike the cash balance plan in *Esden*, the RBAP does not guarantee that interest will be credited to a participant's hypothetical account at a minimum rate so as to create a floor beneath which the value of the interest credits could not drop. *See id.* Specifically, defendant argues that the RBAP interest rate is far from guaranteed, because "the investment credits are based entirely on the future performance of each participant's investment measures and therefore can fluctuate up or down significantly from one period to the next." (Def. Mem. of Law at 21)

However, I do not read *Esden* to create such a loophole in ERISA's requirement of a whipsaw calculation for a cash balance defined benefit plan. The requirement that cash balance plans project the cash account balance forward to normal retirement age applies even when the plan does not have a guaranteed minimum interest rate. *See Hirt v. Equitable Ret. Plan for Employees, Managers, and Agents*, No. 01 Civ. 7920, 2006 WL 2023545, at *43 (July 20, 2006) ("*Esden* and *Berger* . . . required that the plans project the cash account balance forward to normal retirement age – using a rate not less than the minimum guaranteed interest rate, if applicable, or an estimate of the variable interest rate provided by the company's retirement plan if not.") Further, I.R.S. Notice 96-8 explains that when calculating the lump sum distribution under a cash balance plan, "the balance of the employee's hypothetical account must be projected to normal retirement age and then the employee must be paid at least the present value, determined in accordance with [IRC] section 417(e), of that projected hypothetical account balance," while making no mention of the requirement of a guaranteed minimum interest rate.

Allowing a pension plan to avoid the required whipsaw calculation by providing its participants with a less secure benefits package conflicts with ERISA's purpose to guarantee that employees receive the pension benefits they were promised. *See Nachman v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980). Although defendant is correct that it is not required by ERISA to set a minimum interest rate for its cash balance plan, *see Hirt*, 2006 WL 2023545, at *24, the lack of such a minimum rate does not exempt the RBAP from having interest credits fall within the definition of an accrued benefit. Courts require "estimation rather than determination" of the accrued benefit, because interest and discount rates are often tied to government securities and such securities fluctuate over time just as the participant-chosen investments under the RBAP will fluctuate. *See, e.g. Xerox*, 338 F.3d at 760; *Hirt*, 2006 WL 2023545, at *24. As a cash balance plan is based upon hypothetical accounts, the accrued benefit is always an estimate. The RBAP's use of participant-chosen investments as the method of determining the value of the interest credits does not change the requirement that such interest credits be calculated as a benefit promised under the plan. A benefit's inclusion in the whipsaw calculation is not contingent upon the form and degree of estimation required by that benefit; every whipsaw calculation involves estimation and it is irrelevant that some require more than others.

For the reasons stated above, defendant's motion to dismiss the first claim in the amended complaint on this ground is denied.

B. Interest credits for age 65 through age 70 ½

Plaintiffs allege in their second claim for relief that, at the time of the termination of their employment, each had a vested accrued benefit equal to "(1) the nominal balance in their hypothetical cash balance account, plus (2) the stream of future investment credits payable on such account balance through April 1 of the calendar year following the year in which they would attain age 70 ½. (Amended Compl. ¶25) According to plaintiffs, "the essence of the claim is that because the RBAP *by its terms* promises to continue providing investment credits for as long as a participant leaves his money in the Plan – even after normal retirement age – the right to these future investment credits accrues at the same time the underlying pay credits accrue." (Pl. Mem. of Law at 28) Thus, plaintiffs' claim is that, for the purposes of the whipsaw calculation, defendant must use age 70 ½ in place of the normal retirement age.

ERISA and the law of the Second Circuit do not require cash balance defined benefit plans to project the value of account balances beyond the time of normal retirement age if the employee has terminated his employment before he reaches normal retirement age. As explained previously, whipsaw calculations are required to project only up to, but not beyond, the normal retirement age. *See Esden*, 229 F.3d at 163 (accrued benefit "must be valued in terms of the annuity that it will yield at normal retirement age."). Specifically, ERISA § 3(22) defines the "normal retirement benefit" as "the benefit under the plan commencing at normal retirement age." Here, the benefit commencing at normal retirement age does not include interest credits that could be earned, at the participant's option, between ages 65 and 70 ½. Further, there is no case or statutory law that requires a defined benefit plan to provide post-normal retirement age interest credits to participants or that considers such post-normal retirement age optional interest credits to be part of the accrued benefit owed to a participant taking a lump-sum distribution before normal retirement age.

Plaintiffs attempt to analogize the present situation to the body of case law requiring that cost-of-living adjustments ("COLAs") and living pensions, which are guaranteed increases in a previously-accrued benefit mandated by the terms of a pension plan after the participant's benefits commence, be included in a participant's accrued benefit.

In *Shaw v. International Association of Machinists and Aerospace Workers*, 750 F.2d 1458, 1459 (9th Cir. 1985), the Court determined that a "living pension feature," which increased the amount of payments to pensioners when the current salary of the job from which they retired increased, was an "accrued benefit" under ERISA. In particular, the Court ruled that the living pension was not conditional and thus an accrued benefit, because the pension plan "provides for the adjustment in mandatory language, to be measured by an occurrence wholly outside the pensioner's control." *Id.* at 1464. In *Laurenzano v. Blue Cross and Blue Shield of Massachusetts, Inc.*, 134 F. Supp. 2d 189, 199 (D. Mass. 2001), the Court held that a COLA is a part of the participant's accrued benefit for the purposes of valuing a lump-sum payment in a defined benefit plan, because participants would begin receiving COLA payments at the time they reached normal retirement age as a part of their annuity payments. The present case differs from both *Shaw* and *Lauren-*

*zano*, because the interest credits available after the normal retirement age is reached are not mandatory, are not measured by an occurrence outside the pensioner's control, are not guaranteed, and, most importantly, are not available at the moment the normal retirement age commences.

Plaintiffs also rely on *Esden* to support their position that post-normal retirement age optional interest credits constitute an accrued benefit under the RBAP. However, *Esden* does not provide any guidance as to whether interest credits that can be accrued after the participant reaches the normal retirement age should be included in that participant's accrued benefit for the purposes of a pre-normal retirement age lump-sum distribution.

Under 26 C.F.R. § 1.411(a)(4)(a), a right in an accrued benefit is "nonforfeitable," and thus must be included in the calculation to determine the lump-sum distribution before normal retirement age is reached, if at a particular time and thereafter, "it is an unconditional right." Further, "a right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right is a forfeitable right at that time." *Id.* Under 29 U.S.C. § 1002(19), the term "nonforfeitable" when used with respect to a pension benefit or right "means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." The interest credits available to RBAP participants between ages 65 and 70 ½ are conditioned on the subsequent event of leaving money in the RBAP after attaining normal retirement age; therefore, such interest credits are forfeitable and need not be included in the accrued benefit calculation.

Accordingly, to determine the accrued benefit under the RBAP at a time before normal retirement age, the plan must project the participant's hypothetical account balance to age 65, using the rate at which future interest credits would have been calculated if the participant remained in the RBAP until age 65, and then discount that back to present value. Any interest credits that could be acquired between ages 65 and 70 ½ due to the participant choosing to leave his money in the RBAP after he reaches normal retirement age are not included in the calculation of the accrued benefit for the purposes of a distribution before the participant has reached the normal retirement age.

Accordingly, defendant's motion to dismiss the second claim is granted.

C. Age discrimination

Plaintiffs' third claim is that the benefit formula used to compute RBAP participant's benefits violates ERISA § 204(b)(1)(H), because the RBAP benefits accrue at a rate that is reduced as a participant ages. For the reasons explained below, cash balance defined pension plans, including the RBAP, do not violate ERISA's anti-discrimination provision. Therefore, defendant's motion to dismiss the third claim is granted.

Under ERISA § 204(b)(1)(H), an employee's "rate of benefit accrual" cannot be reduced on account of the employee's age. Plaintiffs describe the RBAP's discriminatory conduct in the following manner:

> If two employees, one who is 30 years old and another who is 60 years old, each accrue a retirement benefit under the Plan that has the same *present value* – then fundamental mathematical principles instruct that the promised benefit at retirement age (i.e., the "accrued benefit") must be far greater for the younger employee. For example, if each employee is promised a retirement benefit at age 65 that has a present value for each of $2,000, this means that the retirement benefit promised to the 30-year-old employee is in the neighborhood of $4,082 a year commencing at age 65, while the annual benefit promised to the 60-year-old employee is closer to $308.

(Pl. Mem. of Law at 33)

Specifically, a defined benefit plan violates ERISA if "an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age." 29 U.S.C. § 1054(b)(1)(H)(I). Plaintiffs theory is that a cash balance benefit plan violates this provision, because accrued benefits are the "annual benefit commencing at normal retirement age," 29 U.S.C. § 1002(23)(A), meaning that an accrued benefit is a traditional annuity beginning at age 65. To apply ERISA's definition of an accrued benefit to a cash balance plan, the current hypothetical account balance must be translated to the equivalent annuity those sums could purchase at the normal retirement age.

Thus, the claim of age discrimination arises because pay credits placed into the account of a younger employee are worth more than the same amount of pay credits placed into the account of an older employee, because the younger employee's pay credits will have more years to accrue interest before normal retirement age. *See Tootle v. Arinca, Inc.*, 222 F.R.D. 88, 93 (D. Md. 2004); *Campbell v. BankBoston, N.A.*, 327 F.3d 1, 9-10 (1st Cir. 2003); *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 823-24 (S.D. Ind. 2000). The argument continues that if an employer contributes the same proportional pay credit to an employee's cash balance account every year, the value of that annual benefit decreases with each passing year; the result is a declining benefit accrual rate as an employee ages. Under this line of reasoning, all cash balance plans violate the ERISA age discrimination provision.

The existing case law on this issue is sparse but heavily weighted to one side. *Compare Richards v. FleetBoston Fin. Corp.*, 427 F. Supp. 2d 150 (D. Conn. 2006) (finding violation of ERISA), *with Cooper v. IBM Personal Pension Plan*, No. 05-3588, 2006 WL 2243300 (7th Cir. Aug. 7, 2006) (finding no violation of ERISA); *Tootle*, 222 F.R.D. at 93 (same); *Eaton*, 117 F. Supp. 2d at 826 (same), *Hirt*, 2006 WL 2023545, at *27 (same); *Register v. PNC Fin. Servs. Group, Inc.*, No. 04 Civ. 6097, 2005 WL 3120268 (E.D. Pa. Nov. 21, 2005) (same); *Campbell*, 327 F.3d at 10 (noting problems with this theory of age discrimination). I find that *Richards* is at odds not only with all other applicable case law but also the logic of ERISA, and, thus, I agree with the majority position that a cash balance benefit plan does not violate the ERISA age discrimination provision.

First, the ERISA anti-discrimination provision does not apply to employees who have not yet reached normal retirement age. I agree with the majority view that the legislative history and statutory language of ERISA provide strong evidence that the age discrimination provision was not intended to protect employees until after they reach normal retirement age. *See Register*, 2005 WL 3120268, at *5; *Eaton*, 117 F. Supp. 2d at 826-29. It is particularly persuasive that the statutory headings in the parallel provision in the I.R.C. refer to the accrual of benefits "beyond normal retirement age" as being the subject of the anti-discrimination provision. *See* 26 U.S.C. § 411(b)(1)(H) and Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99- 509, 100 Stat. 1874, 1975.

In *Tootle*, 222 F.R.D. at 93, the Court held that a cash balance defined benefit plan did not violate the ERISA age discrimination provision, because ERISA's "legislative history and statutory language provide strong evidence that this aspect of ERISA is not intended to protect workers until after the have attained normal retirement age." The Court in *Hirt* also held that a cash balance plan does not violate ERISA's age discrimination provision, because the legislative history illustrates that ERISA's anti-discrimination provision was "intended to prevent discrimination against employees who wished to work past their normal retirement age without compromising their ability to continue earning pension benefits," thus the purpose was not to protect employees who had not yet reached normal retirement age. 2006 WL 2023545, at *27; *see* OBRA of 1986 § 9002, 100 Stat. At 1975; 26 U.S.C. § 411; *see also Eaton*, 117 F. Supp. 2d at 826 (holding cash balance plan does not violate ERISA's prohibitions on age discrimination because there are "strong indications in the statutes and the legislative history . . . that Congress did not intend to apply those provisions to the rate of benefit accrual for employees who have not yet reached retirement age").

The First Circuit, did not decide whether a cash balance plan violated the anti-discrimination provision of ERISA, but supported this position when it stated that "the ERISA age discrimination provision may not even apply to workers younger than the age of normal retirement" based upon their interpretation of the statutory text of I.R.C. § 411(b)(1)(H). *Campbell*, 327 F.3d at 10.

Based on my reading of the statutory text, particularly the statutory headings of IRC § 411(b)(1)(H), and considering also the nature of the legislative history, I agree with the majority view that ERISA's anti-discrimination provision does not apply to employee who have not reached normal retirement age.

Second, the term "benefit accrual" is not equivalent to the term "accrued benefit" for the purpose of ERISA's anti-discrimination provision. ERISA does not define "rate of an employee's benefit accrual" for the purpose of applying the ERISA age discrimination provisions. Because cash balance plans accrue benefits otherwise than traditional defined benefit plans, and in particular are not defined in terms of an age 65 annuity, it is logical that the rate of benefit accrual is not determined by the change in the age 65 annuity but is instead determined by the change in account balance. The change in the account balance is the logical measurement because cash balance plans are defined in terms of an account balance that grows with pay credits and interest. *See Register*, 2005 WL 3120268, at *7; *Tootle*, 222 F.R.D. at 94; *Eaton*, 117 F. Supp. 2d at 830.

The Court in *Hirt* took a similar approach, holding that the test for age discrimination with regard to a cash balance plan focuses on the amount of credits a plan provides to participants' accounts as opposed to the amount of interest those credits can accrue over time; thus, ERISA's age discrimination rule is not violated because such amounts are not varied based upon age. 2006 WL 2023545, at *33. The Court in *Register* agreed, noting that "cash balance plans accrue benefits differently than traditional defined benefit plans," thus "it follows logically that the rate of benefit accrual [for cash balance plans] is determined by the change in the account balance." 2005 WL 3120268 at *7; *see also Tootle*, 222 F.R.D. at 94 ("The more sensible approach is to measure benefit accrual under cash balance plans by examining the rate at which amounts are allocated and the changes over time in an individual's account balance, as the ERISA provisions designed for traditional defined contribution plans would direct.").

*Richards*, 427 F. Supp. 2d at 161, is the only contrary case. That case found that the phrase "attainment of any age" was "unambiguous with respect to the question of whether it protects only employees who have reached age 65," and she used *Esden*'s definition of the term accrued benefit in place of the term "benefit accrual" in the ERISA anti-discrimination rule. Therefore, the court held that "ERISA itself requires the court to compare annual benefits commencing at normal retirement age when considering age discrimination in a cash balance plan under § 204(b)(1)(H)," *Richards*, 427 F. Supp. 2d at 167, and, as a result, ruled that any cash balance defined benefit plan violates ERISA's anti-discrimination provision. I do not believe such a drastic result is warranted. If the term "benefit accrual" and "accrued benefit" are to be read as equivalents then the same term would have been used in both statutory sections.

Third, even if ERISA's age discrimination provision does apply to all participants, when that provision is properly applied to cash balance plans the rate of benefit accrual under such plans is not age dependent. *See, e.g.*, *Eaton*, 117 F. Supp. 2d at 816. The pay credits do not depend on a participant's age, nor do the interest credits themselves depend on age. The effect of a younger employee's pay credits being worth more than those paid to older workers is caused not by discrimination but by the time value of money. That RBAP participants all earn potentially different rates of interest credits is irrelevant to the discrimination claim, because all RBAP participants have the same opportunity to select investments from the same PWC-created list. Any participant may chose any mix of investment vehicles under the RBAP to yield the amount of interest credits they deem most prudent, this determination is in no way based upon or limited by age.

*Hirt* supports this position, reasoning that "[t]he compounding of interest does not . . . cause a reduction in the rate of benefit accruals because of the attainment of any age." Cash balance plans do not grant any rights to one group of participants that are different from those granted to participants who were younger or older. Every participant is entitled to the same employer contributions. Because "each participant, regardless of age, is entitled to increases in the participant's cash account according to the same interest rate, without any variation according to age," *Hirt*, 2006 WL 2023545, at *33, there is no violation of ERISA's anti-discrimination provision.

The Seventh Circuit is the only Circuit Court of Appeals to address this issue and it held that a cash balance defined benefit pension plan is not unlawfully discriminatory. *Cooper*, 2006 WL 2243300. The Court held that the terms of a cash balance plan are age-neutral, because every participant receives the same pay credit and interest credit each year. *Id.* at *2. Further, the time value of money does not create age discrimination, because "[i]nterest is not treated as age discrimination for a defined contribution plan, and the fact that [a defined contribution plan and a defined benefit plan] are so close in both function and expression implies that it should not be treated as discriminatory for a defined benefit plan either. The phrase 'benefit accrual' reads most naturally as a reference to what the employer puts in . . . while the defined phrase 'accrued benefit' refers to outputs after compounding." *Id.* at *2. Age discrimination simply cannot arise from the neutral application of interest to account balances.

Further, the Department of Treasury has stated consistently that cash balance plans are not age discriminatory. In its Revenue Proposals for 2005 and 2006, the Department of Treasury, after noting the disagreement between the district courts, stated that "cash balance plans and cash balance conversions are not inherently age-discriminatory." Department of Treasury, *General Explanations of the Administration's Fiscal Year 2006 Revenue Proposals* 82 (2005); Department of Treasury, *General Explanations of the Administration's Fiscal Year 2005 Revenue Proposals* 104 (2004).

For the aforementioned reasons, defendant's motion to dismiss the third claim in plaintiffs' amended complaint is granted.

### D. Forfeiture of accrued benefits

Plaintiffs allege in their fourth claim that the RBAP violates ERISA because it "did not and does not actuarially increase a participant's benefit after normal retirement age." (Amended Compl. ¶84) Thus, this claim focuses on benefits paid to RBAP participants after they reach normal retirement age. However, ERISA does not require PWC to provide RBAP participants with actuarial increases above the benefits they accrued under the RBAP after reaching normal retirement age. Further, under the RBAP, participants do not suffer any impermissible benefit forfeitures resulting from benefit payments being deferred until participants stop working, because each participant is entitled to the entire value of his account balance regardless of when he elects to receive payments. This differs from the traditional defined benefit plan, under which a participant's benefit is expressed as a lifetime stream of monthly payments commencing at normal retirement age; delaying benefit payment for a year beyond normal retirement age in that situation causes the participant to lose the value of the 12 monthly payments unless some additional benefit accrues after normal retirement age.

Under ERISA § 203(a)(3)(B), benefits based upon employer contributions are not forfeitable solely because the plan permits the payment of benefits to be suspended if the participant works past normal retirement age. ERISA § 204(c)(3) states that if a participant's accrued benefit is determined in an amount other than a normal retirement age annuity, then that amount must be the actuarial equivalent of such an annuity. Thus, ERISA requires only that an employee not forfeit benefits he has accrued prior to normal retirement age because he decides to continue working past that age.

Under the RBAP, participants can continue to earn pay credits for work after normal retirement age as well as interest credits in the same manner they did before reaching normal retirement age; thus, there is no forfeiture. *See Lunn v. Montgomery Ward & Co.*, 166 F.3d 880, 883 (7th Cir. 1999); *Atkins v. Northwest Airlines*, 967 F.2d 1197, 1202 (8th Cir. 1992) (finding a "plan's failure to actuarially increase benefits to account for the delay in receiving benefits does not constitute a forfeiture of benefits under ERISA § 203(a).").

If an RBAP participant decides to defer payment of his pension after the normal retirement age passes, that participant will still receive his full account balance including any additional pay and interest credits he accrues. When continued benefits accruals are provided for employment beyond normal retirement age, ERISA does not require further actuarial adjustments to a participant's accrued benefit. In *Lunn*, Judge Posner explained that there is no forfeiture under ERISA when plan participants continue to earn benefits at the same rate after normal retirement age as they did before normal retirement age. 166 F.3d at 883; *see also Monks v. Keystone Powdered Metal Co.*, 78 F. Supp. 2d 647, 668-69 (E.D. Mich. 2000) (holding that ERISA does not require additional actuarial adjustment beyond the plaintiff's continued accruals of benefits for each year he worked past normal retirement age).

Further, ERISA § 204(c)(3), the provision upon with plaintiffs' rely, is titled "Allocation of accrued benefits between employer and employee contributions." The RBAP does not provide for employee contributions, and thus this section likely does not even apply here. *See Kohl v. Assoc. of Trial Lawyers of Am.*, 183 F.R.D. 475, 482 (D. Md. 1998) (§ 204(c)(3) does not apply when a plan does not include employee contributions because that provision "pertain[s] to an employee's accrued benefits derived from employer and employee contributions.").

Accordingly, defendant's motion to dismiss the fourth claim of plaintiffs' amended complaint is granted.

* * *

For the reasons set forth above, defendant's motion to dismiss is denied as to claim one of the plaintiffs' amended complaint and is granted as to claims two, three, and four.

SO ORDERED:

s/

Dated: New York, New York
September 5, 2006

Michael B. Mukasey
U.S. District Judge

## APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

|  |  |
|---|---|
| -------------------------------------------x |  |
| TIMOTHY D. LAURENT, | MEMORANDUM |
| on behalf of himself and on | DECISION AND |
| behalf of all others similarly | ORDER |
| situated, | 06 CV 2280 |
| Plaintiffs, | (GBD) |
| -against- |  |
| PRICEWATERHOUSECOOPER, |  |
| LLP, *et al.*, |  |
| Defendant. |  |
| -------------------------------------------x |  |

GEORGE B. DANIELS:

This action was originally assigned to Judge Michael B. Mukasey. Before this action was reassigned to this Court, Judge Mukasey decided defendants' motion to dismiss the amended complaint. In an Opinion and Order, dated September 5, 2006, Judge Mukasey denied the motion to dismiss the first claim, but granted the motion as to the three remaining causes of action. Defendants now moves for reconsideration of the September 5th Order denying their motion to dismiss count one of the amended complaint, or in the alternative, certifying that portion of the Order for interlocutory review pursuant to 28 U.S.C. § 1292(b). The motion for reconsideration is denied. Certification of Judge Mukasey's entire Order for immediate appeal is granted.

The standard for granting reconsideration is strict, and such relief is generally appropriate only where the movant identifies a controlling decision or factual matters which was overlooked by the Court and which might reasonably be expected to alter the Court's decision. *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). Reconsideration should be denied where the movant simply seeks to relitigate an issue already decided by the Court. *Shrader*, 70 F.3d at 257. Defendants merely present the same arguments and essentially the same legal authorities they raised in support of their motion to dismiss, which were fully considered and rejected by Judge MuKasey. Accordingly, defendants' motion for reconsideration is denied.[1]

Defendants alternatively seek certification, for immediate appellate review, of that portion of Judge Mukasey's Order denying the motion to dismiss claim one. Plaintiffs oppose that application on the grounds that it would result in piecemeal litigation. Despite their aversion to piecemeal litigation, plaintiffs "suggest that it would make sense to certify [Judge Mukasey's dismissal of] the three [other] counts for immediate appeal," while litigation, as to count one, continues before this Court. (Pls.' Opp'g Mem. at 22). However, "Plaintiffs would not oppose the Court's certification of Counts Two, Three and Four, or of the entire case." (*Id.*). "[D]efendants agree that the most efficient way to resolve this liti-

[1] Defendants contend the Judge Mukasey's ruling was based on an argument not raised by the parties and, as a result, defendants were deprived of a fair opportunity to argue the merits of the issue. Since this was not the sole ground upon which Judge MuKasey premised his ruling, reconsideration is unwarranted.

gation is for the Court of Appeals to review Judge Mukasey's decision in its entirety, including the dismissal of Counts Two, Three, and Four." (Defts.' Reply Mem. at 15).

As the parties correctly note, Judge Mukasey's Order involves controlling questions of law to which there exists substantial grounds for difference of opinion. Since an immediate appeal from that Order will materially advance the ultimate termination of the litigation, certification is warranted as to Judge Mukasey's entire Order. *See*, 28 U.S.C. § 1292(b).

Accordingly, defendants' motion for reconsideration is denied. The application seeking certification for interlocutory review is granted as to all portions of Judge Mukasey's September 5th Order.

Dated: New York, New York
August 16, 2007

SO ORDERED:

s/

GEORGE B. DANIELS
United States District Judge

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| TIMOTHY D. LAURENT, on behalf of himself and on behalf of all others similarly situated,<br>Plaintiffs,<br>-v-<br>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,<br>Defendants. | MEMORANDUM DECISION AND ORDER<br>06 CV 2280 (GBD) |

GEORGE B. DANIELS, District Judge:

On September 5, 2006, United States District Judge Michael B. Mukasey granted in part and denied in part Defendants' Motion to Dismiss the Amended Complaint. *See Laurent v. PriceWaterhouseCoopers LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006). Judge Mukasey's Opinion and Order dismissed Counts Two (Unlawful Conditioning of Accrued Benefits), Three (Age Discrimination Under

ERISA § 204(b)(1)(H)), and Four (Failure to Preserve Actuarial Value of Normal Retirement Benefits), and did not dismiss Count One (Unlawful Lump Saw "Whipsaw" Calculation). Defendants moved for reconsideration with respect to Count One, and on August 16, 2007, this Court denied the motion because "Defendants merely present[ed] the same arguments and essentially the same legal authorities they raised in support of their motion to dismiss, which were fully considered and rejected by Judge MuKasey." *See Laurent v. PriceWaterhouseCooper LLP*, 2007 U.S. Dist. LEXIS 60774, at *2 (S.D.N.Y. Aug. 17, 2007).

Defendants now ask this Court to reconsider its denial of their motion for reconsideration. Defendants argue that "[t]he law with respect to the controlling issue of statutory construction is now substantially more developed than at the time of the original decision on PwC's motion to dismiss." Letter from Lauren O. Casazza, Counsel for Defendants, to the Honorable George B. Daniels (September 13, 2006), at 3. Defendants identify two cases that purportedly "address[] the central legal issue underlying plaintiffs' claim in this case" and hold that a definition of "normal retirement age" based on five years of vesting service is permissible: *Fry v. Exelon*, 571 F.3d 644, 647 (7th Cir. 2009) and *Pender v. Bank of America Corp.*, 2010 WL 3370058 (W.D.N.C. Aug 25, 2010). Letter from Casazza, at 1. Defendants' request is DENIED.

The standard for granting reconsideration is "strict." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). "The moving party must establish: (1) that the court overlooked controlling decisions or data; (2) that there has been a change in controlling law; (3) that new evidence has become available; or (4) that reconsideration is necessary to correct a clear error or prevent manifest injustice." *Dorchester Fin. Secs v. Banco BRJ*, 2010 U.S. Dist. LEXIS 59702, at *4 (S.D.N.Y. June 15, 2010); *see also Shrader*, 70 F.3d at 257; *Doe v. New York City Dep't of Social Services*, 709 F.2d 782, 789 (2d Cir. 1983). Reconsideration should be denied where the movant simply seeks to relitigate an issue already decided by the Court. *Shrader*, 70 F.3d at 257.

Defendants argue that there has been a change in the controlling law. However, neither of the cases identified by Defendant are *controlling* decisions that might reasonably be expected to alter the Court's ruling. The law within the Second Circuit did not change after the September 5, 2006 Opinion and Order. *See Duchow v. New York State Teamsters Conference Pension & Retirement Fund*, 691 F.2d 74 (2d Cir. 1982) (holding that "Congress intended that an employee's pension rights would vest[] irrespective of the length of his service at a certain age"), *cert. den.* 461 U.S. 918 (1983). Additionally, as correctly noted by Plaintiffs, PwC fails to "demonstrate that the Second Circuit repudiated *Duchow*, or that intervening statutory or regulatory enactments mean that *Duchow* is no longer good law such that the Court would be free to disregard it." Letter from Eli Gottesdiener, Counsel for Plaintiffs and the Proposed Class, to the Honorable George B. Daniels (Sept. 27, 2010), at 3. Accordingly, Defendants are not entitled to further reconsideration.

## **CONCLUSION**

Defendants' request for reconsideration is DENIED. All parties are hereby directed to attend a conference on Thursday, January 6, 2011, at 9:30

a.m. at the United States District Courthouse, 500 Pearl Street, New York, New York, Courtroom 21D.

Dated: New York, New York
December 22, 2010

SO ORDERED:

s/

GEORGE B. DANIELS
United States District Judge

## APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| ---------------------------------------------- | X | |
| TIMOTHY D. LAURENT | : | |
| Plaintiff, | : | 06 Civ. 2280 (JPO) |
| -against- | : | OPINION AND ORDER |
| PRICEWATERHOUSECOOPERS LLP, et al., | : | |
| Defendants. | : | |
| ---------------------------------------------- | X | |

J. PAUL OETKEN, District Judge:

This case involves claims against Defendant PricewaterhouseCoopers ("PWC") under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* (2000) ("ERISA"), relating to PWC's Retirement Benefit Accumulation Plan for Employees of PriceWaterhouseCoopers LLP ("the RBAP"). Plaintiffs Timothy Laurent and Smeeta Sharon allege that the RBAP violates ERISA's vesting and accrual standards by defining its "normal retirement age" as five years of service. They also allege that the summary plan description ("SPD") is defective and that it violates ERISA's general fiduciary standards provision. These claims, most of which were addressed and held to survive a previous motion to dismiss in an opinion issued by Judge Mukasey on September 5, 2006, *Laurent v. PriceWaterhouseCoopers LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006) ("*Laurent I*"), are alleged in Plaintiffs' Second Amended

Complaint ("SAC"). Seven years after Judge Mukasey issued his ruling, PWC has filed a motion to dismiss the SAC, pointing to intervening decisions from other circuits and reiterating its objections to *Laurent I*. For the reasons that follow, PWC's motion to dismiss is denied.[1]

## I. Applicable Legal Standards

### A. Rule 12(b)(6)

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court must accept as true all well-pleaded factual allegations in the complaint, and "draw [ ] all inferences in the plaintiff's favor." *Allaire Corp. v. Okumus*, 433 F.3d 248, 249-50 (2d Cir. 2006) (internal quotations omitted). That said, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. In a summary of the plausibility standard, the Second Circuit explained that:

[1] The Court held argument on this motion on March 14, 2013 and on July 19, 2013. In a separate order, the Court withdraws its reference to Magistrate Judge Fox for general pretrial supervision and directs the parties to provide a status update and proposals for the remaining phase of the case.

> [*Twombly*] stated that a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, but mere labels and conclusions or formulaic recitations of the elements of a cause of action will not do; rather, the complaint's factual allegations must be enough to raise a right to relief above the speculative level, i.e., enough to make the claim plausible.

*Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (quoting *Twombly*, 550 U.S. at 555, 570) (quotation marks and internal citations omitted).

### B. Law of the Case Doctrine

Any questions of law ruled upon earlier in this litigation are revisited through the lens of law of the case doctrine, which provides that "when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case." *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991) (citing *Arizona v. California*, 460 U.S. 605, 618 (1983)). This doctrine serves the purpose of "maintain[ing] consistency and avoid[ing] reconsideration of matters once decided during the course of a single continuing lawsuit." 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4478 at 788. It thus plays an important role in the administration of the federal courts, though "unlike the doctrines of *res judicata* and collateral estoppel, which a court cannot ignore where they apply, the law of the case, as Justice Holmes remarked, 'merely expresses the practice of the courts generally to refuse to reopen what has been decided.'" *Devilla v. Schriver*, 245 F.3d 192, 197 (2d Cir. 2001) (quoting *Messinger v. Anderson*, 225 U.S. 436, 444 (1912)).

Law of the case doctrine is prudential and discretionary in character, *see United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000), and courts "always [have] the power to change a ruling" in light of "further reflection," *Corporacion de Mercadeo Agricola v. Mellon Bank Int'l*, 608 F.2d 43, 48 (2d Cir. 1979); *see also United States v. Birney*, 686 F.2d 102, 107 (2d Cir. 1982) ("The doctrine of the law of the case is not an inviolate rule."). That rule holds true even where a case has been reassigned to a new judge. *See In re U.S.*, 733 F.2d 10, 13 (2d Cir. 1984). Under law of the case doctrine, the principal bases for departure from a prior ruling include "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Doe v. New York City Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983). Courts remain sensitive in this context to the potential for prejudice that can result from a lack of notice or "a lack of sufficient opportunity to prepare armed with the knowledge that the prior ruling is not deemed controlling." *Uccio*, 940 F.2d at 758 (quotation marks, citation, and alterations omitted).

## II. Discussion[2]

### A. Count One: Defining Normal Retirement Age As A Term of Years

Count One alleges that the RBAP-defined "normal retirement age" ("the RBAP NRA") of five years of service is invalid under ERISA. The parties' dispute over the validity of the RBAP NRA is subject to law of the case doctrine. In September 2006, relying principally on *Duchow v. New York State Teamsters*

[2] Familiarity with the facts and background of this case is assumed.

*Conference Pension and Ret. Fund*, 691 F.2d 74 (2d Cir. 1982), Judge Mukasey concluded that the RBAP NRA is invalid. *See Laurent v. PriceWaterhouse-Coopers LLP*, 448 F. Supp. 2d 537, 545 (S.D.N.Y. 2006) (*Laurent I*); *see also id.* ("The RBAP does not specify one consistent age as the normal retirement age . . . each employee will be a different age at the time he reaches the normal retirement age. Such a normal retirement age is invalid under the Second Circuit's interpretation of ERISA."). Nearly one year later, after a reassignment from Judge Mukasey, Judge Daniels denied a motion for reconsideration of *Laurent I*, but certified Judge Mukasey's opinion for interlocutory appeal. *See Laurent v. PriceWaterhouseCooper LLP*, No. 06 Civ. 2280, 2007 WL 2363616, at *1 (S.D.N.Y. Aug. 17, 2007) (*Laurent II*). Ultimately, the Second Circuit refused to hear an interlocutory appeal. In December 2010, Judge Daniels denied Defendants' request for reconsideration of his opinion denying their original motion for reconsideration of Judge Mukasey's ruling. *See Laurent v. PriceWaterHouseCoopers LLP*, No. 06 Civ. 2280, 2010 WL 5396089, at *1 (S.D.N.Y. Dec. 22, 2010) (*Laurent III*).

Upon an independent examination of the merits, the Court reaffirms *Laurent I*'s result, though it departs somewhat from *Laurent I*'s reasoning. *Laurent I* relied on *Duchow* to conclude that the RBAP NRA violated ERISA, but upon careful reflection it is clear that *Duchow* and the other sources cited in *Laurent I* lend only modest support to that conclusion. Of course, the conclusion that *Laurent I*'s reasoning cannot control does not end the inquiry. Rather, a decision must be reached as to whether the RBAP NRA is invalid for some other reason. Considering the positions advanced by the parties, as well as the logic of recent Fourth and Seventh Circuit cases, the Court identifies another such basis in ERISA's plain text and embraces *Laurent I*'s result.

### 1. Relevant ERISA Provisions

ERISA § 3(24) defines normal retirement age as follows:

> 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—
> >
> > > (i) the time a plan participant attains age 65, or
> > >
> > > (ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C.A. § 1002(24). Section § 203 of ERISA, in turn, creates minimum vesting standards:

> (a) Nonforfeitability requirements
>
> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> > (1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

> (2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).
>
> > (A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.
> >
> > (B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table: (table omitted).
> >
> > (C)
> >
> > (i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table: [omitted] . . .

29 U.S.C. § 1053(a).

### 2. *Duchow* and the RBAP NRA

In *Duchow*, the Second Circuit held that a plan must provide that pension benefits vest either when a participant reaches normal retirement age or when he satisfies one of the three service-based requirements set forth in 29 U.S.C. § 1053(a)(2). 691 F.2d at 75.

*Duchow* is readily summarized. Herman Duchow became a member of a pension plan on February 1, 1969, was denied pension benefits at the age of 69 in February 1977, and terminated his employment in May 1977. *Id.* He then returned to work at the same company for two months in 1979, during which time he once again applied for benefits and was once again denied. *Id.* The Trustees justified their denials on the undisputed ground that Duchow had not fulfilled the plan's service requirements. *Id.* Duchow's estate sued and argued that his pension benefits had vested by February 1979, explaining that the plan's purely service-based rules violated ERISA's vesting provisions. *Id.* at 75-76. The Second Circuit agreed and held that "pension benefits become vested upon an employee's attainment of 'normal retirement age,' as defined in [ERISA]." *Id.* at 75. Because Duchow had joined the pension plan in February 1969, and sought benefits upon reaching normal retirement age in February 1979 (his 10-year anniversary of commencing participation in the plan), the Circuit concluded that Duchow had vested and was entitled to pension benefits. *Id.* at 80. As part of that analysis, it held that "anniversary" means "a date rather than the years between the date and the past event." 691 F.2d at 79.

*Duchow*'s holding that pension benefits must vest by the time a plan member reaches normal retirement age hinged on a determination that § 203 imposes two distinct kinds of vesting requirements. In reaching that result, the Circuit disagreed with the pension plan, which had argued that § 203 requires nothing more than satisfaction of the requirements set forth in § 203(a)(2), all of which are linked to an employee's years of service. *Id.* at 77.

Reasoning from statutory text and structure, *Duchow* noted that § 203 "indicate[s] that two discrete vesting requirements are imposed, the first linked to age and the second depending on length of service without regard to age." *Id.* at 77. *Duchow* also looked to legislative history, which revealed a clear intent to impose the requirement that an employee must be fully vested by the time he reaches normal or stated retirement age. *Id.* at 77-78. The Second Circuit thus concluded that, whereas § 203(a)(2) imposes vesting standards linked to an employee's years of service, § 203(a) imposes a vesting standard keyed to normal retirement age. *Id.* at 77; *see also id.* ("Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." (quoting § 203(a))).

As a result, *Duchow* explained that "§ 203(a)'s provisions with regard to employer contributions are properly interpreted as imposing two distinct types of minimum vesting requirements, one of which is independent of years of service." *Id.* at 77.

*Laurent I*'s invalidation of the RBAP NRA was based almost entirely on the foregoing line from *Duchow*. 448 F. Supp. 2d at 545. *Laurent I* also recited *Duchow*'s other formulation of this point: "'[B]oth the format of § 203(a) and the disparate contents of its conjoined parts indicate that two discrete vesting requirements are imposed, the first *linked* to *age without regard* to *length* of *service* and the second depending on the length of service without regard to age.'" *Id.* (quoting *Duchow*, 691 F.2d at 77) (emphasis in original). *Laurent I* reasoned that any service-based definition of normal retirement age would violate the vesting rules set forth in § 203(a), as interpreted by *Duchow*, by impermissibly rendering *both* of the discrete vesting requirements dependant on length of service without regard to age. *Id.*

This interpretation, however, reads more into *Duchow*'s holding than it can bear.

When *Duchow* drew a sharp line between age- and service-based requirements, and referred to age-based requirements "independent" of length of service, it did not consider the possibility of a service-based normal retirement age. Rather, *Duchow* concerned itself with the existence of a discrete requirement under § 203(a) that pension benefits vest no later than normal retirement age. Thus, when *Duchow* referred to "age," it used that word as a shorthand for "normal retirement age" under § 203(a) and in contradistinction to the three service-based vesting rules set forth in § 203(a)(2). Normal retirement age, in turn, is defined under ERISA as the earlier of a plan's definition of normal retirement age or a statutory default (the later of attaining age 65 or the tenth anniversary of commencing participation). *Duchow* interpreted and applied only the anniversary provision of the statutory default.

In light of ERISA's text and contemporary business practice, *Duchow* presumed that normal retirement age would generally be defined in terms of age. In *dictum*, *Duchow* then relied on that assumption to describe as "independent of years of service" the statutory requirement that pension benefits vest by normal retirement age. 691 F.2d at 77. Understood in context, and standing alone, that *dictum* is too slender a reed to bear the weight it is assigned in

*Laurent I*. Though it may gesture in that direction, *Duchow* did not create an anticipatory prohibition on service-based definitions like the RBAP NRA. Rather, it recognized that § 203(a) imposes two requirements, one based on service and the other on normal retirement age.[3]

In further support of its conclusion, *Laurent I* also invoked *Duchow*'s interpretation of "10th anniversary" as used in the statutory default definition of

[3] In 2007, Judge Hart offered a similar interpretation of Duchow:

> In *Duchow*, the Second Circuit followed the plain language of 29 U.S.C. § 1053(a) in holding that a plan must provide that pension benefits can vest either by reaching normal retirement age or by satisfying one of the three service requirements then set forth in § 1053(a)(2). In emphasizing that normal retirement age and these vesting requirements are distinct, the Second Circuit made the point that the former is an age requirement independent of service time while the latter requirements were all based on service time. Whether, consistent with § 1002(24)(A), normal retirement age could be measured by service time was not an issue before the court. The statement that normal retirement age is independent of service time was *dictum*; the court otherwise held that the plain language of the statute (as well as its purpose and legislative history) required that either reaching normal retirement age or satisfying a provision of § 1053(a)(2) be sufficient for vesting . . .
>
> While the *dictum* in *Duchow* provides some support for the holding in *Laurent [I]*, it is weak support since the Duchow case did not actually address the issue of a normal retirement date based on service time.

*Fry v. Exelon Corp. Cash Balance Pension Fund*, No. 06 Civ.3723, 2007 WL 2608524, at *4 (N.D. Ill. Aug. 31, 2007), *amended on reconsideration in part*, No. 06 Civ. 3723, 2007 WL 4569872 (N.D. Ill. Dec. 21, 2007), *aff'd sub nom. Fry v. Exelon Corp. Cash Balance Pension Plan*, 571 F.3d 644 (7th Cir. 2009) (internal citations omitted).

normal retirement age. Though that part of *Duchow* lends some support to *Laurent I*'s result, it does not control the analysis.

In relevant part, *Duchow* held that "10th anniversary" referred to a date occurring ten years after commencing participation in a plan, not ten statutorily defined "years of service." 691 F.2d at 79. It based this result primarily on plain meaning analysis and the fact that Congress had elsewhere shown a sharp eye for detail with such important terms in ERISA's statutory scheme. *Id.* *Duchow* added that "had Congress intended 'normal retirement age' to be dependent on ten years of service, it would hardly have selected such convoluted and imprecise (for defendant's purposes) language." *Id.* at 80. The Second Circuit thus sharply distinguished anniversary-based definitions from service-based definitions.

*Laurent I* referenced this *dictum* to explain why its holding was compatible with the statutory reference to anniversaries: although the statutory default allows for normal retirement ages that are not defined as a precise age, the statute creates certainty by using the unmovable anniversary date rather than the variable year-of-service metric. *See* 448 F. Supp. 2d 545-46 ("[*Duchow*] explained that the use of the phrase '10th anniversary' in ERISA's definition of the default normal retirement age does not impose a service requirement such that years of service can be used to define a normal retirement age." (citing *Duchow*, 691 F.2d at 80)). That part of the reasoning in *Laurent I* is sound and applies to this Court's conclusion as well.

*Laurent I* misstepped, however, when it summarized *Duchow*'s holding in terms that controlled analysis of the RBAP NRA: "'Congress intended that an employee's pension rights would vest, irrespective of the length of his service' at a certain age." *Id.* at 546 (quoting *Duchow*, 691 F.2d at 80). On close inspection, *Duchow*'s discussion of the statutory default is silent on what limits plans must follow when defining normal retirement age. Thus, whereas *Laurent I* quotes *Duchow* to show that "'Congress intended that an employee's pension rights would vest, irrespective of the length of his service' at a certain age," *id.* (quoting *Duchow*, 691 F.2d at 80), the full quote from *Duchow* does not support this conclusion: "Congress intended that an employee's pension rights would vest, irrespective of the length of his service, *either on his 65th birthday or on the tenth anniversary of his joining the plan, whichever occurred later, unless the plan itself allowed earlier vesting*." *Duchow*, 691 F.2d at 80 (emphasis added). To be sure, *Duchow* suggested that it would be inconsistent with certain legislative purposes to construe "anniversary" as a service-based term—but as described in *Duchow*, those purposes mainly involved Congress's desire to create a ceiling on when benefits would vest distinct from the particular service-based requirements set forth in § 203(a)(2). Thus, *Duchow* offers only a measure of support for a prohibition on definitions like the RBAP NRA.

In sum, *Duchow* does not dictate—and affords only modest support for—*Laurent I*'s holding that plan-defined normal retirement ages cannot be defined by years of service.[4]

This conclusion, however, does not end the inquiry and require departure from *Laurent I*. Rather, it calls for consideration of the parties' remaining arguments to see whether *Laurent I* nonetheless reached the right result. That inquiry, in turn, directs attention to firmer ground for invalidation of the RBAP NRA: ERISA's text.

### 3. The Validity of the RBAP NRA

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). "[E]ffect should be given to every word of a statute whenever possible." *Leocal v. Ashcroft*, 543 U.S. 1, 3 (2004). Thus, as Chief Judge Easterbrook noted in 2009, "[h]ow much discretion employers enjoy when selecting a 'normal retirement age' depends on the language of ERISA, for the phrase is a defined term." *Fry v. Exelon Corp. Cash Balance Pension Plan*, 571 F.3d 644, 647 (7th Cir. 2009).

[4] *Laurent I* also relied on *Deak v. Masters, Mates & Pilots Pension Plan*, 821 F.2d 572, 575 (11th Cir. 1987). *See Laurent I*, 448 F. Supp. 2d at 545 ("The Eleventh Circuit takes this view also, finding that normal retirement age is a term of art under ERISA that was incorporated into the Act in 1976 to differentiate it from the vesting period limitations of a pension, which are based upon years of service as opposed to a set age." (citing *Deak*, 821 F.2d at 575 n.5)). *Deak*'s distinction between the MM&P Pension Plan's vesting rules and plan-defined normal retirement age, however, has no bearing on whether it is permissible as a general matter to define normal retirement age through reference to years of service.

Specifically, ERISA § 3(24) provides that "normal retirement age" can mean "the time a plan participant attains normal retirement age under the plan," at least when the plan's definition results in a normal retirement age earlier than the statutory default. As Defendant observes, this language "grants [pension plans] broad discretion to define 'normal retirement age.'" But, contrary to Defendant's argument that "ERISA expressly gives a plan sponsor flexibility to define 'normal retirement age' as it likes," § 3(24) does not confer limitless discretion. *See Fry*, 571 F.3d at 646 (noting that "employers are entitled to vary by contract *those aspects* of pension plans ERISA makes variable" (emphasis added)). For instance, a plan could not say that an employee reaches "normal retirement age" on the first occasion that a double rainbow appears over Tokyo, or when Meryl Streep wins her next Emmy, or when the plan participant consumes his fiftieth cupcake. *See Fry*, 571 F.3d at 647 (suggesting that it would be impermissible for a plan to provide that "an employee reaches normal retirement age when he owns ten umbrellas.").

The reason is simple: plans are given flexibility to create something that ERISA calls "normal retirement age." Presumably, Congress did not choose these words by happenstance. If Congress wanted to confer *complete* discretion on pension plans, it could easily have said that "normal retirement age" is the earlier of the statutory default or "whatever age a plan member has reached when conditions set forth in the plan for this requirement are satisfied." Instead, Congress decided to require that a participant "attain[] normal retirement age under the plan." This decision, in a "complex statute replete with defined terms," *Duchow*, 691 F.2d at 79, must not be rendered null and void by an interpretation that strips the statutory terms of all meaning.

In *Fry*, Chief Judge Easterbrook examined a similar plan and concluded that it satisfied these requirements. Focusing on "normal" and "retirement," he explained:

> [ERISA] does not compel a pension plan's retirement age to track the actuarial tables. If it did, then instead of granting discretion to the plan's sponsor the statute would read something like: "The term 'normal retirement age' means the median age at which participants in the plan retire." But the statute does not say this, nor does it say that the "normal retirement age" must be at least 62 but cannot exceed 65. Some industries have much younger retirement ages-under 30 for football and under 40 for futures commission merchants. The statutory cap at age 65 itself requires some departure from normal practices at law firms, universities, and other employers where people work past the time when they can start drawing full Social Security benefits (which for those approaching retirement today is 66 rather than 65).
>
> Under [ERISA] an age is the "normal retirement age" because the plan's text makes it so. The age in the plan is "normal" in the sense that it applies across the board, to every participant in the plan. (It is important to understand that a "normal retirement age" in a pension plan does not control when employees must retire, but only when certain rights vest and how benefits are adjusted. That's why it makes sense to speak of an age

> being "normal" to the plan's operation rather than to anyone's retirement prospects.)

*Fry*, 571 F.3d at 647. This analysis is persuasive and the Court adopts it here. The RBAP NRA is "normal" and satisfies the "retirement" requirement for the reasons set forth in *Fry*.

This still leaves the critical question whether the RBAP NRA defines an "age," as ERISA requires. *Fry* involved a pension plan in which employees reached normal retirement age upon their fifth anniversary of commencing participation. *Id.* When an employee joined that plan, she could know with certainty the date and age at which she would reach normal retirement age under the plan. Chief Judge Easterbrook concluded that this plan accorded with ERISA because "the Plan's formula—the participant's age when beginning work, plus five years—is an 'age.'" *Id.* "It is employee specific," he admitted, but "'age + 5'" remains an age." *Id.* In support of this reasoning, he relied on the anniversary rule in the statutory default as proof that "ERISA does not require the 'normal retirement age' to be the same for every employee." *Id.*

This reasoning undoubtedly rests at the outermost periphery of the meanings that "age" can support. *The Oxford English Dictionary* provides more familiar definitions of "age" when it reports that "age" means "time that any animal or vegetable has lived," "a period of existence," "a period of time," and "a lifetime taken as a measure of time." *Oxford English Dictionary* (2d ed. 1989). As a matter of ordinary usage, the query "what's your age?" should not be met with the response, "the first time I went to work, as modified by an algorithm that I'll now describe," or the euphemistic rejoinder, "it's the third anniversary of my 49th birthday." Rather, the usual answer would take the form of a discrete chronological age, such as "30" or, if the interlocutor is a preteen and eager to show his maturity, "seven and a half." Congress, of course, is ordinarily thought to speak with plain language, not euphemisms or intricate circumlocutions.

As evidenced by its reliance on the default's "anniversary" provision, and its disavowal of "when he owns ten umbrellas" as an "age," *Fry*'s holding that "'age + 5'" remains an age" for purposes of ERISA appears to rest on two related considerations. First, setting aside death, the age at which a participant will reach normal retirement age and vest in an "age + 5" plan can be known with certainty at the outset of participation in the plan. Second, this certainty is assured by the fact that the "age" in an "age + 5" plan is defined through units of time that accumulate without regard to any particular feature of the world. It does not matter whether Meryl Streep once again offers a dazzling performance or whether cupcakes suddenly fall out of favor. We can rest assured that the inevitable passage of time will unfold toward the vesting of benefits.

Unlike *Fry*, this case involves the RBAP NRA, which defines normal retirement age by reference to five "years of service." ERISA defines a "year of service" as 1000 hours of service. 29 U.S.C. § 1053(b)(2)(A). As should be apparent from this definition, a "year of service" is not the same thing as an "anniversary." Observing that only a "strained construction" would lead a reader to equate these terms, *Duchow* confirmed that they bear distinct meanings—and that those differences are significant for purposes of ERISA's statutory scheme. 691 F.2d at 79.

Thus, even accepting *Fry*'s holding that "'age + 5' remains an age" for purposes of ERISA, it does not follow that "*age + five years of service*" is an "age" of the sort that plans are given discretion to define under ERISA. Nor can it follow. *Duchow* may not have anticipated and prohibited definitions like the RBAP NRA, but its explication of the difference between years of service and anniversaries bears directly on why this case is unlike *Fry*. Notably, Defendant has failed to propose any ground for distinguishing years of service from the cupcake, rainbow, and Streep examples. While five years of service will presumably cluster around employees' fifth anniversaries, that clustering will likely take the form of a wide probability band distributed around the fifth anniversary mark. Yet once the *ex ante* certainty of an anniversary date is abandoned in favor of the supposed high probability that five years of service will often land in the same ballpark—a fact, in any event, that is not alleged in the Complaint and has no business controlling a motion to dismiss—it is unclear where to draw the line between plan-defined conditions that are similar enough to anniversaries to qualify as "ages" and conditions that fail this nebulous test. Defendant's argument essentially boils down to its suggestion that years of service are close enough to anniversaries, a position that rests on facts beyond the scope of this motion and on a legal standard that would almost certainly prove unworkable in practice. Simply put, as a matter of plain text and ordinary language, the RBAP NRA is *not* an "age."

This textual reading, moreover, may well accord with Congress's employee-protective purposes in drafting ERISA. If pension plans were free to define normal retirement age without any meaningful limitation based on the "age" requirement, whether by reference to cupcakes and rainbows or by use of more devious definitions, the role of normal retirement age as a robust participant-protective mechanism in ERISA's vesting rules might be compromised. Employees could have a harder time comprehending how the normal retirement age works and employers could condition normal retirement age on aspects of an employee's service (or other factors) that circumvent the role that the normal retirement age requirement is meant to play. *Cf. Esden v. Bank of Boston*, 229 F.3d 154, 164 (2d Cir. 2000) (noting, in a different context, that "[f]or the purposes of this rule, the regulations do not leave a plan free to choose its own methodology for determining the actuarial equivalent of the accrued benefit expressed as an annuity payable at normal retirement age," because "[i]f plans were free to determine their own assumptions and methodology, they could effectively eviscerate the protections provided by ERISA's requirement of 'actuarial equivalence'"). Such limits on employer discretion are hardly unique to the ERISA context; to the contrary, they permeate the statutory regime. *See id.* ("ERISA was enacted to restrict employers' and employees' freedom of contract when bargaining over pensions. Employers do not have to provide pension plans, but when they do, those plans must comply with Title I of ERISA."). While "[e]mployers are entitled to vary by contract those aspects of pension plans ERISA makes variable, and [] may act in their own interest when doing so," *Fry*, 571 F.3d at 646, they may not vary by contract the statutory rules imposed by ERISA.[5]

Because it violates ERISA, the RBAP NRA must be excised as the mechanism for determining "the time a plan participant attains normal retirement age under the plan."

### B. Motion to Dismiss Count Five

Count Five of the SAC alleges violations of ERISA's vesting and anti-backloading rules; the heart of this claim, however, involves backloading. In 2009, the Second Circuit explained in general terms how the backloading regulations function and what purposes they serve:

> All defined benefit plans must comply with ERISA's minimum benefit accrual rules, which are primarily designed to minimize "backloading." *Langman v. Laub*, 328 F.3d 68, 71 (2d Cir. 2003); H.R. Rep. No. 93-807 (1974), reprinted in 1974 U.S.C.C.A.N. 4639,

[5] In *dictum*, the Fourth Circuit reached the contrary conclusion when presented with a pension plan that, like Defendant's plan, employed a "years of service" definition of normal retirement age. *See McCorkle*, 688 F.3d at 171-172. *McCorkle* reached this issue only after emphasizing that the plaintiff in that case had largely abandoned this contention. *See id.* at 171. In a few short paragraphs of discussion, it then relied on *Fry* and some IRS regulations permitting plans to define normal retirement age as less than 65, all without any consideration of the difference between years of service and anniversaries. *See id.* In that regard, *McCorkle* is distinguishable because this Court is bound by *Duchow*'s entirely sensible explanation of the difference between anniversaries and years of service. Regardless, *McCorkle* is at best persuasive authority. By virtue of the fact that it apparently did not consider (and certainly did not discuss) the central arguments presented here, its persuasive power is limited and is not enough to control this case.

> 4688. Backloading occurs when a plan awards a covered employee disproportionately higher benefit accruals for later years of service. *Langman*, 328 F.3d at 71. Thus, while ERISA does not require pension plans to pay out any specific dollar amount, it does regulate the rate at which benefits accrue. 29 U.S.C. § 1054(b)(1); *see Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004). Toward that end, ERISA sets forth three alternative minimum benefit accrual tests; pension plans are required to pass one. 29 U.S.C. § 1054(b)(1)(A)-(C).

*Lonecke v. Citigroup Pension Plan*, 584 F.3d 457, 464 (2d Cir. 2009).[6] The gravamen of the Plaintiffs' fifth count is that the RBAP NRA violates ERISA by impermissibly altering the rate at which benefits accrue; in other words, even if the RBAP NRA is valid under § 3(24), it may be invalid on the alternative ground that it runs afoul of ERISA's backloading rules. Plaintiffs style this count as an independent legal basis for the same relief sought under the first count.

[6] The purpose of the anti-backloading provision, which is also contained in the Internal Revenue Code, was explained in a House Report from the Committee on Ways and Means:

> The primary purpose of [minimum accrual rates] is to prevent attempts to defeat the objectives of the minimum vesting provisions by providing undue "backloading," *i.e.*, by providing inordinately low rates of accrual in the employee's early years of service when he is most likely to leave the firm and by concentrating the accrual of benefits in the employee's later years of service when he is most likely to remain with the firm until retirement.

H.R. Rep. No. 93-807 (Feb. 21, 1974), 1974 U.S.C.C.A.N. 4670, 4688.

The parties focus virtually all of their energy on IRS Notice 2007-69. *See* IRS Notice, *Relief Related to Plan Amendment of Definition of Normal Retirement Age*, Published Aug. 27, 2007, 2007 WL 2285348 ("the Notice"). Two sections of the Notice are relevant to this case:

> **I. Purpose**
>
> This notice provides temporary relief, until the first day of the first plan year that begins after June 30, 2008, for certain pension plans under which the definition of normal retirement age may be required to be changed to comply with the regulations relating to a plan's normal retirement age that were recently issued under § 401(a) of the Internal Revenue Code. This notice also identifies potential violations of the vesting and accrued benefit requirements for defined benefit plans under § 411 that may arise from a definition of normal retirement age based on a minimum period of service. Finally, this notice requests comments from sponsors of governmental plans as defined in § 414(d)) and other plans not subject to the requirements of § 411 on whether such a plan may define normal retirement age based on years of service . . .
>
> **V. Application of Accrual Rules in the Case of Normal Retirement Age Based on Years of Service**
>
> The 2007 regulations do not provide a safe harbor or other guidance with respect to a normal retirement age that is conditioned (directly or indirectly) on the completion of a

> stated number of years of service. The Service and Treasury expect 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 § 411. *See, e.g.*, § 1.411(b)-1(b)(2)(ii)(F). The relief described in Part III of this notice is limited to compliance with the 2007 regulations and thus, for example, does not extend to any violation of § 411(a)(1) or 411(b)(1) that may arise from a plan's definition of normal retirement age as other than a stated age.

*Id.* At bottom, the parties disagree on four critical points: (1) whether Plaintiffs have alleged an "injury" and therefore have standing to assert this claim; (2) whether the 2007 Notice applies only prospectively; (3) whether the Notice merits judicial deference; and (4) if the Notice does apply, whether the RBAP NRA falls within the scope of its statement 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 § 411."

### 1. Whether Plaintiffs Have a Basis for Seeking Relief

In a single paragraph, Defendant asks the Court to dismiss this count on the ground that Plaintiffs were fully vested when they left PWC and therefore suffered no "injury," since "Plaintiffs do not allege that the Plan's definition of normal retirement age changed the time at which they vested, or that they would have vested earlier had the RBAP conformed to their proffered interpretation of ERISA's vesting requirements." Particularly in light of the Court's conclusion that the RBAP NRA is invalid as a definitional matter, this argument cannot succeed. As alleged in the Complaint, by accepting lump-sum cash-outs when the RBAP illegally defined normal retirement age as five years of service, Plaintiffs unwittingly forfeited a portion of their accrued benefits—namely, the portion of those benefits attributable to future interest credits through an otherwise-valid normal retirement age. Alternatively, it is also possible that Plaintiffs would have a basis for seeking relief for a violation of the accrual rules if the remedy for such a violation would mirror the remedy for liability on Count One—namely, a whipsaw calculation.

### 2. Whether the Notice Applies Only Prospectively

Defendant argues that the Notice has no bearing on this case and characterizes Plaintiffs' argument to the contrary as an unsupported assertion "that the IRS retroactively changed the vesting rules when it issued Notice 2007-69." Both of these arguments miss the mark.

First, Plaintiffs do not claim that the IRS changed the law in 2007. Rather, they argue that the Notice afforded the IRS an opportunity to indicate how it interprets an ERISA regulation dating back to 1977. In other words, Plaintiffs argue that the Notice provides an authoritative interpretation of existing law, not an announcement of how the law will be applied in the future. In that regard, the Notice is relevant as an aid to interpretation, not as a source of new law.

Second, the plain text of the Notice is incompatible with Defendant's claim that the IRS said nothing about application of preexisting accrual rules. Defendant relies heavily on the undisputed fact that the Notice is focused principally on a Treasury regulation promulgated after the time period relevant to this case. To be sure, the Purpose section of the Notice leads with this very concern: "This notice provides temporary relief, until the first day of the first plan year that begins after June 30, 2008, for certain pension plans under which the definition of normal retirement age may be required to be changed to comply with the regulations relating to a plan's normal retirement age that were recently issued under § 401(a) of the Internal Revenue Code."

In the very next sentence of its Purpose section, however, the Notice adds that it "*also* identifies potential violations of the vesting and accrued benefit requirements for defined benefit plans under § 411 that may arise from a definition of normal retirement age based on a minimum period of service." (emphasis added). As used here, "also" means exactly what one would expect: *in addition to the thing just mentioned*. The structure of the Notice then confirms what the plain language of the Purpose section strongly suggests: Parts II, III, and IV all focus on the new Treasury regulation, while a separate section—Part V—addresses the distinct accrual issue. If that were not confirmation enough, Part V of the Notice expressly cites a 1977 regulation as an example of the sort of accrual rule whose meaning it is addressing—a citation that points firmly toward Plaintiffs' interpretation. Furthermore, the Notice fails to include an effective date or any transition relief—steps that would at least suggest an awareness on the part of the IRS that it is promulgating a new, prospective rule. Defendant cites no authority for the proposition that a Notice cannot simultaneously address prospective matters and preexisting issues—and for good reason, since no such authority exists. Moreover, the Second Circuit has confirmed that Notices of this sort are not subject to "retroactivity" doctrines of the sort advanced by Defendant. *See, e.g.*, *Esden*, 229 F.3d at 171 ("The Plan contends that following Notice 96-8 improperly subjects the Plan to a retrospective application of a subsequent interpretation. We disagree. Because Notice 96-8 is an authoritative interpretation of existing statutes and regulations, we hold that it is valid guidance on the law as it applied at the time of Esden's lump-sum distribution." (citing *Chock Full O' Nuts Corp. v. United States*, 453 F.2d 300, 303 (2d Cir. 1971) ("To the extent that a regulation interprets or elucidates the meaning of a statute, it is merely explanatory or confirmatory rather than retroactive."))).[7]

[7] In *dictum* in *McCorkle*, the Fourth Circuit reached the opposite conclusion. It reached this question, however, only after concluding that the plaintiff had effectively abandoned this claim by conceding—as Plaintiffs here do not—that the accrual and "definitional" questions about the validity of a service-based normal retirement age overlap. *McCorkle*, 688 F.3d at 172. "[O]ut of an abundance of caution," *McCorkle* nonetheless decided to "briefly address" this accrual theory. *Id.* As will become clear, *McCorkle*'s discussion of this issue—set forth as brief *dictum*—is unpersuasive. With respect to the prospective application issue, *McCorkle* concluded that "[w]hen read in context, the language cited by Plaintiffs is simply a warning that the safe harbors described in the Notice for future plan years are not available to a plan wherein 'a participant's normal retirement age changes to an earlier date upon completion of a stated number of years of service.' The safe harbors, in turn, are related to the implementation of the new Treasury regulations that, the parties agree, are prospective in nature only." *Id.* at 174. This reading does not account for many of the considerations described *supra* and is unpersuasive on those grounds alone. In any event, *McCorkle* misreads the Notice. When the

### 3. Whether the Notice Merits Deference

Defendant argues in the alternative that the Notice should be disregarded because it was not created through formal adjudication or notice-and-comment rulemaking, the statute is clear, and the Notice offers a qualified conclusion without any evident reasoning. There is some force to this argument: the Notice is no model of thorough legal analysis and offers only the skeleton of an explanation for the correctness of its conclusion. Nonetheless, it would be inappropriate to set the Notice entirely aside—both because the Notice reflects the IRS's guidance as to its own view and because the Notice does not contradict any prior IRS statements. *See Esden*, 229 F.3d at 169 (affording deference to an IRS Notice and describing some of the relevant grounds for doing so). Justice Breyer's recent statements about deference, offered in a case where the relevant federal agency had produced "skimpy" reasoning for its position, best capture the point:

> [E]ven though this case does not fall directly within a case-defined category, such as "*Chevron* deference," "*Skidmore* deference," "*Beth Israel* deference," "*Seminole Rock* deference," or deference as defined by some oth-

Notice indicates that the 2007 regulations do not address a normal retirement age defined by years of service, it is not cautioning that the following statements are prospective in nature. Rather, it is acknowledging that the new regulations are silent on this matter and then using the opportunity to indicate the IRS's belief that, separate from those new Treasury rules, some preexisting accrual rules—notably including the 1977 change-the-base regulation—already imperil such plans. Given that the IRS does not indicate that these violations of the accrual rules are the result of the new regulations, it would be particularly odd to adopt such a cramped view of this statement.

> er case, I believe the agency, in taking a position, nonetheless retains some small but special "power to persuade." And I would consequently to some degree take account of, and respect, the agency's judgment.

*Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1403-04 (2013) (Breyer, J., concurring); *see also id.* ("I cannot measure the degree of deference with the precision of a mariner measuring a degree of latitude. But it is still worth noting that the agency's determination has played some role in my own decision."). Accordingly, the Notice warrants a measure—though only a modest measure—of deference when it states that plans like the RBAP typically will violate ERISA's accrual and vesting rules. At the very least, it suggests the plausibility of Plaintiffs' argument and, by citing the change-the-base regulation, indicates how such a violation would occur.

### 4. Whether the Notice Bears on the Question Whether the RBAP Violates ERISA's Accrual Rules

The Notice states 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 § 411. *See, e.g.*, § 1.411(b)-1(b)(2)(ii)(F)." The regulation that the Notice cites in support of this proposition—§ 1.411(b)-1(b)(2)(ii)(F)—provides as follows:

> (F) Computation of benefit. *A plan shall not satisfy the requirements of this subparagraph if the base for the computation of retirement benefits changes solely by reason of an increase in the number of years of participation.*

> Thus, for example, a plan will not satisfy the requirements of this subparagraph if it provides a benefit, commencing at normal retirement age, of the sum of (1) 1 percent of average compensation for a participant's first 3 years of participation multiplied by his first 10 years of participation (or, if less than 10 his total years of participation) and (2) 1 percent of average compensation for a participant's 3 highest years of participation multiplied by each year of participation subsequent to the 10th year.

(emphasis added). This regulation, also known as the "change-the-base regulation," illustrates the sort of backloading rule that a normal retirement age defined through years of service might violate. By citing the change-the-base regulation, the Notice plainly suggests that a definition like the RBAP NRA is impermissible for two related reasons: (1) normal retirement age is a key component of a plan's benefit formula and is thus part of the "base"; and (2) normal retirement age "changes" within the meaning of § 1.411(b) when a participant reaches the requisite number of years of service. The question then arises: does this interpretation withstand scrutiny? And the answer quickly follows: yes, it does. Indeed, the Notice's implicit argument represents the best view of the law and must therefore govern separate and apart from the matter of deference.

This argument starts from the familiar proposition that the change-the-base regulation serves a critical purpose. ERISA's regulations governing how employers may change accrual rates over time could be eviscerated if employers were also free to change the "base" on which those rates operate, so ERISA prevents any changes to the "base" in relation to which the rate-focused regulations are defined. In the ordinary course, the relevant "base" consists of an employee's salary. *See Carollo v. Cement And Concrete Workers Dist. Council Pension Plan*, 964 F. Supp. 677, 681-82 (E.D.N.Y. 1997) ("The regulations under the Act provide that a Plan may not circumvent this 'rate' requirement simply by changing the 'base' used in the calculation. Under many pension plans, employees accrue benefits at a percentage of their average monthly pay. The percentage is considered the 'rate'; the average monthly pay constitutes the 'base.' . . . [A] pension plan may not change the base in the accrual formula—e.g. from average monthly pay to highest monthly pay—solely because a participant has worked more years than other participants."). In light of the rule's purpose, however, and the fact that the plain text does not offer a fuller definition of "base," this provision is best understood as encompassing all non-rate variables—including salary—that are assumed by the rate-focused regulations, such as the 133-1/3% rule, to remain constant in future years.

Defendant pushes back against this position by suggesting that "base" means only "compensation," but this argument is unsupported by text and purpose. If the regulation's drafters intended to clarify that only salary must be held constant, they could easily have done so by using words like "salary" or "compensation" instead of "base." Their decision to speak of a "base" connotes a broader view of the textual object and militates against a reduction of this word's meaning to a narrow term that was certainly within the drafters' linguistic toolkit. More importantly, it would have been nonsensical for the drafters to describe a base in so narrow a fashion.

The point of requiring the base to be held constant is to test for improper manipulations of rates; if employers could sneak under and around this rule by tinkering with the value of the accrued benefits through other means, the drafters' objectives in forging accrual rules could be readily thwarted. And this is precisely what might happen when normal retirement age is expressed unconventionally, for instance through reference to years of service rather than as a chronological age, since the value of a retirement benefit must be understood in relation to both its dollar amount and the age of the participant at which the benefit becomes payable. The intuition here is simple: $10,000 today is not worth the same amount as $10,000 after five years of service or $10,000 at age 65. Because normal retirement age can dramatically affect the value of an employee's retirement benefit—as occurs when an employee's retirement age drops from 65 to, say, 35 and that employee loses a portion of her benefits attributable to future investment credits—it would be irrational to restrict the definition of "base" solely to the dollar value of an employee's annual compensation. Thus, when the change-the-base regulation refers to average "compensation," it does so in an exemplary rather than definitional manner. Judge Siragusa impliedly acknowledged this point in 2002, when he noted that in *Carollo*, "[t]he Eastern District found that by changing the 'base,' *in that case the average monthly pay*, 'solely' by reason of a participant's increased service, [a plan] violated 26 C.F.R. § 1.411(b)–1(b)(2)(ii)(F)." *Melvin v. UA Local 13 Pension Plan*, 204 F. Supp. 2d 564, 572 (W.D.N.Y. 2002) (emphasis added). Just as the "base" can consist of "average monthly pay," it may also consist of other non-rate variables. The fact that the IRS appears to have interpreted "base" this way in the Notice only adds further support to this understanding of the accrual rules.[8]

Concluding that normal retirement age is part of the "base," at least under the unique circumstances of the RBAP NRA, prompts the question whether this base "changes" within the meaning of the change-the-base regulation when a participant reaches five years of service. This is a close and difficult question. On the one hand, the base obviously does change: an employee who starts work at age 25 has a normal retirement age of age 65 until the day she completes five years of service, at which point her normal retirement age drops to whatever age she happens to have reached at that point. On the other hand, on the assumption that employees do not leave the plan before attaining normal retirement age and vesting, the RBAP NRA never changes in the sense that it is always the earlier of the date on which an employee completes five years of vesting service or

[8] *McCorkle*'s *dicta* reached the opposite result. After an abbreviated discussion of the change-the-base regulation, that court concluded that the "base" consists only of the "amount upon which benefits were to be calculated," a view it then reformulated as "[the] 'base' means just that: the amount of compensation that, when multiplied by the benefit computation formula, becomes the benefit payable under the plan." *McCorkle*, 688 F.3d at 175. However, *McCorkle* did not offer any explanation of how this interpretation of "base" accorded with the regulation's undisputed purpose, did not indicate why its narrow interpretation was required as a matter of textual analysis, and cited only a single district court case as authority for its result—an opinion that, on close inspection, does not stand for so narrow a view. As a result, *McCorkle*'s brief and incomplete *dictum* on this point—*dictum* that did not take into account the IRS Notice, which *McCorkle* had already dismissed as irrelevant—does not persuade.

reaches age 65.[9] In other words, while the RBAP's definition of normal retirement age never changes, that unchanging definition contains a built-in trigger that moves a participant's normal retirement age to an earlier moment in time upon satisfaction of a condition. While philosophers may puzzle over the notion of change within stasis, such metaphysical questions are beyond the scope of this opinion. Presented with the RBAP NRA, the Court must come down in favor of the conclusion that the "base" does, in fact, "change" within the meaning of the regulation.

This result is based on two considerations. First, the Notice suggests that the IRS prefers this understanding of what it means for a base to change under § 1.411(b)-1(b)(2)(ii)(F). Given the closeness of the question, the Notice serves as a tiebreaker. Second, this interpretation best secures the purpose of the change-the-base regulation. If plans were free to test

[9] In *dictum*, *McCorkle* comes down on this side of the dispute:

> [A] participant's employment is "treated as remaining constant" for the year of his initial employment and "for all years after the current year." *Id.* Thus, ERISA would assume the participant's employment continues until actual termination causes a change and would not indulge an artificial assumption the employee would move on within five years of starting.
>
> When employment is viewed as a constant, Plaintiffs' theory that the NRA *changes* after five years of service falls apart. Viewing employment as a constant, as 29 U.S.C. § 1054 says we should, an individual who becomes a Plan participant (before age 60) will reach NRA upon five years of vesting service. Because the Plan does not use an NRA that changes after five years of service, neither 26 C.F.R. § 1.411(b)-1(b)(2)(ii)(F) nor Notice 2007–69 are inapplicable [*sic*].

688 F.3d at 176.

for backloading by assuming that any time-of-service conditions that affect the base have already happened—on the theory that employment must be viewed as a constant and all employees will ultimately reach that condition—then the accrual rules could be rendered blind to the very sort of backloading that the regulation exists to prohibit. After all, if backloading could be expressed as a change in the base that applies to all employees after they reach a certain year of service, and if that kind of change in the base did not qualify as a "change" under § 1.411(b)-1(b)(2)(ii)(F), then employers might too readily thwart the regulation's goal. In other words, the regulation is undermined if pension plans can assume away any jumps in the *de facto* accrual rate that occur by virtue of additional years of service—e.g., by assuming that all employees will reach normal retirement age and that any retirement benefit accrued by that point has been accrued ratably.

For example, in *Carollo*, Judge Nickerson addressed a plan that changed the base after 25 years and applied that change retroactively. He explained that a plan "may not change the base because of length of service," adding that "the Plan does exactly that. It raises the base in the 25th year of service, restricts that raise to the few who have had no break in service longer than two years and at least one year of service after 1980, and gives those favored few a bonanza by making the raise retroactive over their whole careers." 964 F. Supp. 683. The fact that some employees reached that 25th year and had been subject throughout their employment to that condition did not mean that there was no "change" as to those employees' bases, since the result of retroactive application of this benefit was to massively backload benefits. *See id.*

Accordingly, the RBAP does violate § 1.411(b)-1(b)(2)(ii)(F). This interpretation is aided, but not controlled, by the Notice. While it may seem odd to apply an anti-backloading provision to a plan like the RBAP, which Plaintiffs accuse of *frontloading* rather than *backloading* (since the value of the accrued benefits decreases when an employee hits his fifth year of service, vests, and loses the whipsaw calculation), the text of the regulation does not make this distinction. It provides only that "[a] plan shall not satisfy the requirements of this subparagraph if the base for the computation of retirement benefits changes solely by reason of an increase in the number of years of participation." § 1.411(b)-1(b)(2)(ii)(F). In that regard, it does not operate as a one-way ratchet and its plain text encompasses the RBAP NRA.

In any event, ERISA's change-the-base regulation is not the only source of statutory and regulatory protection for employees. Section 411(b)(1)(G) further provides that once a benefit has accrued, it may not be reduced solely because an employee continues to work. *See* 26 U.S.C. § 411(b)(1)(G) ("Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service."). For reasons similar to those set forth above with respect to § 1.411(b)-1(b)(2)(ii)(F), the RBAP runs afoul of this accrual provision.[10]

### C. Motion to Dismiss Count Six

In *Laurent I*, Judge Mukasey held that Plaintiffs had alleged adequately that Defendant's misleading descriptions of the RBAP NRA in SPDs and other documents violated ERISA. In Count Six of the Second Amended Complaint, Plaintiffs allege two distinct ERISA claims: (1) a claim for equitable relief on the ground that misleading descriptions of the RBAP NRA in SPDs violated regulations requiring SPDs to 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); and (2) a claim that Defendant's misleading descriptions of the RBAP NRA in SPDs and other class-wide communications distributed to participants violated ERISA's general fiduciary standards provision, § 404(a). Defendant seeks dismissal of each of these claims.

As to the first claim, Defendant argues that normal retirement age is a term of art that need not be specifically defined in SPDs, there is no conflict between the RBAP and the SPD, and Plaintiffs fail adequately to allege "actual harm" susceptible to remedy under *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011). Because they were addressed and decided in *Laurent I*, the first and second of these arguments

[10] On a phone conference held on July 19, 2013, Defendant suggested that Plaintiffs have waived this argument. Plaintiffs have not done so, as evidenced by the fact that Defendant squarely addressed this argument—without any suggestion of waiver—in pages 21 and 22 of its brief in support of its motion to dismiss the Second Amended Complaint.

are subject to law of the case doctrine. Judge Mukasey's reasoning in that opinion bears repetition here, as it persuasively controls the analysis:

> Employers are required to distribute SPDs describing pension plan benefits to employees and the SPD "must be sufficiently accurate and comprehensive to apprise participants and beneficiaries of their rights and obligations under the plan." *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 110 (2d Cir. 2003); ERISA § 102 ("[T]he summary plan description . . . shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."). Specifically, 29 C.F.R. § 2520.102-3(j)(1) states "[f]or employee pension benefit plans, [the SPD] shall also include a statement describing the plan's normal retirement age, as that term is defined in section 3(24) of the Act, and a statement describing any other conditions which must be met before a participant will be eligible to receive benefits." The SPD may be relied on by employees as the "'primary source of information regarding employment benefits,'" and it controls over conflicting provisions of the pension plan itself. *Frommert v. Conkright*, 433 F.3d 254, 268-69 (2d Cir. 2006) (quoting *Layaou v. Xerox Corp.*, 238 F.3d 205, 209 (2d Cir. 2001)); *Burke,* 336 F.3d at 110 ("Where the terms of a plan and the SPD conflict, the SPD controls.") . . .

> Thus, the normal retirement age provided in the RBAP is invalid, because it was not clearly stated in the SPD and plaintiffs were likely to have been harmed by their reliance on the faulty SPD. Because the SPD, which stated no normal retirement age, controls, the normal retirement age for purposes of the RBAP is the statutory default of age 65.

*Laurent I*, 448 F. Supp. 2d at 546-47. This logic was then affirmed in *Laurent II* and *Laurent III*.

Here, Defendant does not offer any new arguments addressed to *Laurent I*'s conclusion that the SPDs were deficient; more importantly, Defendant's arguments remain unpersuasive. Plaintiffs quote a Department of Labor Regulation that plainly requires "a statement describing the plan's normal retirement age, as that term is defined in section 3(24) of the Act." *See* 29 C.F.R. § 2520.102-3(j)(1). Even if the SPDs accurately described certain respects in which the RBAP operates, this failure—the apparent intention of which was to disguise the unconventional and potentially controversial nature of the RBAP NRA—suffices to constitute a violation of the standards governing SPDs.[11] It may well be sensible to require a clear statement of the normal retirement age: that piece of data is critical to the valuation of pension benefit plans and its clear communication to readers of an SPD may play an important role in shaping their understanding of how the plan works.

[11] The obvious question to ask is why Defendant made the highly unusual choice to depart from clear regulations and industry practice by not including a description of the RBAP NRA. The answer to this question might shed light on the significance that Defendant itself ascribes to including a normal retirement age in an SPD.

That is to say, "normal retirement age" is, as Defendant insists, a "term of art"—and its importance to a plan member's understanding may be so great that it must be expressed in a certain fashion. By refusing to comply with those rules in its SPDs, Defendant violated ERISA's clear command.

Contrary to Defendant's protestation that Plaintiffs can no longer demonstrate any sound legal basis for equitable relief, the intervening change of law wrought by *Cigna* does not produce a different result.[12] In *Cigna*, the Supreme Court noted that, although "Section 502(a)(3) invokes the equitable powers of the District Court," "[t]he relevant substantive provisions of ERISA do not set forth any particular standard for determining harm." 131 S. Ct. 1881. As a result, the Court reasoned, "any requirement of harm must come from the law of equity." *Id.* Exploring the historic powers of equity courts, *Cigna* held that "under appropriate circumstances, § 502(a)(3) may authorize three possible equitable remedies: estoppel, reformation, and surcharge." *Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162, 1165 (9th Cir. 2012) (citing *Cigna*, 131 S. Ct. at 1878-80). Each of these remedies is associated with a different harm requirement. *See Cigna*, 131 S. Ct. at 1881 ("To the extent any such [harm] requirement arises, it is because the specific remedy being contemplated imposes such a requirement.").

[12] To the extent that *Laurent I* relied on any pre-*Cigna* doctrine, law of the case deference does not apply and the intervening change of governing Supreme Court precedent controls. *Laurent I*'s analysis of this cause of action is therefore repudiated to the extent it is inconsistent with the discussion of equitable remedies and harm set forth in this opinion.

Thus, whereas estoppel requires detrimental reliance, no such requirement attaches to reformation or surcharge. *See id.* Rather, reformation of contracts like the RBAP may be appropriate "where fraudulent suppressions, omissions, or insertions materially . . . affected the substance of the contract, even if the complaining party was negligent in not realizing its mistake, as long as its negligence did not fall below a standard of reasonable prudence and violate a legal duty." *Id.* (citations, quotation marks, and alterations omitted). Although the Ninth Circuit has observed that "[i]t is unclear whether we should analyze reformation in the context of trust law or contract law because retirement plan documents are similar to both trusts and contracts," that same court recognizes that "[u]nder both theories . . . reformation is proper only in cases of fraud and mistake." *Skinner*, 673 F.3d at 1166. In *Amara*, the Court hinted that reformation may have been warranted because the employer "intentionally misled its employees," *Cigna*, 131 S. Ct. at 1874, 1880, and Judge Arterton embraced that suggestion on remand, imposing the remedy of reformation because "there was mistake on one side and fraud or inequitable conduct on the other," *Amara v. CIGNA Corp.*, 84 Fed. R. Serv. 3d 422, at *8 (D. Conn. 2012) (quotation marks and citation omitted).[13] At this early stage in the litigation, without the benefit of a Second Circuit assessment of *Cigna*, and in light of Plaintiffs' detailed allegations of fraud and mistake, the Court cannot conclude as a matter of law that it would be implausible for Plaintiffs to satisfy this requirement for an equitable remedy.

In the alternative, *Cigna* explains that the equitable remedy of surcharge may apply where a plaintiff can show "actual harm," which "may sometimes consist of detrimental reliance, but . . . might also come from the loss of a right protected by ERISA or its trust-law antecedents." 131 S. Ct. at 1881. On the facts before him, Justice Breyer reasoned in *Cigna* that "it is not difficult to imagine how the failure to provide proper summary information, in violation of the statute, injured employees even if they did not themselves act in reliance on summary documents—which they might not themselves have seen—for they may have thought fellow employees, or informal workplace discussion, would have let them know if, say, plan changes would likely prove harmful." *Id.* Ultimately, "to obtain relief by surcharge for violations of §§ 102(a) and 104(b), a plan

[13] Judge Arterton explained:

> CIGNA's deficient notice led to its employees' misunderstanding of the content of the contract, and CIGNA did not take steps to correct their mistake. Instead, CIGNA affirmatively misled and prevented employees from obtaining information that would have aided them in evaluating the distinctions between the old and new plans. Furthermore, CIGNA sought and obtained an advantage from its inequitable actions. As a result of CIGNA's fraud, its employees were mistaken as to their retirement benefits.

*Amara*, 84 Fed. R. Serv. 3d 422, at *5-6 (quotation marks and citations omitted).

participant or beneficiary must show that the violation injured him or her . . . [a]lthough it is not always necessary to meet the more rigorous standard implicit in the words 'detrimental reliance,' actual harm must be shown." *Id.* at 1881-82.

In *Laurent I*, Judge Mukasey applied the Second Circuit's pre-*Cigna* standards to test for the requisite harm. *See* 448 F. Supp. 2d at 547. He concluded that

> Plaintiffs likely were harmed, because it was reasonable for plaintiffs to assume that they would continue to accrue interest credits until age 65 even if they terminated their employment before that point, thus grossly overestimating the value of their pension benefits. "There is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004). Additionally, because plaintiffs were not informed that the normal retirement age under the RBAP was five years, they were prevented from immediately "seeking injunctive relief, altering their retirement investment strategies, or perhaps considering other employment," which is enough to meet the likely prejudice standard. *Frommert*, 433 F.3d at 267. An "employer may rebut a showing of likely prejudice by demonstrating that the deficiency was in fact a harmless error." *Frommert*, 433 F.3d at 267. PWC has not made such a showing

*Id.* Much of this logic retains vitality under *Cigna*'s "actual harm" standard. Plaintiffs allege that, as a result of Defendant's deception and in light of the RBAP NRA's invalidity, they lost part of their accrued benefits. As Plaintiffs allege in ¶ 83 of the Second Amended Complaint:

> Had Defendant calculated and paid lump sums using 65 as the statutory [normal retirement age], as required, participants would have received the full amount of accrued benefits to which they were legally entitled under the terms of the Plan and ERISA. As it was, Plaintiffs . . . unwittingly forfeited a significant portion of their accrued benefits solely because they elected to receive benefits in the form of a single sum following termination of employment rather than as an annuity commencing at age 65.

Plaintiffs further allege that they lost the opportunity "to challenge [] Defendants' benefit calculation methodology" and "to timely react to, internally challenge and/or externally contest Defendants' forfeiture of their benefits" (¶ 102), and that they were deprived of a chance to "file[] suit to seek the relief sought via this action" (¶ 104). Had the SPD complied with ERISA, it is also possible that plan members may have altered their investment strategies, sought alternative employment (either in pursuit of what they perceived to be a superior pension plan or out of disgust with Defendant's perceived machinations), or demanded government intervention. *Cf. Laurent I*, 448 F. Supp. 2d at 547. These allegations suffice to satisfy the requirement post-*Cigna* that Plaintiffs plausibly allege actual harm resulting from the alleged violation. As a result, it is plausible that

Plaintiffs may be entitled to the equitable remedy of surcharge.[14]

Accordingly, as in *Laurent I*, Defendant's motion to dismiss Plaintiffs' cause of action arising from deficient SPDs must be denied.

This leaves only Plaintiffs' claim that Defendant's misleading descriptions of the RBAP NRA in SPDs and other class-wide communications distributed to participants violated ERISA's general fiduciary standards provision, § 404(a). Here, Defendant responds by identifying three grounds for dismissal: (1) the absence of any benefit forfeiture scheme; (2) the three-year statute of limitations for fiduciary duty claims under ERISA; and (3) failure to allege actual harm. The first of these responses can be set aside at the outset, since it depends on the already-rejected assumption that the RBAP NRA does not violate ERISA's vesting standards or accrual rules, and the third response falters for the reasons set forth in the discussion *supra* regarding harm under *Cigna*.

This leaves only Defendant's second argument, which does not succeed. The statute of limitations defense relies on 29 U.S.C. § 1113, an "enigmatic—almost chimerical—statute of limitations that applies to actions for breach of fiduciary duty under the

[14] Defendant has suggested at various points that any loss of an opportunity to contest its decision regarding the RBAP would not constitute harm because Defendant would never have changed its mind; in other words, that this actual harm was actually harmless. That claim is beyond the scope of this motion to dismiss, as the Court must take its facts from the Second Amended Complaint. In any event, "loss of opportunity to object" is not the only kind of actual harm that Plaintiffs allege in support of an equitable remedy on this cause of action.

Employee Retirement Income Security Act ("ERISA")." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 184 (2d Cir. 2001). "Held together by chewing gum and baling wire," *id.* at 188, it provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

In *Caputo*, the Second Circuit held that "the six-year statute of limitations should be applied to cases in which a fiduciary: (1) breached its duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his detriment; *or* (2) engaged in acts to hinder the discovery of a breach of fiduciary duty." 267 F.3d at

190.[15] The *Caputo* court also clarified the "actual knowledge" requirement: "[A] plaintiff has 'actual knowledge of the breach or violation' within the meaning of [§ 1113(2)] when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act." *Id.* at 193. "While a plaintiff need not have knowledge of the relevant law, he must have knowledge of all facts necessary to constitute a claim . . . However, [t]he disclosure of a transaction that is not inherently a statutory breach of fiduciary duty . . . cannot communicate the existence of an underlying breach." *Id.* (citations and quotation marks omitted). In other words, constructive knowledge does not suffice. *See id.* at 194-95. Thus, because the defendant's actions in *Caputo* were not "inherently suspect" and did not, standing alone, "constitute a breach of fiduciary duty or an ERISA violation," the Second Circuit did not find "actual knowledge." *Id.* at 193; *see also id.* ("Although the announcement should have (and did) give plaintiffs reason to *suspect* that Pfizer had lied to them, it is not enough that [plaintiffs] had notice that something was awry; [plaintiffs] must have had specific knowledge of the actual breach of duty upon which [they sued]." (quotation marks and citation omitted)); *Perlman v. Fid. Brokerage Servs. LLC*, No. 11 Civ. 326, 2013 WL 1201237, at *11 (E.D.N.Y. Mar. 26,

[15] The Circuit explained that "Congress intended to provide a lengthier statute of limitations where the fiduciary breached its duty by misrepresenting or failing to disclose a material fact that ERISA required the fiduciary to disclose, most likely because such violations would be difficult to discover." 267 F.3d at 190. The fraud, however, must be alleged with the particularity demanded in Federal Rule of Civil Procedure 9(b). *Id.* at 191.

2013) ("The alleged breach of fiduciary duty at issue in *Caputo* was an employer misrepresenting facts about plaintiffs' pension benefits. The Second Circuit explained that the plaintiffs could not have had 'actual knowledge' of the breach at the time that their employer first provided the information, for it was not until later that they learned new facts which led them to believe that their employer's prior representations had been false." (citations omitted)).

Defendant argues that Plaintiffs had actual knowledge of the basis for their claim no later than April and May 2002, at which time they did not receive any whipsaw calculation and should have been placed on notice that the RBAP was not paying them such amounts. Relying on this premise, Defendant argues that the three-year statute of limitations applies because Plaintiffs cannot avail themselves of the "fraud or concealment" exception. Plaintiffs dispute Defendant's first contention: that Plaintiffs had "actual knowledge" as of 2002. Because Plaintiffs prevail on that point, there is no need to reach the "fraud or concealment" issue.

Based on the facts alleged in the Complaint, Plaintiffs knew in April and May 2002 that their lump sum payment was equal to their account balances. But they knew little more about the alleged breach of fiduciary duty. As they allege in ¶ 112 of the Second Amended Complaint:

> Plaintiffs and other Plan participants did not independently discover that the Plan document defined the RBAP-defined NRA as the earlier of 5 years of service or age 65. Defendants kept the formal Plan document closely held and did not distribute it to Plaintiffs or virtually any other participant out-

> side a small group charged with drafting and administering the Plan. The only time Defendants provided a participant not involved with Plan administration access to or a copy of the formal plan document was if a participant made a formal request in writing for a copy of or for the right to inspect the formal plan document. But Defendants' communications did not give ordinary participants any reason to believe they might need to inspect the formal plan document to protect themselves. Consequently, from 1994 to 2006, only a small handful of participants not involved with Plan administration ever asked for a copy of or for the right to inspect the formal plan document.

Plaintiffs further allege in ¶ 136 that "Defendants' disclosure violations delayed the discovery of their benefit forfeiture scheme until 2004 when Mr. Laurent learned of it only through counsel who independently discovered and informed Plaintiff of it."

In 2002, Plaintiffs allegedly did not know how the RBAP defined normal retirement age, did not know that the SPD violated applicable standards by failing to describe normal retirement age, and did not know that the RBAP NRA violated any law. They did not know about any of the alleged actions taken by Defendant to conceal the RBAP NRA from its employees—even as it admittedly trumpeted this scheme to a wider world of pension specialists and regulators—and they did not know about any of the alleged fraudulent actions taken by Defendant in relation to the SPDs. Receipt of a lump sum benefit equal to their account balance was not "inherently suspect" and was not, itself, the breach of fiduciary duty relevant to the sixth cause of action. *See Caputo*, 267 F.3d at 193. Although *Caputo* makes clear that Plaintiffs are not required to know the applicable law, Plaintiffs satisfactorily and plausibly allege that they were ignorant of key *facts*—though it must be acknowledged that in a case like this one, some of the "facts" pertinent to "actual knowledge" overlap with legal questions (*e.g.*, knowing that the SPD was more than just sketchy or that the RBAP NRA was more than unusual).[16] Accordingly, Defendant's argument that the three-year statute of limitations set forth in 29 U.S.C. § 1113 controls Plaintiffs' claim for breach of fiduciary duty must be rejected.

[16] Defendants cite two cases for the contrary proposition. These cases, however, do not bear directly on this analysis. One case involves application of the "broad" approach to "actual knowledge" set forth by the Sixth Circuit in *Wright v. Heyne*, 349 F.3d 321 (6th Cir. 2003), to a very different kind of manipulation by a Plan Administrator, such that receipt of a lump sum payment in that context could be found to afford actual notice of an improper calculation of benefits. *See Durand v. Hanover Ins. Grp., Inc.*, No. 07 Civ. 130, 2011 WL 1302227, at *7-8 (W.D. Ky. Mar. 31, 2011). The other case concluded that receipt of lump-sum distributions qualified as unequivocal repudiation of any entitlement to benefits beyond the account balance where the participants had repeatedly received accurate information from the Plan indicating that this would be the effect of any such receipt of distributions. *See Thompson v. Ret. Plan for Employees of S.C. Johnson & Son, Inc.*, 651 F.3d 600, 606 (7th Cir. 2011). In *Thompson*, however, the circumstances offered strong reason to believe that the participants knew everything they needed to know in order to trigger the limitations clock. *See id.* at 606-07. To the extent that the issues in *Durand* and *Thompson* are analogous to the question here, the limits of that analogy are exceeded by differences that bear on Plaintiffs' knowledge.

## III. Conclusion

For the foregoing reasons, Defendant's motion to dismiss is DENIED.

The Clerk of Court is directed to terminate the motion entry at Dkt. No. 137.

SO ORDERED.

Dated: New York, New York
August 8, 2013

s/
J. PAUL OETKEN
United States District Judge

## APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| TIMOTHY D. LAURENT, *et al.*,<br>Plaintiffs,<br><br>-v-<br><br>PRICEWATERHOUSECOOPERS LLP, *et al.*,<br>Defendants. | : | 06 Civ. 2280 (JPO)<br>OPINION AND ORDER |

J. PAUL OETKEN, District Judge:

Plaintiffs seek to bring a class action against their former employer, Defendant Pricewaterhouse-Coopers ("PwC" ), for failure to comply with the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* (2000). After litigating several prior motions to dismiss and motions for reconsideration, Defendants now move to certify for interlocutory review the Court's Order denying Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint. For the reasons that follow, the Court grants that motion and certifies its previous Order, *Laurent v. PriceWaterhouseCoopers LLP*, 06 Civ. 2280 (JPO), 2013 WL 4028181 (S.D.N.Y. Aug. 8, 2013) (*Laurent IV*), for interlocutory review.

### I. Legal Standard

Interlocutory review "is a rare exception to the final judgment rule that generally prohibits piecemeal appeals." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996). Under 28 U.S.C. § 1292(b), the district court may certify orders for interlocutory review when the court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation." Additionally, certification is appropriate only when a case presents exceptional circumstances warranting interlocutory review. *See In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996) (noting that the Second Circuit has "repeatedly cautioned" that "only exceptional circumstances will justify" interlocutory review); *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 25 (2d Cir. 1990) ("[I]t continues to be true that only 'exceptional circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'") (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)).

Although the statutory elements and the "exceptional circumstances" standard provide some guidance on the issue, district courts have broad discretion to determine whether to certify an order for interlocutory review. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995) ("Congress . . . confer[ed] on district courts first line discretion to allow interlocutory appeals."); *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 162 (E.D.N.Y. 1999) ("The legislative history, congressional design and case law indicate that district court judges retain unfettered discretion to deny certification of an order for interlocutory appeal even where the three legislative criteria of section 1292(b) appear to be met.").

## II. Discussion[1]

The first requirement of Section 1292 is that an order presented for certification must "involve[] a controlling question of law." As a preliminary matter, the question presented for certification must be a question of law and not fact. The Court's Order, which interpreted ERISA to determine whether "normal retirement age" may be defined as five years of service, hinged on statutory interpretation—a quintessentially legal determination. Furthermore, "a question of law is 'controlling' if reversal of the district court's order would terminate the action." *Klinghoffer*, 921 F.2d at 24 (2d Cir. 1990). Reversal of this Court's Order, which preserved three of Plaintiffs' claims on a Motion to Dismiss, would terminate this action. Finally, while legal questions are not controlling if Plaintiffs have independent and alternative grounds for pursuing their claims, *see California Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 95-96 (2d Cir. 2004), in this case, the possibility of reviving a claim that was dismissed seven years ago does not constitute viable alternative grounds. Therefore, the legal questions that were addressed in this Court's Order are controlling and fit for certification.

Second, Section 1292 requires "substantial ground for difference of opinion" regarding the controlling question of law. ERISA grants employers

[1] Familiarity with the facts and issues discussed in the contested Order is assumed.

some discretion to define "normal retirement age."[2] The limits of this discretion are contested and have produced differences of opinion among the courts of appeals. The Order, for example, distinguishes a Seventh Circuit decision, *Fry v. Exelon Corp. Cash Balance Pension Plan*, 571 F.3d 644, (7th Cir. 2009), which adopts a different interpretation of the relevant portions of ERISA. Furthermore, the Fourth Circuit case *McCorkle v. Bank of America*, 688 F.3d 164 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1253 (2013), contains dicta adopting the Seventh Circuit's reasoning in *Fry* and differs with the result reached by this Court. Having thoroughly examined ERISA's text and purpose in its Order, the Court is of the opinion that the definition of "normal retirement age" contains ambiguity and substantial grounds for difference of opinion.

Third, Section 1292 requires circumstances in which "an immediate appeal from the order may materially advance the ultimate termination of the litigation." In this case, a successful appeal would immediately terminate the litigation. Furthermore, litigation of the remaining issues would continue before the district court during the pendency of this appeal, if granted. This dual-track process ensures that interlocutory appeal may materially advance, but in any event will not further delay, the ultimate termination of this case.

Finally, the Court looks to whether this case presents exceptional circumstances warranting interlocutory review. In a Second Circuit opinion review-

[2] *See, e.g.*, ERISA § 3(24)(A), *codified at* 29 U.S.C. § 1002 (24)(A) (defining "normal retirement age" loosely as "the time a plan participant attains normal retirement age under the plan").

ing the "types of cases [the House Committee on the Judiciary] thought appropriate for interlocutory appeals," the Circuit began the list with cases "where a lengthy accounting is required upon finding liability under a contract." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 866 (2d Cir. 1996) (citing H. Rep. No. 85-1667, at 1-2 (1958)). This case, which requires a complex accounting of "whipsaw" damages, squarely presents circumstances that the Second Circuit and House Committee have determined warrant interlocutory review.

Although the Second Circuit declined to review Judge Mukasey's Order on an earlier motion to dismiss, *Laurent v. PriceWaterhouseCoopers LLP*, 448 F. Supp. 2d 537, 541 (S.D.N.Y. 2006) (*Laurent I*), which was also certified for interlocutory review, *Laurent v. PriceWaterhouseCooper LLP*, 06 Civ. 2280 (GBD), 2007 WL 2363616 (S.D.N.Y. Aug. 17, 2007) (*Laurent II*), the emergence of possibly contradictory law in the Fourth and Seventh Circuits presents a new argument in favor of reviewing the August 8, 2013 Order (*Laurent IV*).

## III. Conclusion

For the foregoing reasons, this Court's Aug. 8, 2013 Order, denying PwC's motion to dismiss with respect to counts one, five, and six of Plaintiffs' Second Amended Complaint, is hereby certified for interlocutory review.

The Clerk of the Court is directed to close the motion at docket number 154.

SO ORDERED.

Dated: New York, New York
January 22, 2014

s/

J. PAUL OETKEN
United States District Judge

# APPENDIX G

S.D.N.Y. - N.Y.C.
06-cv-2280
Oetken, J.

## United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of April, two thousand fourteen.

Present:

Ralph K. Winter,
Barrington D. Parker,
Peter W. Hall,
*Circuit Judges*.

PricewaterhouseCoopers LLP, *et al.*,

*Petitioners*,

v.

Timothy D. Laurent, on behalf of himself and all others similarly situated, *et al.*,

*Respondents*.

14-314

Petitioners move, pursuant to 28 U.S.C. § 1292(b), for leave to appeal an interlocutory order of the district court, and for leave to file a reply in support of their petition.

Upon due consideration, it is hereby ORDERED that motions are GRANTED. The Petitioners are directed to file a scheduling notification within 14 days of the date of entry of this order pursuant to Second Circuit Local Rule 31.2.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk.

## APPENDIX H

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of August, two thousand and fifteen.

Before: José A. Cabranes,
Gerard E. Lynch,
Christopher F. Droney,
*Circuit Judges*.

Timothy D. Laurent, Smeeta Sharon,

*Plaintiffs-Appellees*,

v.

PriceWaterhouseCoopers LLC, The Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP, The Administrative Committee to the Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP,

*Defendants-Appellants*.

**ORDER**
Docket No.
14-1179

Defendants-Appellants move for a stay of the mandate pending the filing and disposition of a petition for writ of *certiorari* with the Supreme Court of the United States.

IT IS HEREBY ORDERED that the motion is GRANTED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

## APPENDIX I

**Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP (1995) (C.A. App. 305-496)** ***(excerpt)***

*  *  *

## ARTICLE 2

## DEFINITIONS

*  *  *

2.32 Normal Retirement Age. The earlier of the date a Participant attains age 65 or completes five (5) Years of Service.

*  *  *

2.46 Year of Service. For purposes of determining a Participant's nonforfeitable benefit (as defined in Article 6), a Computation Period during which an Employee is credited with at least one thousand (1,000) Hours of Service. Years of Service before age seventeen (17) are not considered. For purposes of determining a Participant's Accrued Benefit, a credit used to determine such Benefit. . . .

*  *  *

# ARTICLE 6
# VESTING

6.1 Employer Contributions. A Participant's Accrued Benefit shall be vested and nonforfeitable as follows.

(a) Nonforfeitable Benefit at Normal Retirement Age or Death. A Participant who is employed by the Employer on attainment of Normal Retirement Age or the date of his or her death shall be fully vested and have a nonforfeitable right to his or her Accrued Benefit.

(b) Nonforfeitable Benefit Upon Termination of Employment. If a Participant terminates from employment, or in the case of a Participant who is a Partner, Principal, Limited Equity Partner or Limited Equity Principal when he ceases to be active, with the Employer other than by reason of death, he or she shall be vested and have a nonforfeitable right to his or her Accrued Benefit after having completed five (5) Years of Service. Notwithstanding the preceding sentence, a Participant who was employed by the Employer on June 30, 1999 and was earning benefits under the Kwasha Lipton Retirement Plan on that date shall be vested and have a nonforfeitable right upon termination of employment, or the case of a participant who is a Partner, Principal, Limited Equity Partner or Limited Equity Principal when he ceases to be active, other than by reason of death, as follows:

| Completed Years of Service | Vested Percentage |
|---|---|
| Less than 3 | 0% |
| 3 | 20% |
| 4 | 40% |
| 5 or more | 100% |

Upon a Participant's termination from employment with the Employer, or in the case of a Participant who is a Partner, Principal, Limited Equity Partner or Limited Equity Principal when he ceases to be active, other than be reason of death, the Accrued Benefit of a Participant who is not vested and to which the Participant does not have a nonforfeitable right shall be forfeited as of the last business day of the second calendar month following the calendar month in which the Participant's termination from employment occurs or in which the Participant ceases to be active; provided, however, that in the case of a Participant who must maintain independence from the Employer his Accrued Benefit shall be forfeited as of the date of his final Deemed Payroll Period Allocation.

For purposes of this Section 6.1, Hours of Service shall include Hours of Service prior to the Effective Date. Prior to July 1, 1999, in the case of a Participant who has incurred a 1-year Break in Service, Years of Service before such Break are not taken into account until the Participant has completed a Year of Service after such Break in Service. In the case of a Participant who has 5 or more consecutive 1-year Breaks in Service, such Participant's pre-Break service will count in determining the Participant's nonforfeitable benefit that accrues after the Break only if either

(1) such Participant has any nonforfeitable benefit at the time of separation from service; or

(2) upon returning to service the number of consecutive 1-year Breaks in Service is less than the number of Years of Service.

## APPENDIX J

### 29 U.S.C. § 1001. Congressional findings and declaration of policy

### (a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

**(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries**

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

### (c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

## 29 U.S.C. § 1001a. Additional Congressional findings and declaration of policy *(excerpt)*

* * *

### (c) Policy

It is hereby declared to be the policy of this Act—

(1) to foster and facilitate interstate commerce,

(2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,

(3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and

(4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

**29 U.S.C. § 1002. Definitions *(excerpt)***

For purposes of this subchapter:

* * *

(22) The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to—

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 1054(b)(1)(G) of this title.

(23) The term "accrued benefit" means—

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under section 1054(c)(2)(B) of this title with respect to the employee's accumulated contribution.

(24) 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—

(i) the time a plan participant attains age 65, or

(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

(25) The term "vested liabilities" means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable.

* * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

## 29 U.S.C. § 1053. Minimum vesting standards *(excerpt)*

### (a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) (A) (i) In the case of a defined benefit plan, a plan satisfies the requirements of this paragraph if it satisfies the requirements of clause (ii) or (iii).

(ii) A plan satisfies the requirements of this clause if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(iii) A plan satisfies the requirements of this clause if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

| **Years of service** | **The nonforfeitable percentage is** |
|---|---|
| 3 | 20 |
| 4 | 40 |
| 5 | 60 |
| 6 | 80 |
| 7 or more | 100. |

(B) (i) In the case of an individual account plan, a plan satisfies the requirements of this paragraph if it satisfies the requirements of clause (ii) or (iii).

(ii) A plan satisfies the requirements of this clause if an employee who has completed at least 3 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(iii) A plan satisfies the requirements of this clause if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

| **Years of service** | **The nonforfeitable percentage is** |
|---|---|
| 2 | 20 |
| 3 | 40 |
| 4 | 60 |
| 5 | 80 |
| 6 or more | 100. |

(3) (A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced. The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(d)(2) of this title.

(D) (i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). The plan provision required under this clause may provide that such repayment must be made (I) in the case of a withdrawal on account of separation from service, before the earlier of 5 years after the first date on which the participant is subsequently reemployed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (II) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) Cross reference.—

**For nonforfeitability where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 1056(c) of this title.**

(E) (i) A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

(ii) A participant's right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because—

(I) the plan is amended to reduce benefits under section 1425 or 1441 of this title, or

(II) benefit payments under the plan may be suspended under section 1426 or 1441 of this title.

(F) A matching contribution (within the meaning of section 401(m) of title 26) shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is treated as an excess contribution under section 401(k)(8)(B) of title 26, an excess deferral under section 402(g)(2)(A) of title 26, an erroneous automatic contribution under section 414(w) of title 26, or an excess aggregate contribution under section 401(m)(6)(B) of title 26.

* * *

## 29 U.S.C. § 1054. Benefit accrual requirements *(excerpt)*

* * *

### (b) Enumeration of plan requirements

(1) (A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than—

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 33 1⁄3) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph—

(i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of—

(i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

(E) Notwithstanding subparagraphs (A), (B), and (C) of this paragraph, a plan shall not be treated as not satisfying the requirements of this paragraph solely because the accrual of benefits under the plan does not become effective until the employee has two continuous years of service. For purposes of this subparagraph, the term "year of service" has the meaning provided by section 1052(a)(3)(A) of this title.

(F) Notwithstanding subparagraphs (A), (B), and (C), a defined benefit plan satisfies the requirements of this paragraph if such plan

(i) is funded exclusively by the purchase of insurance contracts, and

(ii) satisfies the requirements of paragraphs (2) and (3) of section 1081(b) of this title (relating to certain insurance contract plans), but only if an employee's accrued benefit as of any applicable date is not less than the cash surrender value his insurance contracts would have on such applicable date if the requirements of paragraphs (4), (5), and (6) of section 1081(b) of this title were satisfied.

(G) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service. The preceding sentence shall not apply to benefits under the plan commencing before benefits payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] which benefits under the plan—

(i) do not exceed social security benefits, and

(ii) terminate when such social security benefits commence.

(H) (i) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

(ii) A plan shall not be treated as failing to meet the requirements of this subparagraph solely because the plan imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(iii) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

> (I) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and
>
> (II) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan

> during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The preceding provisions of this clause shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations may provide for the application of the preceding provisions of this clause, in the case of any such employee, with respect to any period of time within a plan year.

(iv) Clause (i) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(v) A plan shall not be treated as failing to meet the requirements of clause (i) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(vi) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 shall apply with respect to the requirements of this subparagraph in the same manner and to the same extent as such regulations apply with respect to the requirements of such section 411(b)(1)(H).

*  *  *

### (c) Employee's accrued benefits derived from employer and employee contributions

(1) For purposes of this section and section 1053 of this title an employee's accrued benefit derived from employer contributions as of any applicable date is the excess (if any) of the accrued benefit for such employee as of such applicable date over the accrued benefit derived from contributions made by such employee as of such date.

(2) (A) In the case of a plan other than a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is—

(i) except as provided in clause (ii), the balance of the employee's separate account consisting only of his contributions and the income, expenses, gains, and losses attributable thereto, or

(ii) if a separate account is not maintained with respect to an employee's contributions under such a plan, the amount which bears the same ratio to his total accrued benefit as the total amount of the employee's contributions (less withdrawals) bears to the sum of such contributions and the contributions made on his behalf by the employer (less withdrawals).

(B) DEFINED BENEFIT PLANS.—In the case of a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is the amount equal to the employee's accumulated contributions expressed as an annual benefit commencing at normal retirement age, using an interest rate which would be used under the plan under section 1055(g)(3) of this title (as of the determination date).

(C) For purposes of this subsection, the term "accumulated contributions" means the total of—

(i) all mandatory contributions made by the employee,

(ii) interest (if any) under the plan to the end of the last plan year to which section 1053(a)(2) of this title does not apply (by reason of the applicable effective date), and

(iii) interest on the sum of the amounts determined under clauses (i) and (ii) compounded annually—

(I) at the rate of 120 percent of the Federal mid-term rate (as in effect under section 1274 of title 26 for the 1st month of a plan year for the period beginning with the 1st plan year to which subsection (a)(2) of this section applies by reason of the applicable effective date) and ending with the date on which the determination is being made, and

(II) at the interest rate which would be used under the plan under section 1055(g)(3) of this title (as of the determination date) for the period beginning with the determination date and ending on the date on which the employee attains normal retirement age.

For purposes of this subparagraph, the term "mandatory contributions" means amounts contributed to the plan by the employee which are required as a condition of employment, as a condition of participation in such plans, or as a condition of obtaining benefits under the plan attributable to employer contributions.

(D) The Secretary of the Treasury is authorized to adjust by regulation the conversion factor described in subparagraph (B) from time to time as he may deem necessary. No such adjustment shall be effective for a plan year beginning before the expiration of 1 year after such adjustment is determined and published.

(3) For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

(4) In the case of a defined benefit plan which permits voluntary employee contributions, the portion of an employee's accrued benefit derived from such contributions shall be treated as an accrued benefit derived from employee contributions under a plan other than a defined benefit plan.

*  *  *

## 29 U.S.C. § 1056. Form and payment of benefits *(excerpt)*

### (a) Commencement date for payment of benefits

Each pension plan shall provide that unless the participant otherwise elects, the payment of benefits under the plan to the participant shall begin not later than the 60th day after the latest of the close of the plan year in which—

(1) occurs the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,

(2) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or

(3) the participant terminates his service with the employer.

In the case of a plan which provides for the payment of an early retirement benefit, such plan shall provide that a participant who satisfied the service requirements for such early retirement benefit, but separated from the service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially reduced under regulations prescribed by the Secretary of the Treasury.

*  *  *

## 29 U.S.C. § 1085. Additional funding rules for multiemployer plans in endangered status or critical status *(excerpt)*

* * *

### (e) Rehabilitation plan must be adopted for multiemployer plans in critical status

#### (1) In general

In any case in which a multiemployer plan is in critical status for a plan year, the plan sponsor, in accordance with this subsection—

(A) shall adopt a rehabilitation plan not later than 240 days following the required date for the actuarial certification of critical status under subsection (b)(3)(A), and

(B) within 30 days after the adoption of the rehabilitation plan—

(i) shall provide to the bargaining parties 1 or more schedules showing revised benefit structures, revised contribution structures, or both, which, if adopted, may reasonably be expected to enable the multiemployer plan to emerge from critical status in accordance with the rehabilitation plan, and

(ii) may, if the plan sponsor deems appropriate, prepare and provide the bargaining parties with additional information relating to contribution rates or benefit reductions, alternative schedules, or other information relevant to emerging from critical status in accordance with the rehabilitation plan.

The schedule or schedules described in subparagraph (B)(i) shall reflect reductions in future benefit accruals and adjustable benefits, and increases in contributions, that the plan sponsor determines are reasonably necessary to emerge from critical status. One schedule shall be designated as the default schedule and such schedule shall assume that there are no increases in contributions under the plan other than the increases necessary to emerge from critical status after future benefit accruals and other benefits (other than benefits the reduction or elimination of which are not permitted under section 1054(g) of this title) have been reduced to the maximum extent permitted by law.

**(2) Exception for years after process begins**

Paragraph (1) shall not apply to a plan year if such year is in a rehabilitation plan adoption period or rehabilitation period by reason of the plan being in critical status for a preceding plan year. For purposes of this section, such preceding plan year shall be the initial critical year with respect to the rehabilitation plan to which it relates.

**(3) Rehabilitation plan**

For purposes of this section—

**(A) In general**

A rehabilitation plan is a plan which consists of—

(i) actions, including options or a range of options to be proposed to the bargaining parties, formulated, based on reasonably anticipated experience and reasonable actuarial assumptions, to enable the plan to cease to be in critical status by the end of the rehabilitation period and may include reductions in plan expenditures (including plan mergers and consolidations), reductions in future benefit accruals or increases in contributions, if agreed to by the bargaining parties, or any combination of such actions, or

(ii) if the plan sponsor determines that, based on reasonable actuarial assumptions and upon exhaustion of all reasonable measures, the plan can not reasonably be expected to emerge from critical status by the end of the rehabilitation period, reasonable measures to emerge from critical status at a later time or to forestall possible insolvency (within the meaning of section 1426 of this title).

A rehabilitation plan must provide annual standards for meeting the requirements of such rehabilitation plan. Such plan shall also include the schedules required to be provided under paragraph (1)(B)(i) and if clause (ii) applies, shall set forth the alternatives considered, explain why the plan is not reasonably expected to emerge from critical status by the end of the rehabilitation period, and specify when, if ever, the plan is expected to emerge from critical status in accordance with the rehabilitation plan.

**(B) Updates to rehabilitation plan and schedules**

**(i) Rehabilitation plan**

The plan sponsor shall annually update the rehabilitation plan and shall file the update with the plan's annual report under section 1024 of this title.

**(ii) Schedules**

The plan sponsor shall annually update any schedule of contribution rates provided under this subsection to reflect the experience of the plan.

**(iii) Duration of schedule**

A schedule of contribution rates provided by the plan sponsor and relied upon by bargaining parties in negotiating a collective bargaining agreement shall remain in effect for the duration of that collective bargaining agreement.

**(C) Imposition of default schedule where failure to adopt rehabilitation plan**

**(i) In general**

If—

(I) a collective bargaining agreement providing for contributions under a multiemployer plan that was in effect at the time the plan entered critical status expires, and

(II) after receiving one or more schedules from the plan sponsor under paragraph (1)(B), the bargaining parties with respect to such agreement fail to adopt a to adopt a[1] contribution schedule with terms consistent with the rehabilitation plan and a schedule from the plan sponsor under paragraph (1)(B)(i),

the plan sponsor shall implement the default schedule described in the last sentence of paragraph (1) beginning on the date specified in clause (ii).

**(ii) Date of implementation**

The date specified in this clause is the date which is 180 days after the date on which the collective bargaining agreement described in clause (i) expires.

**(iii) Failure to make scheduled contributions**

Any failure to make a contribution under a schedule of contribution rates provided under this subsection shall be treated as a delinquent contribution under section 1145 of this title and shall be enforceable as such.

**(4) Rehabilitation period**

For purposes of this section—

**(A) In general**

The rehabilitation period for a plan in critical status is the 10-year period beginning

[2] So in original. See 2008 Amendment note below.

on the first day of the first plan year of the multiemployer plan following the earlier of—

(i) the second anniversary of the date of the adoption of the rehabilitation plan, or

(ii) the expiration of the collective bargaining agreements in effect on the due date for the actuarial certification of critical status for the initial critical year under subsection (a)(1) and covering, as of such date at least 75 percent of the active participants in such multiemployer plan.

If a plan emerges from critical status as provided under subparagraph (B) before the end of such 10-year period, the rehabilitation period shall end with the plan year preceding the plan year for which the determination under subparagraph (B) is made.

**(B) Emergence**

A plan in critical status shall remain in such status until a plan year for which the plan actuary certifies, in accordance with subsection (b)(3)(A), that the plan is not projected to have an accumulated funding deficiency for the plan year or any of the 9 succeeding plan years, without regard to the use of the shortfall method but taking into account any extension of amortization periods under section 1084(d) of this title.

**(5) Rehabilitation plan adoption period**

For purposes of this section, the term “rehabilitation plan adoption period” means the period beginning on the date of the certification under subsection (b)(3)(A) for the initial critical year and ending on the day before the first day of the rehabilitation period.

**(6) Limitation on reduction in rates of future accruals**

Any reduction in the rate of future accruals under the default schedule described in the last sentence of paragraph (1) shall not reduce the rate of future accruals below—

(A) a monthly benefit (payable as a single life annuity commencing at the participant's normal retirement age) equal to 1 percent of the contributions required to be made with respect to a participant, or the equivalent standard accrual rate for a participant or group of participants under the collective bargaining agreements in effect as of the first day of the initial critical year, or

(B) if lower, the accrual rate under the plan on such first day.

The equivalent standard accrual rate shall be determined by the plan sponsor based on the standard or average contribution base units which the plan sponsor determines to be representative for active participants and such other factors as the plan sponsor determines to be relevant. Nothing in this paragraph shall be construed as limiting the ability of the plan sponsor to prepare and provide the bargaining parties with alternative schedules to the default schedule that establish lower or higher accrual and contribution rates than the rates otherwise described in this paragraph.

### (7) Automatic employer surcharge

#### (A) Imposition of surcharge

Each employer otherwise obligated to make contributions for the initial critical year shall be obligated to pay to the plan for such year a surcharge equal to 5 percent of the contributions otherwise required under the applicable collective bargaining agreement (or other agreement pursuant to which the employer contributes). For each succeeding plan year in which the plan is in critical status for a consecutive period of years beginning with the initial critical year, the surcharge shall be 10 percent of the contributions otherwise so required.

#### (B) Enforcement of surcharge

The surcharges under subparagraph (A) shall be due and payable on the same schedule as the contributions on which the surcharges are based. Any failure to make a surcharge payment shall be treated as a delinquent contribution under section 1145 of this title and shall be enforceable as such.

#### (C) Surcharge to terminate upon collective bargaining agreement renegotiation

The surcharge under this paragraph shall cease to be effective with respect to employees covered by a collective bargaining agreement (or other agreement pursuant to which the employer contributes), beginning on the effective date of a collective bargaining agreement (or other such agreement) that includes terms consistent with a schedule presented by the plan sponsor under paragraph (1)(B)(i), as modified under subparagraph (B) of paragraph (3).

**(D) Surcharge not to apply until employer receives notice**

The surcharge under this paragraph shall not apply to an employer until 30 days after the employer has been notified by the plan sponsor that the plan is in critical status and that the surcharge is in effect.

**(E) Surcharge not to generate increased benefit accruals**

Notwithstanding any provision of a plan to the contrary, the amount of any surcharge under this paragraph shall not be the basis for any benefit accrual under the plan.

**(8) Benefit adjustments**

**(A) Adjustable benefits**

**(i) In general**

Notwithstanding section 1054(g) of this title, the plan sponsor shall, subject to the notice requirements in subparagraph (C), make any reductions to adjustable benefits which the plan sponsor deems appropriate, based upon the outcome of collective bargaining over the schedule or schedules provided under paragraph (1)(B)(i).

**(ii) Exception for retirees**

Except in the case of adjustable benefits described in clause (iv)(III), the plan sponsor of a plan in critical status shall not reduce adjustable benefits of any participant or beneficiary whose benefit commencement date is before the date on which the plan provides notice to the participant or beneficiary under subsection (b)(3)(D) for the initial critical year.

**(iii) Plan sponsor flexibility**

The plan sponsor shall include in the schedules provided to the bargaining parties an allowance for funding the benefits of participants with respect to whom contributions are not currently required to be made, and shall reduce their benefits to the extent permitted under this subchapter and considered appropriate by the plan sponsor based on the plan's then current overall funding status.

**(iv) Adjustable benefit defined**

For purposes of this paragraph, the term "adjustable benefit" means—

(I) benefits, rights, and features under the plan, including post-retirement death benefits, 60-month guarantees, disability benefits not yet in pay status, and similar benefits,

(II) any early retirement benefit or retirement- type subsidy (within the meaning of section 1054(g)(2)(A) of this title) and any benefit payment option (other than the qualified joint and survivor annuity), and

(III) benefit increases that would not be eligible for a guarantee under section 1322a of this title on the first day of initial critical year because the increases were adopted (or, if later, took effect) less than 60 months before such first day.

**(B) Normal retirement benefits protected**

Except as provided in subparagraph (A)(iv)(III), nothing in this paragraph shall be construed to permit a plan to reduce the level of a participant's accrued benefit payable at normal retirement age.

**(C) Notice requirements**

**(i) In general**

No reduction may be made to adjustable benefits under subparagraph (A) unless notice of such reduction has been given at least 30 days before the general effective date of such reduction for all participants and beneficiaries to—

(I) plan participants and beneficiaries,

(II) each employer who has an obligation to contribute (within the meaning of section 1392(a) of this title) under the plan, and

(III) each employee organization which, for purposes of collective bargaining, represents plan participants employed by such an employer.

**(ii) Content of notice**

The notice under clause (i) shall contain—

(I) sufficient information to enable participants and beneficiaries to understand the effect of any reduction on their benefits, including an estimate (on an annual or monthly basis) of any affected adjustable benefit that a participant or beneficiary would otherwise have been eligible for as of the general effective date described in clause (i), and

(II) information as to the rights and remedies of plan participants and beneficiaries as well as how to contact the Department of Labor for further information and assistance where appropriate.

**(iii) Form and manner**

Any notice under clause (i)—

(I) shall be provided in a form and manner prescribed in regulations of the Secretary of the Treasury, in consultation with the Secretary,

(II) shall be written in a manner so as to be understood by the average plan participant, and

(III) may be provided in written, electronic, or other appropriate form to the extent such form is reasonably accessible to persons to whom the notice is required to be provided.

The Secretary of the Treasury shall in the regulations prescribed under subclause (I) establish a model notice that a plan sponsor may use to meet the requirements of this subparagraph.

**(9) Adjustments disregarded in withdrawal liability determination**

**(A) Benefit reductions**

Any benefit reductions under this subsection shall be disregarded in determining a plan's unfunded vested benefits for purposes of determining an employer's withdrawal liability under section 1381 of this title.

**(B) Surcharges**

Any surcharges under paragraph (7) shall be disregarded in determining the allocation of unfunded vested benefits to an employer under section 1391 of this title, except for purposes of determining the unfunded vested benefits attributable to an employer under section 1391(c)(4) of this title or a comparable method approved under section 1391(c)(5) of this title.

**(C) Simplified calculations**

The Pension Benefit Guaranty Corporation shall prescribe simplified methods for the application of this paragraph in determining withdrawal liability.

* * *

## 29 U.S.C. § 1132. Civil enforcement *(excerpt)*

* * *

### (e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

## 29 U.S.C. § 1144. Other laws *(excerpt)*

### (a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

**(b) Construction and application**

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

> (2) (A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.
>
> > (B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

> (5) (A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393–1 through 393–51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts 1 and 4 and the preceding sections of this part.

(6) (A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) of this section shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title), qualified medical child support orders (within the meaning of section 1169(a)(2)(A) of this title), and the provisions of law referred to in section 1169(a)(2)(B)(ii) of this title to the extent they apply to qualified medical child support orders.

(8) Subsection (a) of this section shall not be construed to preclude any State cause of action—

(A) with respect to which the State exercises its acquired rights under section 1169(b)(3) of this title with respect to a group health plan (as defined in section 1167(1) of this title), or

(B) for recoupment of payment with respect to items or services pursuant to a State plan for medical assistance approved under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] which would not have been payable if such acquired rights had been executed before payment with respect to such items or services by the group health plan.

(9) For additional provisions relating to group health plans, see section 1191 of this title.

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## 29 U.S.C. § 1322a. Single-employer plan benefits guaranteed *(excerpt)*

*   *   *

### (c) Payment by corporation to participants and beneficiaries of recovery percentage of outstanding amount of benefit liabilities

(1) In addition to benefits paid under the preceding provisions of this section with respect to a terminated plan, the corporation shall pay the portion of the amount determined under paragraph (2) which is allocated with respect to each participant under section 1344(a) of this title. Such payment shall be made to such participant or to such participant's beneficiaries (including alternate payees, within the meaning of section 1056(d)(3)(K) of this title).

(2) The amount determined under this paragraph is an amount equal to the product derived by multiplying—

(A) the outstanding amount of benefit liabilities under the plan (including interest calculated from the termination date), by

(B) the applicable recovery ratio.

(3) (A) IN GENERAL.—Except as provided in subparagraph (C), the term "recovery ratio" means the ratio which—

(i) the sum of the values of all recoveries under section 1362, 1363, or 1364 of this title, determined by the corporation in connection with plan terminations described under subparagraph (B), bears to (ii) the sum of all unfunded benefit liabilities under such plans as of the termination date in connection with any such prior termination.

(B) A plan termination described in this subparagraph is a termination with respect to which—

(i) the corporation has determined the value of recoveries under section 1362, 1363, or 1364 of this title, and

(ii) notices of intent to terminate were provided (or in the case of a termination by the corporation, a notice of determination under section 1342 of this title was issued) during the 5-Federal fiscal year period ending with the third fiscal year preceding the fiscal year in which occurs the date of the notice of intent to terminate (or the notice of determination under section 1342 of this title) with respect to the plan termination for which the recovery ratio is being determined.

(C) In the case of a terminated plan with respect to which the outstanding amount of benefit liabilities exceeds $20,000,000, for purposes of this section, the term "recovery ratio" means, with respect to the termination of such plan, the ratio of—

(i) the value of the recoveries of the corporation under section 1362, 1363, or 1364 of this title in connection with such plan, to

(ii) the amount of unfunded benefit liabilities under such plan as of the termination date.

(4) Determinations under this subsection shall be made by the corporation. Such determinations shall be binding unless shown by clear and convincing evidence to be unreasonable.

*  *  *

### 29 U.S.C. § 1425. Adjustments in accrued benefits *(excerpt)*

*  *  *

### (b) Reduction of accrued benefits; notice by plan sponsors to plan participants and beneficiaries

(1) Accrued benefits may not be reduced under this section unless—

(A) notice has been given, at least 6 months before the first day of the plan year in which the amendment reducing benefits is adopted, to—

(i) plan participants and beneficiaries,

(ii) each employer who has an obligation to contribute (within the meaning of section 1392(a) of this title) under the plan, and

(iii) each employee organization which, for purposes of collective bargaining, represents plan participants employed by such an employer,

that the plan is in reorganization and that, if contributions under the plan are not increased, accrued benefits under the plan will be reduced or an excise tax will be imposed on employers;

(B) in accordance with regulations prescribed by the Secretary of the Treasury—

(i) any category of accrued benefits is not reduced with respect to inactive participants to a greater extent proportionally than such category of accrued benefits is reduced with respect to active participants,

(ii) benefits attributable to employer contributions other than accrued benefits and the rate of future benefit accruals are reduced at least to an extent equal to the reduction in accrued benefits of inactive participants, and

(iii) in any case in which the accrued benefit of a participant or beneficiary is reduced by changing the benefit form or the requirements which the participant or beneficiary must satisfy to be entitled to the benefit, such reduction is not applicable to—

(I) any participant or beneficiary in pay status on the effective date of the amendment, or the beneficiary of such a participant, or

(II) any participant who has attained normal retirement age, or who is within 5 years of attaining normal retirement age, on the effective date of the amendment, or the beneficiary of any such participant; and

(C) the rate of employer contributions for the plan year in which the amendment becomes effective and for all succeeding plan years in which the plan is in reorganization equals or exceeds the greater of—

(i) the rate of employer contributions, calculated without regard to the amendment, for the plan year in which the amendment becomes effective, or

(ii) the rate of employer contributions for the plan year preceding the plan year in which the amendment becomes effective.

(2) The plan sponsors shall include in any notice required to be sent to plan participants and beneficiaries under paragraph (1) information as to the rights and remedies of plan participants and beneficiaries as well as how to contact the Department of Labor for further information and assistance where appropriate.

*    *    *

**(d) Amendment of plan to increase or restore accrued benefits previously reduced or rate of future benefit accruals; conditions, applicable factors, etc.**

(1) (A) A plan which has been amended to reduce accrued benefits under this section may be amended to increase or restore accrued benefits, or the rate of future benefit accruals, only if the plan is amended to restore levels of previously reduced accrued benefits of inactive participants and of participants who are within 5 years of attaining normal retirement age to at least the same extent as any such increase in accrued benefits or in the rate of future benefit accruals.

(B) For purposes of this subsection, in the case of a plan which has been amended under this section to reduce accrued benefits—

(i) an increase in a benefit, or in the rate of future benefit accruals, shall be considered a benefit increase to the extent that the benefit, or the accrual rate, is thereby increased above the highest benefit level, or accrual rate, which was in effect under the terms of the plan before the effective date of the amendment reducing accrued benefits, and

(ii) an increase in a benefit, or in the rate of future benefit accruals, shall be considered a benefit restoration to the extent that the benefit, or the accrual rate, is not thereby increased above the highest benefit level, or accrual rate, which was in effect under the terms of the plan immediately before the effective date of the amendment reducing accrued benefits.

(2) If a plan is amended to partially restore previously reduced accrued benefit levels, or the rate of future benefit accruals, the benefits of inactive participants shall be restored in at least the same proportions as other accrued benefits which are restored.

(3) No benefit increase under a plan may take effect in a plan year in which an amendment reducing accrued benefits under the plan, in accordance with this section, is adopted or first becomes effective.

(4) A plan is not required to make retroactive benefit payments with respect to that portion of an accrued benefit which was reduced and subsequently restored under this section.

*  *  *

## 26 C.F.R. § 1.401(a)–1. Post-ERISA qualified plans and qualified trusts; in general.

(a) *Introduction*—(1) *In general.* This section and the following regulation sections under section 401 reflect the provisions of section 401 after amendment by the Employee Retirement Income Security Act of 1974 (Pub. L. 93– 406) ("ERISA").

(2) [Reserved]

(b) *Requirements for pension plans*—(1) *Definitely determinable benefits.* (i) In order for a pension plan to be a qualified plan under section 401(a), the plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to its employees over a period of years, usually for life, after retirement or attainment of normal retirement age (subject to paragraph (b)(2) of this section). A plan does not fail to satisfy this paragraph (b)(1)(i) merely because the plan provides, in accordance with section 401(a)(36), that a distribution may be made from the plan to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

(ii) Section 1.401–1(b)(1)(i), a pre-ERISA regulation, provides rules applicable to this requirement, and that regulation is applicable except as otherwise provided.

(iii) The use of the type of plan provision described in § 1.415(a)–1(d)(1) which automatically freezes or reduces the rate of benefit accrual or the annual addition to insure that the limitations of section 415 will not be exceeded, will not be considered to violate the requirements of this subparagraph provided that the operation of such provision precludes discretion by the employer.

(2) *Normal retirement age*—(i) *General rule.* 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.

(ii) *Age 62 safe harbor.* A normal retirement age under a plan that is age 62 or later is deemed to be 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.

(iii) *Age 55 to age 62.* In the case of a normal retirement age that is not earlier than age 55 and is earlier than age 62, whether the age 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 is based on all of the relevant facts and circumstances.

(iv) *Under age 55.* A normal retirement age that is lower than age 55 is presumed to be earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed, unless the Commissioner determines that under the facts and circumstances the normal retirement age 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.

(v) *Age 50 safe harbor for qualified public safety employees.* A normal retirement age under a plan that is age 50 or later is deemed to be 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 if substantially all of the participants in the plan are qualified public safety employees (within the meaning of section 72(t)(10)(B)).

(3) *Benefit distribution prior to retirement.* For purposes of paragraph (b)(1)(i) of this section, retirement does not include a mere reduction in the number of hours that an employee works. Accordingly, benefits may not be distributed prior to normal retirement age solely due to a reduction in the number of hours that an employee works.

(4) *Effective date.* Except as otherwise provided in this paragraph (b)(4), paragraphs (b)(2) and (3) of this section are effective May 22, 2007. In the case of a governmental plan (as defined in section 414(d)), paragraphs (b)(2) and (3) of this section are effective for plan years beginning on or after January 1, 2009. In the case of a plan maintained pursuant to one or more collective bargaining agreements that have been ratified and are in effect on May 22, 2007, paragraphs (b)(2) and (3) of this section do not apply before the first plan year that begins after the last of such agreements terminate determined without regard to any extension thereof (or, if earlier, May 24, 2010. See § 1.411(d)–4, A–12, for a special transition rule in the case of a plan amendment that increases a plan's normal retirement age pursuant to paragraph (b)(2) of this section.