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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

REG-149752-03

RIN 1545-BC87

Exclusion of Employees of 501(c)(3) Organizations in 401(k) and 401(m) Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the regulations under section 410(b) of the Internal Revenue Code. The proposed amendments permit, in certain circumstances, employees of a tax-exempt organization described in section 501(c)(3) to be excluded for the purpose of testing whether a section 401(k) plan (or a section 401(m) plan that is provided under the same general arrangement as the section 401(k) plan of the employer) meets the requirements for minimum coverage specified in section 410(b).

These regulations will affect tax-exempt employers described in section 501(c)(3), retirement plans sponsored by these employers, and participants in these plans.

DATES: Written or electronic comments and requests for a public hearing must be received by June 14, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-149752-03), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044.

Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-149752-03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet directly to the IRS Internet site at www.irs.gov/regs.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, R. Lisa Mojiri-Azad, 202-622-6060, or Stacey Grundman, 202-622-6090; concerning submissions and delivery of comments, Treena Garrett, 202-622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) under section 410(b) of the Internal Revenue Code of 1986 (Code).

The amendments implement a directive by Congress, contained in section 664 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (Public Law 107-16, 115 Stat. 38) (EGTRRA), to amend §1.410(b)-6(g) of the regulations.

Prior to the enactment of the Small Business Job Protection Act of 1996 (Public Law 104-188, 110 Stat. 1755) (SBJPA), both governmental and tax-exempt entities generally were subject to the section 410(b) coverage requirements and precluded from maintaining section 401(k) plans pursuant to section 401(k)(4)(B). To prevent the section 401(k)(4)(B) prohibition from causing a plan to fail section 410(b), the existing regulations provide that

employees of either governmental or tax-exempt entities who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B) may be treated as excludable in applying the minimum coverage rules to a section 401(k) plan or a section 401(m) plan that is provided under the same general arrangement as the section 401(k) plan, if more than 95 percent of the employees of the employer who are not precluded from being eligible employees by section 401(k)(4)(B) benefit under the plan for the plan year. Although tax-exempt organizations described in section 501(c)(3) were precluded by section 401(k)(4)(B) from maintaining a section 401(k) plan, they were permitted to allow their employees to make salary reduction contributions to a plan or contract that satisfies section 403(b) (a section 403(b) plan).

Section 1426(a) of SBJPA amended section 401(k)(4)(B) to allow nongovernmental tax-exempt organizations (including organizations exempt under section 501(c)(3)) to maintain section 401(k) plans. Thus, a section 501(c)(3) tax-exempt organization can now maintain a section 401(k) plan, a section 403(b) plan, or both. In light of this provision of SBJPA, section 664 of EGTRRA directed the Secretary of the Treasury to modify the regulations under section 410(b) to provide that employees of a tax-exempt organization described in section 501(c)(3) who are eligible to make salary reduction contributions under a section 403(b) plan may be treated as excludable employees for the purpose of testing whether a section 401(k) plan or a section 401(m) plan that is provided under the same general arrangement as the section 401(k) plan meets the minimum coverage requirements contained in section 410(b) if (1) no employee of the organization is eligible to participate in

the section 401(k) or section 401(m) plan and (2) at least 95 percent of the employees of the employer who are not employees of the organization are eligible to participate in the section 401(k) or section 401(m) plan.

The change recognizes that many tax-exempt organizations maintained section 403(b) plans prior to the enactment of SBJPA and is needed to allow the continued maintenance of section 403(b) plans by these organizations without requiring the same employees to be covered under a section 401(k) plan and the section 403(b) plan. The change will help an employer that maintains both a section 401(k) plan and a section 403(b) plan to satisfy the section 410(b) coverage requirements without the employer having to provide dual coverage for employees.

Explanation of Provisions

These regulations provide that employees of a tax-exempt organization described in section 501(c)(3) who are eligible to make salary reduction contributions under a section 403(b) plan may be treated as excludable employees for the purpose of testing whether a section 401(k) plan or a section 401(m) plan that is provided under the same general arrangement as the section 401(k) plan meets the minimum coverage requirements contained in section 410(b) if (1) no employee of the tax-exempt organization is eligible to participate in the section 401(k) or section 401(m) plan and (2) at least 95 percent of the employees of the employer who are not employees of the tax-exempt organization are eligible to participate in the section 401(k) or section 401(m) plan.

The proposed regulations do not include any changes to the treatment of

governmental plans under the current regulations. Unless grandfathered, State and local governmental entities continue to be precluded from maintaining section 401(k) plans pursuant to section 401(k)(4)(B). However, as a result of section 1505(a)(1) of the Taxpayer Relief Act of 1997 (Public Law 105-34, 111 Stat. 788), which added section 401(a)(5)(G) to the Code, governmental plans (within the meaning of section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof) are not subject to the minimum coverage requirements contained in section 410(b). Consequently, the IRS and Treasury request comments on whether it would be appropriate to modify the special rule for governmental plans contained in §1.410(b)-6(g) to reflect the addition of section 401(a)(5)(G) (including whether there continues to be a need for this special rule with respect to governmental plans).

Effective Date

As directed by Congress in section 664 of EGTRRA, the amendments to §1.410(b)-6(g) are proposed to be effective for plan years beginning after December 31, 1996. Taxpayers may rely on these proposed regulations for guidance pending the issuance of final regulations. If, and to the extent, future guidance is more restrictive than the guidance in these proposed regulations, the future guidance will be applied without retroactive effect.

Special Analyses

It has been determined that this notice of proposed rulemaking 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. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and 8 copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these proposed regulations are R. Lisa Mojiri-Azad and Stacey Grundman 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 the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1 -- INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entry for §§1.410(b)-2 through 1.410(b)-10 and adding entries in numerical order to read, in part, as follows:

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

§1.410(b)-2 also issued under 26 U.S.C. 410(b)(6).

§1.410(b)-3 also issued under 26 U.S.C. 410(b)(6).

§1.410(b)-4 also issued under 26 U.S.C. 410(b)(6).

§1.410(b)-5 also issued under 26 U.S.C. 410(b)(6).

§1.410(b)-6 also issued under 26 U.S.C. 410(b)(6) and section 664 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (Public Law 107-16, 115 Stat. 38).

§1.410(b)-7 also issued under 26 U.S.C. 410(b)(6).

§1.410(b)-8 also issued under 26 U.S.C. 410(b)(6).

§1.410(b)-9 also issued under 26 U.S.C. 410(b)(6).

§1.410(b)-10 also issued under 26 U.S.C. 410(b)(6).* * *

Par. 2. Section 1.410(b)-0, table of contents, the entry for 1.410(b)-6 is amended by:

1. Revising the paragraph heading for 1.410(b)-6(g).
2. Adding paragraph headings for 1.410(b)-6(g)(1) and (g)(2).

The revision and additions read as follows:

§1.410(b)-0 Table of contents.

* * * * *

§1.410(b)-6 Excludable employees.

* * * * *

(g) Employees of certain governmental or tax-exempt entities.

(1) Employees of governmental entities.

(2) Employees of tax-exempt entities.

* * * * *

Par. 3. In §1.410(b)-6, paragraph (g) is revised to read as follows:

§1.410(b)-6 Excludable employees.

* * * * *

(g) Employees of certain governmental or tax-exempt entities. For purposes of testing either a section 401(k) plan or a section 401(m) plan that is provided under the same general arrangement as a section 401(k) plan, an employer may treat as excludable those employees described in paragraphs (g)(1) and (2) of this section.

(1) Employees of governmental entities. Employees of governmental entities who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B)(ii) may be treated as excludable employees if more than 95 percent of the employees of the employer who are not precluded from being eligible employees by section 401(k)(4)(B)(ii) benefit under the plan for the plan year.

(2) Employees of tax-exempt entities. Employees of a tax-exempt organization described in section 501(c)(3) who are eligible to make salary reduction contributions under a section 403(b) plan may be treated as excludable employees if --

(i) No employee of the organization is eligible to participate in the section 401(k) or section 401(m) plan; and

(ii) At least 95 percent of the employees of the employer who are not

employees of the organization are eligible to participate in the section 401(k) or section 401(m) plan.

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Mark E. Mathews,
Deputy Commissioner for Services and Enforcement.