

## Part III - Administrative, Procedural, and Miscellaneous

### Application of the Normal Retirement Age Requirements to Governmental Plans

Notice 2012-29

#### I. PURPOSE

The IRS and the Treasury Department anticipate issuing guidance relating to the applicability of the normal retirement age rules to governmental plans (as defined in § 414(d)). This notice describes and invites public comment on the guidance under consideration, which (a) would clarify that governmental plans that do not provide for in-service distributions before age 62 do not need to have a definition of normal retirement age and (b) would modify the age-50 safe harbor rule for qualified public safety employees. The notice also provides that the IRS and Treasury Department intend to extend the effective date of the regulations relating to distributions from a pension plan upon attainment of normal retirement age for governmental plans.

#### II. BACKGROUND

Section 414(d) of the Code provides that the term governmental plan generally means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. See sections 3(32) and 4021(b)(2) of

the Employee Retirement Income Security Act of 1974 (ERISA) for definitions of the term governmental plan, which govern for purposes of title I and title IV of ERISA, respectively.<sup>1</sup>

Section 401(a) sets forth the qualification requirements for a trust forming part of a stock bonus, pension, or profit-sharing plan of an employer. Several of these qualification requirements are based on a plan's normal retirement age. Section 411(a)(8) defines the term normal retirement age as the earlier of (a) the time a participant attains normal retirement age under the plan or (b) the later of the time a plan participant attains age 65 or the 5<sup>th</sup> anniversary of the time a plan participant commenced participation in the plan. However, under the statutory framework, the definition of normal retirement age under § 411(a)(8) does not apply to a governmental plan that is not subject to § 411(a) through (d) (provided that the governmental plan satisfies the requirements in § 411(e)(2)). Under § 411(e)(1), the provisions of § 411, other than § 411(e)(2), do not apply to a governmental plan within the meaning of § 414(d).<sup>2</sup>

Section 401(a)(36) provides that a "trust forming part of a pension plan shall not be treated as failing to constitute a qualified trust under this section solely because the

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<sup>1</sup> The definition of the term governmental plan also includes special rules relating to (a) plans to which the Railroad Retirement Act of 1935 or 1937 (49 Stat. 967, as amended by 50 Stat. 307) applies, (b) plans of an international organization that is exempt from taxation by reason of the International Organizations Immunities Act (59 Stat. 669), and (c) certain plans that are established and maintained by an Indian tribal government (as defined in § 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with § 7871(d)), or an agency or instrumentality of either. See REG-157714-06 and REG-133223-08, which are advance notices of proposed rulemaking (ANPRMs) relating to the determination of governmental plan status and Indian tribal governmental plans. The ANPRMs were published November 8, 2011 in the **Federal Register** (76 FR 69172 and 69188).

<sup>2</sup> Section 411(e)(2) states that governmental plans "shall be treated as meeting the requirements of [§ 411], for purposes of section 401(a), if such plan meets the vesting requirements resulting from the

plan provides that a distribution may be made from such trust to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.”

On May 22, 2007, final regulations on distributions from a pension plan upon attainment of normal retirement age were published in the **Federal Register** as TD 9325 (72 FR 28604) (2007 NRA regulations). Section 1.401(a)-1(b)(1) of the 2007 NRA regulations requires that a pension plan be established and maintained primarily to provide systematically for the payment of definitely determinable benefits over a period of years, usually for life, after retirement.<sup>3</sup> The 2007 NRA regulations describe two exceptions to this rule. First, a plan is permitted to commence payment of benefits to a participant after the participant reaches normal retirement age even if the participant continues employment with the employer. Second, a plan does not fail to provide definitely determinable benefits to employees after retirement or attainment of normal retirement age merely because the plan, pursuant to § 401(a)(36), provides 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 the distribution. Thus, there are two exceptions to the prohibition against the payment of benefits from a pension plan during employment: (1) payments can commence after attainment of normal retirement

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application of section 401(a)(4) and 401(a)(7) as in effect on September 1, 1974.”

<sup>3</sup> This rule was also reflected in pre-ERISA regulations. See § 1.401-1(b)(1)(i) of the regulations, which was adopted prior to the enactment of ERISA and provides that for pre-ERISA plans a qualified pension plan is a “plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement.”

age (as defined in the 2007 NRA regulations); and (2) payments can commence after an employee reaches age 62.

Section 1.401(a)-1(b)(2)(i) of the 2007 NRA regulations provides that, as a 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. Section 1.401(a)-1(b)(2) provides various safe harbors for determining normal retirement ages that are 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. Under § 1.401(a)-1(b)(2)(v) of the 2007 NRA regulations, in the case of a plan in which substantially all of the participants are qualified public safety employees (within the meaning of § 72(t)(10)(B)), a normal retirement age of 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.

Notice 2007-69 (2007-2 C.B. 468) asked for comments “on whether and how a pension plan with a normal retirement age conditioned on the completion of a stated number of years of service satisfies the requirement in § 1.401(a)-1(b)(1)(i) that a pension plan be maintained primarily to provide for the payment of definitely determinable benefits after retirement or attainment of normal retirement age and how such a plan satisfies the pre-ERISA vesting rules.” Comments were received on a variety of issues, including comments that the guidance should (1) clarify that governmental plans are not required to define normal retirement age and (2) provide that the age-50 safe harbor rule in § 1.401(a)-1(b)(2)(v) for qualified public safety

employees can apply to these employees even if less than substantially all of a plan's participants are qualified public safety employees.

Notices 2008-98 (2008-44 IRB 1080) and 2009-86 (2009-46 IRB 629) provided that the IRS and the Treasury Department intend to amend the 2007 NRA regulations to change the effective date of the 2007 NRA regulations for governmental plans to January 1, 2013.

### III. GUIDANCE UNDER CONSIDERATION

The IRS and the Treasury Department are currently considering guidance relating to the applicability of the 2007 NRA regulations to governmental plans, as described in this Part III. For governmental plans, the definition of normal retirement age may be used in a variety of different circumstances relating to plan qualification, e.g., in applying the pre-ERISA vesting rules or to specify circumstances in which in-service benefit payments are permitted. The definition of normal retirement age may also be relevant to participant eligibility for certain favorable tax treatment, including § 402(l) of the Code (providing an income exclusion of up to \$3,000 annually for certain distributions for health insurance and long-term care insurance premiums to eligible retired public safety officers who separate from service by reason of disability or attainment of normal retirement age) or the special catch-up provisions under § 1.457-4(c)(3)(v)(A).<sup>4</sup>

For plans that are required to comply with § 411(a) through (d) of the Code

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<sup>4</sup> Section 1.457-4(c)(3)(v)(A) provides that, for purposes of the special § 457 catch-up in § 1.457-4(c)(3), a plan must specify the normal retirement age under the plan. It further provides that a plan may define normal retirement age as any age that is on or after the earlier of age 65 or the age at which participants have the right to retire and receive, under the basic defined benefit pension plan of the State, immediate

(including any governmental plans not satisfying the requirements of § 411(e)(2)), the definition of normal retirement age is used for a variety of additional purposes relating to plan qualification. The definition of normal retirement age is important in applying the accrual rules under § 411(b), rules relating to suspension of benefits under § 411(a)(3)(B), plan offset rules under § 411(b)(1)(H)(iii), and the minimum benefit rules for non-key employees in a top-heavy defined benefit plan under § 416.

In response to comments received with respect to Notice 2007-69, the IRS and the Treasury Department intend to modify provisions of the 2007 NRA regulations as applied to governmental plans in two ways.<sup>5</sup> First, the regulations would be modified to clarify that a governmental plan that is not subject to § 411(a) through (d) and does not provide for the payment of in-service distributions before age 62 will not fail to satisfy the requirement that the plan provide definitely determinable benefits to employees after retirement or attainment of normal retirement age merely because the pension plan does not have a definition of normal retirement age or does not have a definition of normal retirement age that satisfies the requirements of the 2007 NRA regulations.

Second, the IRS and the Treasury Department intend to modify the 2007 NRA regulations with respect to the age-50 safe harbor rule for qualified public safety employees (within the meaning of § 72(t)(10)(B)). Under the 2007 NRA regulations, in the case of a plan in which substantially all of the participants are qualified public safety employees, a normal retirement age of 50 or later is deemed to satisfy the requirement

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retirement benefits without actuarial or similar reduction.

<sup>5</sup> Further modifications to the 2007 NRA regulations may be made after consideration of comments not addressed in this notice, as well as future comments received in response to the request for comments in Part IV of this notice.

that a pension plan's normal retirement age 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. It has come to our attention that a requirement that qualified public safety employees be in a separate plan, rather than a separate group within a larger plan containing other employees with higher NRAs, may impose inappropriate administrative burdens on state and local governments.

Accordingly, the IRS and the Treasury Department intend to modify the 2007 NRA regulations to provide that the rule deeming age 50 or later to be a normal retirement age that satisfies those regulations will apply to a group of employees substantially all of whom are qualified public safety employees, whether or not the group of qualified public safety employees are covered by a separate plan. Thus, a governmental pension plan could satisfy the normal retirement age requirement using a normal retirement age as low as 50 for a group substantially all of whom are qualified public safety employees and a later normal retirement age that otherwise satisfies the 2007 NRA requirements for other participants.

The IRS and Treasury intend to amend the 2007 NRA regulations to change the effective date for governmental plans to annuity starting dates that occur in plan years beginning on or after the later of (1) January 1, 2015 or (2) the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is 3 months after the final regulations are published in the **Federal Register**. Governmental plan sponsors may rely on this notice with respect to the extension until such time as the 2007 NRA regulations are so amended. This extension will provide additional time for the IRS and Treasury to consider and

respond to comments on the guidance under consideration that is described in this notice.

#### IV. COMMENTS REQUESTED

Comments are requested regarding the guidance under consideration that is described in Part III of this notice. The IRS and the Treasury Department specifically request comments regarding whether, because qualified public safety employees generally tend to have career spans that commence at a young age and continue over a limited period of years, an additional rule should be provided under which retirement after 20 to 30 years of service may be a normal retirement that is reasonably representative for qualified public safety employees.<sup>6</sup> Comments are also requested on whether there is information indicating that there are other categories of governmental employees who have career spans similar to qualified public safety employees that would justify a similar rule. In addition, any information that governmental plans have on the overall retirement patterns of other employees in government service is requested in order to assist the IRS and Treasury in determining the earliest age that is reasonably representative of the typical retirement ages for such employees.

Written comments should be submitted by July 30, 2012. Send submissions to CC:PA:LPD:PR, (Notice 2012-29), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 20044. Comments may also be hand delivered Monday through Friday between the hours of 8 a.m. and 4:00 p.m. to: Internal Revenue Service, CC:PA:LPD:PR, (Notice 2012-29), Courier's Desk, Internal

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<sup>6</sup> See section 4(j) of the Age Discrimination in Employment Act.

Revenue Service, 1111 Constitution Avenue, N.W., Washington DC. Alternatively, comments may be submitted via the Internet at [notice.comments@irs counsel.treas.gov](mailto:notice.comments@irs counsel.treas.gov) (Notice 2012-29). All comments will be available for public inspection.

#### V. EFFECT ON OTHER DOCUMENTS

Notices 2008-98 and 2009-86 are modified.

#### DRAFTING INFORMATION

The principal authors of this notice are Sarah R. Bolen and Pamela R. Kinard of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Ms. Bolen and Ms. Kinard at (202) 622-6060 (not a toll-free number).