

Section 411.—Minimum Vesting Standards

26 CFR 1.411(d)-4: Section 411(d)(6) protected benefits.

T.D. 9176

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

Elimination of Forms of Distribution in Defined Contribution Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that would modify the circumstances under which certain forms of distribution previously available are permitted to be eliminated from qualified defined contribution plans. These final regulations affect qualified retirement plan sponsors, administrators, and participants.

DATES: These regulations are effective January 25, 2005.

FOR FURTHER INFORMATION CONTACT: Vernon S. Carter, 202-622-6060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final amendments to 26 CFR part 1 under section 411(d)(6) of the Internal Revenue Code of 1986 (Code) as amended by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) (115 Stat. 117).

Section 411(d)(6)(A) of the Code generally provides that a plan will not be treated as satisfying the requirements of section 411 if the accrued benefit of a participant is decreased by a plan amendment. Section 411(d)(6)(B) prior to amendment by EGTRRA provided that an amendment

is treated as reducing an accrued benefit if, with respect to benefits accrued before the amendment is adopted, the amendment has the effect of either eliminating or reducing an early retirement benefit or a retirement-type subsidy, or, except as provided by regulations, eliminating an optional form of benefit.

The IRS published T.D. 8900, 2000-2 C.B. 279 in the **Federal Register** on September 6, 2000 (65 FR 53901). T.D. 8900, which amended §1.411(d)-4 of the Income Tax Regulations, added paragraph (e) of Q&A-2 to provide for additional circumstances under which a defined contribution plan can be amended to eliminate or restrict a participant's right to receive payment of accrued benefits under certain optional forms of benefit.

Section 1.411(d)-4, Q&A-2(e)(1), provides that a defined contribution plan may be amended to eliminate or restrict a participant's right to receive payment of accrued benefits under a particular optional form of benefit without violating the section 411(d)(6) anti-cutback rules if, once the plan amendment takes effect for a participant, the alternative forms of payment that remain available to the participant include payment in a single-sum distribution form that is otherwise identical to the eliminated or restricted optional form of benefit. The amendment cannot apply to a participant for any distribution with an annuity starting date before the earlier of the 90th day after the participant receives a summary that reflects the plan amendment and that satisfies Department of Labor's requirements for a summary of material modifications under 29 CFR 2520.104b-3, or the first day of the second plan year following the plan year in which the amendment is adopted. Section 1.411(d)-4, Q&A-2(e)(2), provides that a single-sum distribution form is otherwise identical to the optional form of benefit that is being eliminated or restricted only if it is identical in all respects (or would be identical except that it provides greater rights to the participant), except for the timing of payments after commencement. A single-sum distribution form is not otherwise identical to a specified installment form of benefit if the single-sum form:

- is not available for distribution on any date on which the installment form could have commenced;
- is not available in the same medium as the installment form; or
- imposes any additional condition of eligibility.

Further, an otherwise identical distribution form need not retain any rights or features of the eliminated or restricted optional form of benefit to the extent those rights or features would not be protected from elimination under the anti-cutback rules. The single-sum distribution form would not, however, be disqualified from being an otherwise identical distribution form if the single-sum form provides greater rights to participants than did the eliminated or restricted optional form of benefit.

Section 645(a)(1) of EGTRRA added section 411(d)(6)(E), which provides that, except to the extent provided in regulations, a defined contribution plan is not treated as reducing a participant's accrued benefit where a plan amendment eliminates a form of distribution previously available under the plan if a single-sum distribution is available to the participant at the same time as the form of distribution eliminated by the amendment and the single-sum distribution is based on the same or greater portion of the participant's account as the form of distribution eliminated by the amendment. Thus, section 411(d)(6)(E) includes conditions that are similar to those in existing §1.411(d)-4, Q&A-2(e), but without the advance notice condition.

On July 8, 2003, a notice of proposed rulemaking (REG-112039-03, 2003-2 C.B. 504 [68 FR 40581]) was published in the **Federal Register** to reflect the addition of section 411(d)(6)(E) by EGTRRA. The proposed regulations amended §1.411(d)-4, Q&A-2(e) to eliminate the 90-day advance notice condition on plan amendments otherwise permitted under §1.411(d)-4, Q&A-2(e). Following publication of the proposed regulations, comments were received, but no public hearing was requested. After consideration of the comments received, the pro-

posed regulations are adopted as revised by this Treasury decision.

Explanation of Provisions

These final regulations retain the general structure and much of the substance of the proposed regulations, including an example illustrating the provisions. Some changes have been made in connection with a specific recommendation for modification and clarification. The comments received in response to the proposed regulations are generally summarized below.

Two commentators were concerned that, following the elimination of the 90-day notice requirement, plan participants who counted on being able to retire with an annuity could discover that option is suddenly gone. The commentators argued that the participant may have made plans based on the expectation of receiving an annuity, and that, although participants can purchase annuities with their lump sums, they may find that annuities purchased outside the plan cost more or pay lower amounts than what they were expecting from the plan. The commentators recommended that, to the extent plan sponsors adopt amendments that terminate an annuity option, those plan sponsors should allow participants within 90 days of retiring at the time of the amendment to be permitted to elect that annuity.

The legislative history to section 645(a)(1) of EGTRRA shows that Congress was aware of the notice requirement in existing §1.411(d)-4, Q&A-2(e)(2), and adopted all of the same provisions in section 411(d)(6)(E) as are in existing §1.411(d)-4, Q&A-2(e)(2), except for the notice requirement. See Conference Report No. 107-84, 107th Cong., 1st Session 253-254. Accordingly, these final regulations adopt the amendments in the proposed regulation. The regulations retain the rules under which a defined contribution plan may be amended to eliminate or restrict a participant's right to receive payment of accrued benefits under a particular optional form of benefit without violating the section 411(d)(6) anti-cutback rules if, once the plan amendment takes effect for a participant, the alternative forms of payment that remain available to the par-

ticipant include payment in a single-sum distribution. The regulations clarify that such an amendment can apply only to distributions with annuity starting dates after the amendment is adopted and, therefore, cannot apply to distributions that have already commenced. However, these final regulations remove the 90-day notice condition previously applicable to these plan amendments.¹

One commentator commented on the example in §1.411(d)-4, Q&A-2(e), of the proposed regulations. The commentator stated it is not clear from the example why the amendment does not apply to P (the participant in the Plan) if P elects to have annuity payments begin before July 1, 2004. The commentator stated that the confusion may result because the example provided that the amendment is adopted on May 2, 2004, but does not provide when the amendment is effective. The example has been revised to reflect the comment.

Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these regulations for purposes of the Employee Retirement Income Security Act of 1974 (ERISA). Section 204(g)(2) of ERISA, as amended by EGTRRA, provides a parallel rule to section 411(d)(6)(E) of the Code that applies under Title I of ERISA, and authorizes the Secretary of the Treasury to provide exception to this parallel ERISA requirement. Therefore, regulations issued under section 411(d)(6)(E) of the Code apply for purposes of the parallel requirements of section 204(g)(2) of ERISA, as well as for section 411(d)(6)(E) of the Code.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C.

¹ The Department of Labor has advised Treasury and the IRS that plans covered by Title I of ERISA are subject to the requirement under Title I that plan amendments be described in a timely summary of material modifications (SMM) or a revised summary plan description (SPD) to be distributed to plan participants and beneficiaries in accordance with applicable Department of Labor disclosure rules (see 29 CFR 2520.104b-3).

chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Vernon S. Carter of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in their development.

* * * * *

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

Paragraph 1. The authority citation for part 1 is amended to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.411(d)-4, Q&A-2(e) is revised to read as follows:

§1.411(d)-4 Section 411(d)(6) protected benefits.

* * * * *

A-2: * * *

(e) *Permitted plan amendments affecting alternative forms of payment under defined contribution plans—(1) General rule.* A defined contribution plan does not violate the requirements of section 411(d)(6) merely because the plan is amended to eliminate or restrict the ability of a participant to receive payment of accrued benefits under a particular optional form of benefit for distributions with annuity starting dates after the date the amendment is adopted if, after the plan amendment is effective with respect to the participant, the alternative forms of payment available to the participant include payment in a single-sum distribution form that is otherwise identical to the optional form of benefit that is being eliminated or restricted.

(2) *Otherwise identical single-sum distribution.* For purposes of this paragraph (e), a single-sum distribution form is oth-

erwise identical to an optional form of benefit that is eliminated or restricted pursuant to paragraph (e)(1) of this Q&A-2 only if the single-sum distribution form is identical in all respects to the eliminated or restricted optional form of benefit (or would be identical except that it provides greater rights to the participant) except with respect to the timing of payments after commencement. For example, a single-sum distribution form is not otherwise identical to a specified installment form of benefit if the single-sum distribution form is not available for distribution on the date on which the installment form would have been available for commencement, is not available in the same medium of distribution as the installment form, or imposes any condition of eligibility that did not apply to the installment form. However, an otherwise identical distribution form need not retain rights or features of the optional form of benefit that is eliminated or restricted to the extent that those rights or features would not be protected from elimination or restriction under section 411(d)(6) or this section.

(3) *Example.* The following example illustrates the application of this paragraph (e):

Example. (i) P is a participant in Plan M, a qualified profit-sharing plan with a calendar plan year that is invested in mutual funds. The distribution forms available to P under Plan M include a distribution of P's vested account balance under Plan M in the form of distribution of various annuity contract forms (including a single life annuity and a joint and survivor annuity). The annuity payments under the annuity contract forms begin as of the first day of the month following P's severance from employment (or as of the first day of any subsequent month, subject to the requirements of section 401(a)(9)). P has not previously elected payment of benefits in the form of a life annuity, and Plan M is not a direct or indirect transferee of any plan that is a defined benefit plan or a defined contribution plan that is subject to section 412. Distributions on the death of a participant are made in accordance with plan provisions that comply with section 401(a)(11)(B)(iii)(I). On September 2, 2005, Plan M is amended so that, effective for payments that begin on or after November 1, 2005, P is no longer entitled to any distribution in the form of the distribution of an annuity contract. However, after the amendment is effective, P is entitled to receive a single-sum cash distribution of P's vested account balance under Plan M payable as of the first day of the month following P's severance from employment (or as of the first day of any subsequent month, subject to the requirements of section 401(a)(9)).

(ii) Plan M does not violate the requirements of section 411(d)(6) (or section 401(a)(11)) merely because, as of November 1, 2005, the plan amendment has eliminated P's option to receive a distribution in

any of the various annuity contract forms previously available.

(4) *Effective date.* This paragraph (e) is applicable on January 25, 2005.

* * * * *

Mark E. Matthews,
*Deputy Commissioner for
Services and Enforcement.*

Approved January 10, 2005.

Eric Solomon,
*Acting Deputy Assistant Secretary
of the Treasury (Tax Policy).*

(Filed by the Office of the Federal Register on January 24, 2005, 8:45 a.m., and published in the issue of the Federal Register for January 25, 2005, 70 F.R. 3475)